

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI**

GORDON SYLTE, an individual, SUSAN GOODRICH, an individual, JOHN SYLTE, an individual, and SYLTE RANCH LIMITED LIABILITY COMPANY, and Idaho limited liability company,

Petitioners,

vs.

THE IDAHO DEPARTMENT OF WATER RESOURCES,

Respondent,

and

TWIN LAKES IMPROVEMENT ASSOCIATION, MARY A. ALICE, MARY F. ANDERSON, MARY F. ANDERSON ET AL., DEBRA ANDREWS, MATTHEW A. BARFUS, CHARLES AND RUTH BENAGE, ARTHUR CHETLAIN JR., CLARENCE & KURT GEIGER FAMILIES, MARY K. COLLINS/BOSCH PROPERTIES, SANDRA COZZETTO, WES CROSBY, JAMES CURB, MAUREEN DEVITIS, DON ELLIS, SUSAN ELLIS, SCOTT ERICKSON, JOAN FREIGE, AMBER HATROCK, BARBARA HERR, WENDY AN JAMES HILLIARD, PAT & DENISE HOGAN, STEVEN & ELIZABETH HOLMES, LIEF HOUKAM, DONALD JAYNE, DOUGLAS I. & BERTHA MARY JAYNE, TERRY KIEFER, MICHAEL KNOWLES, ADAM KREMIN, ROBERT KUHN, RENE LACROIX, JOAN LAKE-OMMEN, LARRY D. & JANICE A. FARIS LIVING TRUST, TERRY LALIBERTE, PATRICK E. MILLER, WILLIAM H. MINATRE, ANGELA MURRAY, DAVID R.

Case No. CV-2017-7491

RESPONDENT'S BRIEF

NIPP, JOHN NOONEY, STEVE & PAM RODGERS, KIMBERLI ROTH, DAVID & LORI SCHAFFER, DARWIN R. SCHULTZ, MOLLY SEABURG, HAL SUNDAY, TCRV LLC, TWIN ECHO RESORT, UPPER TWIN LAKES, LLC, RICK & CORRINNE VAN ZANDT, GERALD J. WELLER, BRUCE & JAMIE WILSON, DAVE ZIUCHKOVSKI, PAUL FINMAN, AND TWIN LAKES FLOOD CONTROL DISTRICT NO. 17,

Intervenors.

IN THE MATTER OF SYLTE'S PETITION FOR DECLARATORY RULING REGARDING DISTRIBUTION OF WATER TO WATER RIGHT NO. 95-0734

RESPONDENT'S BRIEF

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

ATTORNEYS FOR RESPONDENT

LAWRENCE G. WASDEN
ATTORNEY GENERAL

DARRELL G. EARLY
Deputy Attorney General
Chief, Natural Resources Division

GARRICK L. BAXTER, ISB #6301
EMMI L. BLADES, ISB #8682
KRISTINA N. FUGATE, ISB #9242
Deputy Attorneys General
P.O. Box 83720
Boise, ID 83720-0098
Telephone: (208) 287-4800

ATTORNEYS FOR PETITIONER

MICHAEL P. LAWRENCE
JACK W. RELF
GIVENS PURSLEY, LLP
P.O. Box 2720
Boise, Idaho 83701-2720
Telephone: (208) 388-1200
mpl@givenspursley.com
jwr@givenspursley.com

Attorneys for Gordon Sylte, et al.

garrick.baxter@idwr.idaho.gov
emmi.blades@idwr.idaho.gov
kristina.fugate@ag.idaho.gov

*Deputy Attorneys General for Idaho
Department of Water Resources*

ATTORNEYS FOR INTERVENORS

NORMAN M. SEMANKO
PARSONS BEHLE & LATIMER
800 W. Main Street, Ste. 1300
Boise, Idaho 83702
Telephone: (208) 562-4900
nsemanko@parsonbehle.com

*Attorneys for Twin Lakes Improvement
Association, et al.*

ATTORNEYS FOR INTERVENORS

ALBERT P. BARKER
BARKER ROSHOLT & SIMPSON, LLP
101 W. Jefferson Street, Ste. 102
P.O. Box 2139
Boise, Idaho 83701-2139
Telephone: (208) 336-0700
apb@idahowaters.com

*Attorneys for Twin Lakes Flood Control
District No. 17*

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I. STATEMENT OF THE CASE

A. NATURE OF THE CASE

This is a judicial review proceeding in which the Petitioners challenge an order issued by the Idaho Department of Water Resources (“Department”) upholding, with one modification, instructions the Department issued to the Water District 95C (“WD 95C”) watermaster for administering water rights pursuant to the *Final Decree*, In the Matter of the General Determination 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) (“1989 Decree”). The Department upheld the instructions because it determined the instructions correctly informed the watermaster how to distribute water pursuant to the plain language of the 1989 Decree and in accordance with the prior appropriation doctrine and Idaho Supreme Court precedent.

B. STATEMENT OF FACTS AND PROCEDURAL BACKGROUND

I. Twin Lakes and Rathdrum Creek Water System

Twin Lakes is a body of water in Kootenai County, Idaho, that contains two lakes joined by a channel “which flows from the upper lake to the lower lake.” R. 181. Fish Creek and many other small tributaries feed the lakes. *Id.* Rathdrum Creek is the only outlet from Twin Lakes. *Id.* Rathdrum Creek “begins at the lower end of Lower Twin Lakes and flows southwesterly to Rathdrum Prairie.” *Id.*

The outflow from Lower Twin Lake passes through a man-made “dam and outlet structure” which was constructed around 1900. *Id.* The structure “enabled a portion of the water stored in Lower Twin Lake to be released downstream to Rathdrum Creek.” *Id.* In addition, around 1900 “[t]he natural channel connecting the lakes was widened and deepened.” *Id.*

II. 1989 Decree

All surface and storage water rights in the Twin Lakes and Rathdrum Creek water system were decreed in a general stream adjudication. R. 173, 188-89. The general stream adjudication began in 1975 by order of the Kootenai County district court and concluded with the court's 1989 Decree. R. 196-209. As part the proceeding, the Department prepared and filed with the court the *Director's Proposed Finding of Water Rights in the Twin Lakes – Rathdrum Creek Drainage Basin* ("Proposed Finding"). R. 174. Four objections to the Proposed Finding were filed with the court, all by claimants to water rights for natural flow in Rathdrum Creek, including John and Evelyn Sylte. R. 175-79. None of the objectors filed claims "to a water right for storage purposes." R. at 188-89.

