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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 SYLTE'S PETITION FOR DECLARATORY RULING REGARDING DISTRIBUTION OF WATER TO WATER RIGHT NO. 95-0734	Docket No. P-DR-2017-001 **TWIN LAKES IMPROVEMENT ASSOCIATION'S RESPONSE IN OPPOSITION TO SYLTE'S APPEAL, EXCEPTIONS, REQUEST FOR RECONSIDERATION AND CLARIFICATION, AND REQUEST FOR HEARING**

COMES NOW, Twin Lakes Improvement Association ("TLIA"), by and through its attorney of record in this matter, pursuant to the Department's Rules of Procedure, IDAPA 37.01.01, and on behalf of the Intervenors in this matter who have designated the same as their spokesperson, and hereby submits its response in opposition to *Sylte's Appeal, Exceptions, Request for Reconsideration and Clarification, and Request for Hearing* (September 20, 2017).

I. PROCEDURAL BACKGROUND

Sylte filed a petition seeking a declaratory ruling from the Department regarding the Instructions to the Watermaster in Water District 95-C. Following a prehearing conference, Sylte filed a motion for summary judgment and TLIA filed a cross-motion for summary judgment. The Hearing Officer subsequently issued his *Order on Motions for Summary Judgment; Order Amending Instructions; Order Vacating Hearing Dates and Schedule*. Sylte now seeks to overturn the Hearing Officer's prehearing order.

No hearing has been held in this matter.

II. ARGUMENT

Sylte is asking the Director to do what the District Court Judge properly refused to do in the Twin Lakes-Rathdrum Creek Adjudication, which is to authorize Sylte to utilize the storage water in Twin Lakes as a supplemental supply for his natural flow water right from Rathdrum Creek, thereby adversely impacting the two storage water rights in the lake, held by TLIA and Twin Lakes-Rathdrum Creek Flood Control District 17. The Hearing Officer appropriately denied this request. Accordingly, the Director should affirm the Hearing Officer's decision by denying Sylte's appeal, exceptions and request for reconsideration and clarification.

TLIA incorporates by reference all of the previous briefing that it submitted to the Hearing Officer in this matter, including *TLIA's Memorandum in Support of Cross-Motion for Summary Judgment and in Opposition to Sylte's Motion for Summary Judgment* (July 7, 2017) and the *Reply in Support of TLIA's Cross-Motion for Summary Judgment* (July 27, 2017). Additional argument pertinent to Sylte's current request to the Director is set forth below.

A. The Hearing Officer's Order is Consistent With the Memorandum Decision, the Decree and Idaho Law.

Sylte claims that the Hearing Officer "ignored" Judge Magnuson's Memorandum Decision in coming to his decision. The Hearing Officer did no such thing. To the contrary, he exhaustively reviewed the Memorandum Decision, Decree and associated documents, citing from them at length in his summary judgment order, including the portions that Sylte relies upon. In doing so, the Hearing Officer considered all of the relevant provisions of the documents, not just the selectively quoted – and creatively interpreted – provisions that Sylte favors. Far from reading anything out of these documents, the Hearing Officer carefully examined and analyzed the entirety of the documents, providing a straightforward, plain-meaning interpretation of Judge Magnuson's decision. That same interpretation is reflected in the Instructions.

The problem for Sylte, of course, is that they want their interpretation to prevail, notwithstanding the clear statements cited by the Hearing Officer, which stand for the exact opposite of what Sylte is arguing for. In this regard, Sylte offers nothing new. They have been making the same argument, and attempting to manipulate and control the storage in Twin Lakes for their own purposes, for decades. This needs to come to an end.

While Sylte has a unique natural flow water right in the basin – it is not subject to the evaporation and seepage losses applied to other natural flow water rights – it is not exempt or immune from Idaho law, including the administration of water rights in a water district and the futile call doctrine. Judge Magnuson made this very clear.

Regarding the distinction between natural flow water rights (like Sylte's) and storage water rights (like TLIA's), Judge Magnuson noted: "Storage water rights differ from direct flow rights in the water is impounded and stored for later use, while waters, subject to direct flow rights, are

diverted for immediate use." Memorandum Decision at 14. Sylte has no storage water right and is precluded from claiming or asserting any now. *Id.* at 16-17. "No water right exists for the natural storage below the level of 0.0 on the Staff Gauge located at the outlet of Lower Twin Lake." Proposed Finding of Water Rights at xix (Conclusions of Law No. 8). Of course, this serves to entirely defeat Sylte's claim to this water as "natural flow."

These findings and conclusions help explain Judge Magnuson's ultimate ruling that, as the senior water right in the basin, Sylte "may divert the natural flow, but not the stored waters, on the basis of water right priority." Decree at xix (amended/final Conclusions of Law No. 14). The Judge's edict could hardly be clearer. The Hearing Officer's order correctly recognized this and should be upheld.

B. The Hearing Officer's Futile Call Analysis Is Sound.

The futile call doctrine is a bedrock principle of water rights administration and the prior appropriation doctrine in Idaho. Sylte fails to identify any authority to the contrary, and Judge Magnuson did not purport to waive the futile call doctrine as applied to Sylte's water right or any other water right in the basin.

The Hearing Officer's decision – and the Instructions – appropriately recognize the role of the futile call doctrine in Water District 95-C and should not be disturbed or overturned by the Director.

C. The Sylte Volume Limit Is Appropriate to Include in the Instructions.

In its petition for declaratory ruling, Sylte asks the Department to revise the Instructions to the Watermaster for Water District 95-C. It should come as no surprise to them, then, that the Hearing Officer revised the Instructions. The only rub is that the Instructions were not revised in the manner requested by Sylte. That doesn't render the changes improper.

The Hearing Officer added to the Instructions a reference to the decreed diversion volume for Sylte's water right. It is beyond reason how Sylte can complain about such an addition. The quantity element of a water right is a key component of water rights administration. Without it, the Watermaster is unable to accurately and effectively ensure the delivery of water rights during times of shortage.

Both the diversion rate and the annual diversion volume are defined in Sylte's water right, as decreed by Judge Magnuson. Sylte cites no authority for the proposition that water rights should be administered only for their diversion rate, not their diversion volume. To do so would negate the purpose for adjudicating the water rights in the first place.

The Hearing Officer's decision is sound, will assist the Watermaster in administering water rights in the future, and should be affirmed.

D. The Director Has Authority to Resolve This Matter, Regardless of the Order's Designation as Final or Preliminary.

Sylte dedicates several pages to discussing whether the Hearing Officer's order is a preliminary order, a recommended order, a final order, or final agency action.

The title and captioning of the order itself does not indicate whether it is preliminary or final. In such cases, the Hearing Officer is allowed to clarify the nature of the order after its release. Rule 750, IDAPA 37.01.01.750. That is precisely what he did with his follow-up letter to the parties, clarifying that the order is final agency action and should be regarded as a final order.

Parties have the