After trial, the court issued its February 22, 1989, *Memorandum Decision* ("Memorandum Decision"). R. 176. The court directed the Department to "amend the general findings and conclusions in the Proposed Finding in accordance with the Memorandum Decision." R. 198. The 1989 Decree incorporated by reference the Memorandum Decision and the Proposed Finding with amendments. R. 197-198.

The Petitioners in this appeal, Gordon Sylte, Susan Goodrich, John Sylte, and Sylte Ranch Limited Liability Company (collectively "Sylte") own water right 95-0734, which was among the water rights confirmed in the 1989 Decree. Water right 95-0734 was decreed with the following elements:

Owner:	Sylte, John; Sylte, Evelyn
Source:	Rathdrum Creek tributary to Sinks
Priority Date:	05-01-1875
Purpose of Use:	Stockwater
Season of Use:	01-01 to 12-31
Diversion Rate:	.07 cfs
Diversion Volume:	4.10 AFA
Point of Diversion:	LT04 S30 T52N R04W

Place of Use: LT04 S30 T52N R04W
Remarks: For 300 head of stock. Natural flow appropriation.

R. 26.

The 1875 priority date for water right 95-0734 is the most senior priority date of the water rights confirmed in the 1989 Decree. The court found that, “at the time [water right 95-0734] was created in 1875 there was sufficient direct flow water in Rathdrum Creek, in its then natural condition, furnished from the water of Twin (Fish) Lakes, to provide .07 cubic foot per second to the appropriator on a continuous year-round basis.” R. 183. The court also found “the source waters for Rathdrum Creek” were formed from “the outlet waters of Twin Lakes” which “flowed over the top of the lip during periods of high water and through the natural pre-dam obstruction at all times.” *Id.* (underlining in original).

The 1989 Decree also described three “blocks” of storage water in Twin Lakes relative to the staff gauge on the outlet control structure:

- “The first block of storage is the natural lake storage located between the bottom of the lake and Staff Gauge height 0.0 feet. No water right has been developed for the use of this water because it provides a base for the overlying storage rights.” R. 201.
- The “second block of storage,” is located between 0.0 feet and 6.4 feet on the staff gauge. *Id.* “This storage water was at one time part of the natural lake storage, but was made available for appropriation by excavation of the outlet from Lower Twin Lakes.” *Id.* The right to store and beneficially use this block of water was decreed to Twin Lakes Improvement Association (“TLIA”) as water right 95-0974, which authorizes the year-round storage of 5,360 acre-feet (“AF”) of water in Twin Lakes for Recreation Storage purposes. *Id.* Filling can occur from November 1 to March 31. R. 205. Water right 95-0974 has a priority date of March 23, 1906. R. 045.
- The “third block of storage,” is located between 6.4 feet and 10.4 feet on the staff gauge. R. 202. “This storage water was also at one time part of the natural lake storage, but was made available for appropriation by excavation of the outlet from Lower Twin Lakes.” *Id.* (underlining in original). The right to store and beneficially use this block of water was decreed as water right 95-0973, which authorizes the year-round storage of 3,730 AF of water in Twin Lakes for Recreation Storage and Wildlife Storage purposes. *Id.*; R. 045. Filling can occur from November 1 to March 31. R. 205. Water right 95-0973 has

a priority date of March 23, 1906. R. 045. Twin Lakes Rathdrum Creek Flood Control District 17 owns water right 95-0973. R. 1394.

The court determined that water rights 95-0973 and 95-0974 are the only two rights “entitled to store water and to make beneficial use of stored water in Twin Lakes.” R. 205. The court also determined “water stored” pursuant to water rights 95-0973 and 95-0974 “is not unappropriated water subject to appropriation by others.” R. 189. The court stated that, “[o]nce the appropriator lawfully diverts the water [from] its natural source to his diversion works, the appropriator does become the owner of the water lawfully diverted.” R. 186. The court concluded “there is a difference between storage rights and natural flow water rights and the Objectors have not established any rights in the artificially stored waters in Twin Lakes.” R. 192-93.

III. The Department’s Instructions

The Department issued its instructions to the watermaster of WD 95C for administering water rights pursuant to the 1989 Decree in response to a written complaint from a water right owner in WD 95C requesting removal of the watermaster. R. 210. The complaint alleged that the watermaster had been “releasing storage water from Twin Lakes contrary to the [1989 Decree].” *Id.*

The Department’s instructions included the following requirements:

5) From April 1 to October 31 each year, when seepage and evaporation losses from Twin Lakes exceed the total natural tributary inflow to Twin Lakes (as determined by decreasing lake level), no water will be released from the lakes to satisfy Rathdrum Creek water rights, except for water right no. 95-734. When this occurs, all or a portion of the total natural tributary inflow to Twin Lakes, as measured by the watermaster, can be released to satisfy delivery of water right no. 95-734 with 0.07 cfs at the legal point of diversion. If all of the natural inflow must be released to satisfy water right no. 95-734, the watermaster shall curtail all junior direct flow water rights. If only a portion of the inflow is released to satisfy water right no. 95-734, the watermaster shall satisfy water rights that divert from Twin

Lakes and its tributaries using the remainder of the natural flow, on the basis of water right priority.

6) From April 1 to October 31 of each year, when seepage and evaporation losses from Twin Lakes do not exceed the total natural tributary inflow (as determined by steady or increasing lake level), the watermaster shall distribute the total natural tributary inflow to water rights that divert from Twin Lakes and its tributaries and Rathdrum Creek on the basis of water right priority.

7) If release of all of the natural tributary inflow does not satisfy delivery of water right no. 95-734 within a 48-hr period, the watermaster shall consult with the Department's Northern Regional Manager or designated Department representative, regarding determination of a futile call with respect to delivery of water right no. 95-734. The Department's Northern Regional Manager will issue written notice to the watermaster regarding the futile call determination. A futile call determination will result in non-delivery of water right no. 95-734.

R. 211 (citations omitted). In sum, the instructions direct the watermaster to satisfy Sylte's water right 95-0734 with the natural tributary inflow to Twin Lakes in priority, even when seepage and evaporation losses from the lakes exceed the natural inflow. The instructions additionally require the watermaster to consult with the Department regarding determination of a futile call when release of all the natural tributary inflow does not satisfy water right 95-0734 within a 48-hour period.

IV. Sylte's Challenge to the Instructions

Sylte filed a *Petition for Declaratory Ruling* asking the Department to issue an order "setting aside and reversing" the watermaster instructions. R. 213. Sylte asserted the instructions "are contrary to the existing decree and are not in accordance with the prior appropriation doctrine." *Id.* The Department issued a notice of prehearing conference and appointed a hearing officer. R. 314-17. After a prehearing conference, the hearing officer issued a scheduling order setting an October 2018 hearing date and a July 28, 2017, deadline for dispositive motions. R. 828-35.

On June 26, 2017, Sylte filed a motion for summary judgment and supporting memorandum. R. 900-35. Sylte argued: (1) water right 95-0734 is entitled to delivery of water “on a continuous year-round basis irrespective of the amount of natural tributary inflow to Twin Lakes”; (2) “application of the futile call doctrine with respect to water right no. 95-0734” does not depend on the amount of natural tributary inflow; and (3) the Department should set aside the instructions because they are “contrary to” the 1989 Decree and the prior appropriation doctrine. R. 930.

On July 7, 2017, TLIA filed a cross-motion for summary judgment and supporting memorandum. R. 1255-74. TLIA argued that Sylte’s motion for summary judgment should be denied, but TLIA’s motion should be granted because the Department’s instructions “are consistent with the 1989 Decree and Idaho law.” R. 1260. TLIA reasoned that Sylte’s request “to have storage water released into Rathdrum Creek” is “contrary to the 1989 Decree . . . and the prior appropriation doctrine.” R. 1268.

On September 6, 2017, the hearing officer issued his *Order on Motions for Summary Judgment; Order Amending Instructions; Order Vacating Hearing Dates and Schedule* (“Order”). R. 1390-1407.¹ The hearing officer denied Sylte’s motion for summary judgment and granted TLIA’s cross-motion. R. 1402.

The hearing officer denied Sylte’s motion for summary judgment because he concluded “Sylte’s argument that Water Right no. 95-0734 is entitled to delivery of water from Twin Lakes ‘irrespective of the amount of natural tributary inflow into Twin Lakes’ is contrary to the

¹ The next day the hearing officer issued a letter clarifying that the Order was a final agency action “pursuant to Idaho Code § 67-5255(3) and Rule 402 of the Department’s Rules of Procedure (IDAPA 37.01.01.402).” R. 1408. Sylte is correct that the Department’s position is that the Order is “a final agency action which was properly and timely appealed to this Court” and that this Court “has jurisdiction to decide the merits of this case.” *Petitioner Sylte’s Opening Brief* at 16.

plain language of the [1989] Decree and must be rejected.” R. 1399. The hearing officer explained that accepting Sylte’s argument would require the Department to deplete water stored in Twin Lakes pursuant to water rights 95-0973 and 95-0974 to attempt to satisfy Sylte’s water right. R. 1397. The hearing officer determined that the plain language of the 1989 Decree does not support such a result. Specifically, the hearing officer explained that the source of Sylte’s water right is “natural flow,” not “stored water.” R. 1398-99. The hearing officer also quoted statements from the 1989 Decree that: 1) the water stored pursuant to water rights 95-0973 and 95-0974 is not “subject to appropriation by others;” 2) only water rights 95-0973 and 95-0974 “are entitled to store water and to make beneficial use of stored water in Twin Lakes;” and 3) when seepage and evaporation losses exceed natural tributary inflow to Twin Lakes, “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.” R. 1399 (underlining in 1989 Decree, italics added in Order). The hearing officer also concluded the instructions correctly guide the watermaster when to consult with the Department with respect to application of the futile call doctrine to Sylte’s water right. R. 1401-02. Finally, the hearing officer modified the instructions to include the 4.10 acre feet per annum (AFA) maximum annual diversion volume decreed for Sylte’s water right in the 1989 Decree. R. 1402. On October 3, 2017, Sylte filed a petition for judicial review of the Order. R. 1437-47.

II. ISSUES ON APPEAL

The Department re-states the issues on appeal as follows:

- (1) Whether the Department correctly determined that the 1989 Decree entitles water right 95-0734 to Twin Lakes' natural tributary inflow in priority, but not waters stored in Twin Lakes.
- (2) Whether the Department correctly determined that application of the futile call doctrine to water right 95-0734 is dependent upon the amount of natural flow available to satisfy the right.
- (3) Whether any error from the Department's reference to documents without official notice is harmless.
- (4) Whether the Department properly modified the watermaster instructions to include reference to the 4.10 AFA limit for water right 95-0734 decreed in the 1989 Decree.
- (5) Whether Sylte is entitled to attorney fees.

III. STANDARD OF REVIEW

Judicial review of a final decision of the Department is governed by the Idaho Administrative Procedure Act, chapter 52, title 67, Idaho Code. Idaho Code § 42-1701A(4). Under the Act, 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 it finds 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 Dep't of Water Res.*, 135 Idaho 414, 417, 18 P.3d 219, 222 (2001). 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.

A reviewing court must defer to the agency's findings of fact unless they are clearly erroneous. *Rangen, Inc. v. Idaho Dep't of Water Res.*, 159 Idaho 798, 804, 367 P.3d 193, 199 (2016). The court freely reviews questions of law. *Idaho Ground Water Ass'n v. Idaho Dep't of Water Res.*, 160 Idaho 119, 125, 369 P.3d 897, 903 (2016). 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 Code § 67-5279(3).

IV. ARGUMENT

A. The 1989 Decree’s plain language mandates that water right 95-0734 is entitled to the natural tributary inflow to Twin Lakes in priority, but not the already appropriated stored waters.

General adjudication decrees “shall be conclusive as to the nature and extent of all water rights in the adjudicated water system.” Idaho Code § 42-1420(1). After a court enters a final decree, the Director of the Department (“Director”) shall administer water rights by distributing water in accordance with the final decree. Idaho Code § 42-1413. The Department’s interpretation of a decree must begin with the decree’s plain language. *City of Blackfoot v. Spackman*, 162 Idaho 302, 396 P.3d 1184, 1188 (2017). When a decree’s terms are unambiguous” the “meaning and legal effect of the decree” will be determined “from the plain and ordinary meaning of its words.” *Id.*

The plain language of the 1989 Decree unambiguously states that, regardless of whether seepage and evaporation losses exceed the total natural tributary inflow to Twin Lakes, Sylte’s water right 95-0734 is entitled to the natural tributary inflow in priority, but not the waters stored in Twin Lakes. Specifically, the 1989 Decree states:

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.

R. 205 (underlining in original; italics added).

The 1989 Decree also relies on Idaho Supreme Court decisions to explain why Sylte’s water right is not entitled to water stored in Twin Lakes. The 1989 Decree cites *Boise City Irrigation & Land Co. v. Stewart*, 10 Idaho 38, 77 P. 25 (1904), for the rule that, “[o]nce the appropriator lawfully diverts the water [from] its natural source to his diversion works, the

appropriator does become the owner of the corpus of the water lawfully diverted.” R. 186. The 1989 Decree also cites *Washington County Irrigation District v. Talboy*, 55 Idaho 382, 389, 43 P.2d 943, 945 (1935), wherein the Idaho Supreme Court held that, once water is “diverted from the natural stream and stored,” it is “no longer ‘public water’ subject to diversion” by others. R. 191. Consistent with this precedent, the court concluded that “water stored” pursuant to water rights 95-0973 and 95-0974 is not “subject to appropriation by others” and only those rights “are entitled to store water and to make beneficial use of stored water in Twin Lakes.” R. 189, 205. These plain statements in the 1989 Decree prohibit the use of water stored in Twin Lakes to satisfy Sylte’s water right 95-0734.

In addressing Sylte’s and TLIA’s motions for summary judgment, the hearing officer followed the prior appropriation doctrine, the 1989 Decree’s plain language, and Idaho Supreme Court precedent to correctly determine that Sylte’s water right 95-0734 is entitled to the natural tributary inflow to Twin Lakes, but not the waters stored in Twin Lakes. The hearing officer first acknowledged that water right 95-0734’s 1875 priority date entitles the right to all the natural tributary inflow to Twin Lakes. R. 1397-98. The hearing officer next evaluated Sylte’s argument that water right 95-0734 is entitled to more than the natural tributary inflow. The hearing officer explained that accepting Sylte’s argument would require the watermaster to draw from water stored in Twin Lakes pursuant to water rights 95-0973 and 95-0974 to attempt to satisfy Sylte’s right. R. 1397. The hearing officer concluded that such a result “is contrary to the plain language of the [1989] Decree” and rejected Sylte’s argument. R. 1399.

In support of his conclusion that Sylte is not entitled to draw stored water from Twin Lakes, the hearing officer explained that, while the 1989 Decree entitles Sylte to “waters from the source of their appropriation,” the source of Sylte’s water right is “natural flow,” not “stored

water.” R. 1398-99. The hearing officer cited the court’s reliance on *Boise City Irrigation & Land Co.* for the rule that, “[o]nce the appropriator lawfully diverts the water [from] its natural source to his diversion works, the appropriator does become the owner of the corpus of the water lawfully diverted.” R. 1398-99. The hearing officer also cited *Washington County Irrigation District*, to explain that, “[u]nlike natural flow, which is delivered to water right holders according to the priority dates of their water rights, stored water is deemed appropriated and unavailable for redistribution by priority.” R. 1398. The hearing officer concluded that, “[b]ecause the water stored pursuant to Water Rights nos. 95-0973 and 95-0974 has been appropriated and is, therefore, owned by the owners of those water rights, it cannot be ‘the source of [Sylte’s] appropriation.’” R. 1399.

In further support of his conclusion that Sylte is not entitled to draw stored water from Twin Lakes, the hearing officer quoted the court’s plain statements in the 1989 Decree that only water rights 95-0973 and 95-0974 “are entitled to store water and to make beneficial use of stored water in Twin Lakes” and such stored water is not “subject to appropriation by others.” R. 1399. Finally, the hearing officer pointed to the 1989 Decree’s unambiguous statement that, when seepage and evaporation losses exceed the total natural tributary inflow to Twin Lakes, “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.” *Id.* (underlining in original; italics added in Order). The hearing officer properly determined that the 1989 Decree’s plain language and Idaho Supreme Court precedent require that water right 95-0734 is entitled to the natural tributary inflow to Twin Lakes, but not waters stored in Twin Lakes.

B. Sylte’s water right 95-0734 is not entitled to delivery of waters stored in Twin Lakes.

Sylte argues the 1989 Decree “requires that water right no. 95-0734 must be satisfied on a continuous, year-round basis from the natural, pre-dam outflow from Twin Lakes, unlimited by the amount of tributary inflow into the Lakes.” *Petitioner Sylte’s Opening Brief* at 21. In other words, Sylte argues that water right 95-0734 is entitled to delivery of the natural tributary inflow to Twin Lakes, plus waters stored in Twin Lakes, to satisfy the right.

In support of this argument, Sylte cites the court’s statement that, “in 1875 there was sufficient direct flow water in Rathdrum Creek, in its then natural condition, furnished from the water of Twin (Fish) Lakes, to provide .07 cubic foot per second to [Sylte] on a continuous year-round basis.” R. 183. Sylte also cites the court’s statement that “[a]n appropriator is entitled to maintenance of stream conditions substantially as they were at the time the appropriators made their appropriation.” R. 185. Sylte notes the court’s statement that “[t]he primary result the dam had on the water level was to hold the water at a higher point longer through the summer months,” and argues that statement “proves the amount of water flowing from Twin Lakes to Rathdrum Creek prior to 1906 was not limited to Twin Lakes’ tributary inflow.” *Petitioner Sylte’s Opening Brief* at 22.

Sylte’s argument that “water right no. 95-0734 must be satisfied on a continuous year-round basis from the natural, pre-dam outflow from Twin Lakes, unlimited by the amount of tributary inflow into the Lakes” runs into a recurring problem. The problem is that, besides natural tributary inflow to Twin Lakes, the only water that could possibly be delivered to augment natural flow in Rathdrum Creek to satisfy Sylte’s water right 95-0734 is water that is already appropriated and stored in Twin Lakes pursuant to water rights 95-0973 and 95-0974.

Sylte attempts to distinguish water stored in Twin Lakes pursuant to water rights 95-0973 and 95-0974 (i.e. “artificially stored water in Twin Lakes”) from water Sylte claims an entitlement to (i.e. “the natural pre-dam outflow”). *Petitioner Sylte’s Opening Brief* at 33. But there is no meaningful distinction between water “artificially stored” in Twin Lakes and “the natural pre-dam outflow.” Sylte even seems to acknowledge this lack of distinction. While Sylte asserts they do “not claim an entitlement to the artificially stored waters in Twin Lakes,” Sylte also asserts that water rights 95-0973 and 95-0974 “are not entitled to retain water to the extent that, absent reservoir operations and diversions, it would have naturally flowed down Rathdrum Creek to satisfy right no. 95-0734.” *Id.* at 26, 28, 35.

Sylte asserts that, by allowing water rights 95-0973 and 95-0974 to “retain water” instead of delivering the stored water to Sylte’s water right 95-0734, the Department “effectively gives upstream junior water rights priority over water right no. 95-0734.” *Petitioner Sylte’s Opening Brief* at 27-28. In support of this assertion, Sylte points to the court’s statement in the 1989 Decree that water right 95-0734 is “entitled to waters from the source of their appropriation on the basis of priority over those storage rights” 95-0973 and 95-0974. R. 185.

The Department’s instructions and Order are consistent with the court’s statement. The court’s statement only means that, when water rights 95-0973 and 95-0974 are diverting natural tributary inflow to storage during their authorized period of November 1 to March 31, the storage rights must bypass sufficient natural flow to satisfy water right 95-0734. The hearing officer acknowledged that water right 95-0734’s 1875 priority date entitles the right to all the natural tributary inflow to Twin Lakes, “up to the decreed amount, regardless of evaporation and

seepage losses, when the natural flow of Rathdrum Creek downstream from the Twin Lakes control structure is not sufficient to satisfy the right.” R. 1397-98.²

Further, the court’s statement does not mean what Sylte suggests: that water rights 95-0973 and 95-0974 cannot “retain water” diverted to storage in accordance with the rights and must release that stored water to satisfy Sylte’s water right 95-0734. *Petitioner Sylte’s Opening Brief* at 26-28. To the contrary, the court concluded “there is a difference between storage rights and natural flow water rights and the Objectors have not established any rights in the artificially stored waters in Twin Lakes.” R. 192-93. The 1989 Decree expressly states that Sylte is entitled to the natural tributary inflow to Twin Lakes, “but not the stored waters.” R. 205. Sylte’s suggestion is also contrary to Idaho law which, as the court recognized, requires that, “[o]nce the appropriator lawfully diverts the water [from] its natural source to his diversion works, the appropriator does become the owner of the corpus of the water lawfully diverted.” R. 186. *See also Washington Cty. Irr. Dist*, 55 Idaho at 389, 43 P.2d at 945 (once water is “diverted from the natural stream and stored,” it is “no longer ‘public water’ subject to diversion” by others).

Sylte cites other Idaho Supreme Court cases to support the argument that water stored in Twin Lakes must be delivered to satisfy Sylte’s water right 95-0734. Specifically, Sylte cites *Carey Lake Reservoir Co. v. Strunk*, 39 Idaho 332, 227 P. 591 (1924), *Arkoosh v. Big Wood Canal Co.*, 48 Idaho 383, 283 P. 522 (1929), *Weeks v. McKay*, 85 Idaho 617, 382 P.2d 788

² Sylte also asserts that the court’s statement in the 1989 Decree that “the rights of all the other objectors are limited to the natural tributary inflows to Twin Lakes, less evaporation and seepage from Twin Lakes” supports Sylte’s assertion that water right 95-0734 is not limited to the natural tributary inflow. *Petitioner Sylte’s Opening Brief* at 25. The court’s statement does not support Sylte’s assertion. The court’s statement only clarifies that the water rights of objectors other than Sylte are subject to evaporation and seepage losses, while Sylte’s water right 95-0734 is entitled to delivery of the natural tributary inflow regardless of evaporation and seepage losses, which the hearing officer explained in the Order. R. 1397-98.

(1963), and *Ward v. Kidd*, 87 Idaho 216, 392 P.2d 183 (1964). *Petitioner Sylte's Opening Brief* at 29-30.

None of the cases Sylte cites dictate the result that Sylte desires: that a downstream senior natural flow water right holder is entitled to demand delivery of waters stored upstream that were lawfully appropriated pursuant to the decreed elements of the storage water rights.³ That result is contrary to Idaho law. *See Washington Cty. Irr. Dist*, 55 Idaho 382, 43 P.2d 943. Sylte's water right 95-0734 is only "entitled to waters from the source of [its] appropriation," "natural flow," and not waters stored in Twin Lakes. R. 26, 185. The Department's instructions and Order, which require delivery of the natural tributary inflow to Sylte's water right 95-0734 in priority, but not waters stored in Twin Lakes, are therefore consistent with the plain language of the 1989 Decree, the prior appropriation doctrine, and Idaho Supreme Court precedent.

C. Application of the futile call doctrine to water right 95-0734 depends on the natural tributary inflow to Twin Lakes.

In the instructions, the Department stated:

If release of all of the natural tributary inflow does not satisfy delivery of water right no. 95-734 within a 48-hr period, the watermaster shall consult with the Department's Northern Regional Manager or designated Department representative, regarding determination of a futile call with respect to delivery of water right no. 95-734. The Department's Northern Regional Manager will issue written notice to the watermaster regarding the futile call determination. A futile call determination will result in non-delivery of water right no. 95-734.
R. 211.

³ In *Carey*, the Idaho Supreme Court agreed with the downstream senior's argument that "by virtue of being prior appropriators, they had the right to have at least the quantity of water to which they were entitled flow down to them uninterrupted, and that if this flow were interfered with by respondent's dam, they had a right to themselves cut the dam . . ." *Carey Lake Reservoir Co.*, 39 Idaho at 337, 227 P. at 593. In *Arkoosh*, the court held that junior upstream storage rights could only be exercised if downstream seniors "have at their headgates, during the irrigation season, the amount of water to which they are entitled under their appropriations as the same would have naturally flowed in the natural stream. . ." *Arkoosh*, 48 Idaho at 396, 283 P. at 526-27. In *Weeks*, the Court held that one who changes a stream by building a dam must "take such precautions as to prevent injury to others." *Weeks*, 85 Idaho at 622, 382 P.2d at 791. In *Ward*, the court held that an upstream junior dam owners could not "obstruct the flow" when "the water, if unobstructed, would reach [the downstream senior's] land . . ." *Ward*, 87 Idaho at 226, 392 P.2d at 189-90.

Sylte argues that the instructions' futile call procedure with respect to water right 95-0734 "violates" the 1989 Decree because "delivery of water to water right 95-0734 is not limited by the amount of natural tributary inflow to Twin Lakes." *Petitioner Sylte's Brief* at 38. Sylte's argument is without merit because, as discussed herein, Sylte's water right 95-0734 is entitled to the tributary inflow to Twin Lakes, but cannot draw upon waters stored in Twin Lakes. Accordingly, as the hearing officer determined, a futile call determination with respect to Sylte's water right 95-0734 depends upon the amount of natural tributary inflow to Twin Lakes available to satisfy the right. R. 1401. The instructions thus properly require the watermaster to consult with the Department regarding a futile call determination when "release of all of the natural tributary inflow does not satisfy delivery of water right no. 95-734 within a 48-hour period."⁴

Sylte also argues "the futile call procedures" in the instructions "must be rejected" because the Department issued an order in 1984 regarding an application for transfer wherein the Department stated "it is not in the interest of the local public to dry up the channel of Rathdrum Creek downstream of the [Twin Lakes dam] control structure.'" *Petitioner Sylte's Opening Brief* at 40-41. The Department's determination in that transfer proceeding related to Idaho Code § 42-222's local public interest criteria does not change that the 1989 Decree's plain language mandates that Sylte's water right 95-0734 is not entitled to delivery of waters stored in Twin Lakes when waters in Rathdrum Creek are not sufficient to satisfy the right. The Department's

⁴ Sylte complains that the hearing officer discussed the Director's ability to "exercise discretion" in relation to a determination of futile call. *Petitioner Sylte's Opening Brief* at 39-40. The hearing officer's discussion of the Director's discretion does not equate to "a conclusion that delivering water to water right no. 95-0734 is wasteful" as Sylte suggests. *Id.* at 40. The hearing officer only cited the Idaho Supreme Court's discussion of the Director's discretion in *In re SRBA*, 157 Idaho 385, 393-94, 336 P.3d 792, 800-01 (2014), to draw the conclusions that "the Director is responsible for balancing the right to divert water against the obligation not to waste it," "no water rights are automatically immune from a futile call determination," "futile call is a judgment made by the Director on a case-by-case basis," and the "48-hour standard" in the instructions is "a reasonable implementation of the Director's discretion in applying the futile call doctrine." R. 1401-02. The hearing officer's statements are accurate reflections of the law.

determination in that transfer proceeding also does not change the Department's authority to evaluate the applicability of the futile call doctrine with respect to delivery of water to satisfy water right 95-0734. Sylte's assertion that the Department's 1984 order in the transfer proceeding is a basis to reject the futile call procedures set forth in the instructions with respect to water right 95-0734 is without merit.

D. The hearing officer's citation to documents filed in the proceeding before Judge Magnuson do not prejudice Sylte nor affect Sylte's substantial rights.

Sylte objects to the hearing officer's citation to two documents in the Order without first taking official notice of the documents pursuant to the Department's Rule of Procedure 602. *Petitioner Sylte's Opening Brief* at 42. Sylte asserts that "[d]oing so was prejudicial to Sylte and must be reversed." *Id.* at 45.

The hearing officer quoted from Sylte's predecessor's *Objection to Proposed Findings of Water Rights* ("Sylte's Objection") filed in the proceeding before Judge Magnuson who issued the 1989 Decree. The hearing officer also quoted from the *Notice of Entry of Final Decree* ("Notice of Entry") issued in that proceeding. Assuming *arguendo* that the hearing officer was required to take official notice of Sylte's Objection and the Notice of Entry before relying upon the documents in the Order, Sylte's argument fails because the hearing officer's reference to the documents is harmless error.

Harmless error is not grounds for reversal. *Obray v. Mitchell*, 98 Idaho 533, 538, 567 P.2d 1284, 1289 (1977). The Idaho Rules of Civil Procedure address harmless error and provide: "At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights." I.R.C.P. 61. In other words, "[a]n error is harmless if it does not affect the substantial rights of a party." *Fonseca v. Corral Agric., Inc.*, 156 Idaho 142, 149, 321 P.3d 692, 699 (2014), abrogated on other grounds by *Sims v. Jacobson*, 157 Idaho 980,

987, 342 P.3d 907, 914 (2015). The appellant bears the burden of showing a substantial right is affected and the error is prejudicial. *Id.*

The hearing officer cited Sylte's Objection to highlight that, in the proceeding before Judge Magnuson, Sylte raised the same argument Sylte raises in this matter: that Sylte's water right 95-0734 is entitled to waters stored in Twin Lakes to satisfy the right. R. 1395. It does not prejudice Sylte nor affect a substantial right of Sylte to document that Sylte raised the same argument in the proceeding before Judge Magnuson that Sylte raises in this matter. The hearing officer also cited Sylte's Objection to point out that Sylte acknowledged in the proceeding before Judge Magnuson that Sylte has no vested right in the block of water "'located between the bottom of the lake and Staff Gauge height 0.0 feet.'" R. 1399. Sylte is not prejudiced nor affected by this citation because the 1989 Decree determined that "[n]o water right has been developed for the use of this water because it provides a base for the overlying storage rights." R. 201. Accordingly, the hearing officer's citation to Sylte's Objection is not grounds for reversal of the Order.

The hearing officer cited the Notice of Entry "as worth noting" to "reinforce the point" that the 1989 Decree's plain language entitles Sylte's water right 95-0734 to the natural tributary inflow to Twin Lakes, but not the waters stored in Twin Lakes. R. 1398. In other words, the hearing officer only cited the Notice of Entry to further support his determination based upon the plain language of the 1989 Decree. The hearing officer would have reached the same conclusion regardless of his citation to the Notice of Entry. Thus, the citation to the Notice of Entry does not prejudice Sylte nor affect Sylte's substantial rights and is not grounds for reversal of the Order.

E. The hearing officer properly modified the instructions to include the decreed annual diversion volume for Sylte’s water right 95-0734.

Sylte’s *Petition for Declaratory Ruling* asked the Department to issue an order “setting aside and reversing” the watermaster instructions. R. 213. Sylte asserted the instructions “are contrary to the existing decree and are not in accordance with the prior appropriation doctrine.”

Id. In the motion for summary judgment, Sylte argued that: (1) water right 95-0734 is entitled to delivery of water “on a continuous year-round basis irrespective of the amount of natural tributary inflow to Twin Lakes”; (2) “application of the futile call doctrine with respect to water right no. 95-0734” does not depend on the amount of natural tributary inflow; and (3) the Department should set aside the instructions because they are “contrary to” the 1989 Decree and the prior appropriation doctrine. R. 930. In sum, Sylte’s *Petition for Declaratory Ruling* and motion for summary judgment asked the Department to evaluate whether the instructions it issued to the watermaster for administering water rights pursuant to the 1989 Decree accurately instructed the watermaster how to deliver water to Sylte’s water right 95-0734.

In evaluating Sylte’s request, the hearing officer relied upon the 4.10 AFA volume limit to respond to Sylte’s argument that water right 95-0734 “must be satisfied on a continuous year-round basis.” R. 1400. In rejecting Sylte’s argument, the hearing officer explained:

A continuous year-round diversion of 0.07 cfs, the maximum diversion rate for Water Right no. 95-0734, would result in the diversion of 50.7 acre feet of water from Rathdrum Creek. However, the maximum annual diversion volume decreed for the right is 4.10 AFA for stock watering purposes. Thus, Water Right no. 95-0734 does not grant Sylte a continuous year-round diversion of 0.07 cfs. Idaho Code § 42-104 states: “The appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest ceases to use it for such purpose, the right ceases.” Sylte is entitled to appropriate only the amount of water its cattle will beneficially use, up to a maximum of 4.10 acre feet per year. Furthermore, because Water Right no. 95-0734 does not contain a storage use and is, in fact, designated in remarks as a ‘[n]atural flow appropriation’, Sylte is not authorized to store more than a 24-hour supply for their cattle.

R. 1400 (citations and footnotes omitted). The hearing officer recognized that the instructions did not refer to the decreed 4.10 AFA diversion volume for Sylte's water right and modified the instructions accordingly. R. 1402.

Sylte argues that the addition of the decreed volume limit to the instructions "must be reversed because it was outside the issues raised in this proceeding." *Petitioner Sylte's Opening Brief* at 45-46. But Sylte's *Petition for Declaratory Ruling* and motion for summary judgment asked the Department to evaluate whether the instructions accurately reflect what water Sylte's water right 95-0734 is entitled to pursuant to the 1989 Decree. The hearing officer evaluated Sylte's arguments and answered the question asked. In doing so, the hearing officer discovered the decreed annual volume limit was not mentioned in the instructions. The Order's inclusion of the decreed volume limit in the instructions fell squarely within issues raised in the underlying proceeding.

Sylte also argues that the hearing officer's modification to the instructions "misapplies whatever volume limitation must be imposed on water right 95-0734." *Petitioner Sylte's Opening Brief* at 46. Sylte argues they are "entitled to have water delivered to water right no. 95-0734's point of diversion on a continuous year-round basis, only to be curtailed when the right has diverted the volume limit in priority." *Id.*

Sylte's argument suggests that Sylte is entitled to have .07 cfs flow by the point of diversion for water right 95-0734 at all times, regardless of whether Sylte will divert the water and put it to beneficial use. Such a result is contrary to the plain language of the 1989 Decree. As the hearing officer explained: "A continuous year-round diversion of 0.07 cfs, the maximum diversion rate for Water Right no. 95-0734, would result in the diversion of 50.7 acre feet of water from Rathdrum Creek." R. 1400. "However, the maximum annual diversion volume

decreed for the right is 4.10 AFA for stock watering purposes. Thus, Water Right no. 95-0734 does not grant Sylte a continuous year-round diversion of 0.07 cfs.” *Id.*

Sylte’s argument is also contrary to Idaho law. As the Idaho Supreme Court has stated: “Integral to the goal of securing maximum use and benefit of our natural water resources is that water be put to beneficial use. This is a continuing obligation.” *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 727, 735, 947 P.2d 400, 408 (1997). “A water user is not entitled to waste water.” *Id.* The result of accepting Sylte’s argument would be that the watermaster would have to curtail upstream juniors in an effort to ensure that .07 cfs flows past the point of diversion for water right 95-0734 at all times, even if Sylte does not intend to divert the water. Idaho’s policy against waste and requiring that water must be put to beneficial use precludes such a result. Thus, the hearing officer properly modified the instructions to include the maximum annual diversion volume decreed for Sylte’s water right 95-0734.

F. Sylte is not entitled to attorney fees because the Department acted with a reasonable basis in fact and law.

Sylte requests attorney fees pursuant to Idaho Code § 12-117, arguing that the Department “acted without a basis in fact or law” by “ignor[ing] Sylte’s arguments” and the 1989 Decree. *Petitioner Sylte’s Brief* at 47-48.

Idaho Code § 12-117(1) provides in relevant part:

Unless otherwise provided by statute, in any proceeding involving as adverse parties a state agency or a political subdivision and a person, the state agency, political subdivision or the court hearing the proceeding, including on appeal, shall award the prevailing party reasonable attorney’s fees, witness fees and other reasonable expenses, if it finds that the nonprevailing party acted without a reasonable basis in fact or law.

I.C. § 12-117(1).

Sylte’s request for attorney fees must be denied because the plain language of the 1989 Decree mandates that, contrary to Sylte’s arguments, Sylte’s water right 95-0734 is entitled to

delivery of natural tributary inflow to Twin Lakes, but not waters stored in Twin Lakes. The Department's instructions and Order, which require delivery of the natural tributary inflow to Sylte's water right 95-0734 in priority, but not waters stored in Twin Lakes, are consistent with the 1989 Decree's plain language and Idaho law. Therefore, Sylte is not entitled to attorney fees pursuant to Idaho Code § 12-117.

V. CONCLUSION

For the foregoing reasons, the Department respectfully requests that the court affirm the Order upholding and modifying the instructions to the watermaster of WD 95C for administering water rights pursuant to the 1989 Decree. The Department also respectfully requests the court deny Sylte's request for attorney fees.

RESPECTFULLY SUBMITTED this 9th day of February 2018.

LAWRENCE G. WASDEN
Attorney General

DARRELL G. EARLY
Deputy Attorney General
Chief, Natural Resources Division



KRISTINA N. FUGATE
Deputy Attorney General
Idaho Department of Water Resources

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of February, 2018, 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:

Original to:
SRBA DISTRICT COURT
253 3rd AVENUE NORTH
PO BOX 2707
TWIN FALLS ID 83303-2707
Facsimile: (208) 736-2121

- U.S. Mail, postage prepaid
- Hand Delivery
- Overnight Mail
- Facsimile
- Email

MICHAEL P LAWRENCE
JACK W RELF
GIVENS PURLSEY LLP
PO BOX 2720
BOISE ID 83701-2720
mpl@givenspursley.com
jwr@givenspursley.com

- U.S. Mail, postage prepaid
- Hand Delivery
- Overnight Mail
- Facsimile
- Email

NORMAN SEMANKO
PARSONS BEHLE & LATIMER
800 W MAIN ST STE 1300
BOISE ID 83702
nsemanko@parsonsbehle.com

- U.S. Mail, postage prepaid
- Hand Delivery
- Overnight Mail
- Facsimile
- Email

ALBERT P BARKER
BARKER ROSHOLT & SIMPSON LLP
1010 W. JEFFERSON ST STE 102
PO BOX 2139
BOISE ID 83701-2139
apb@idahowaters.com

- U.S. Mail, postage prepaid
- Hand Delivery
- Overnight Mail
- Facsimile
- Email



Kristina N. Fugate
Deputy Attorney General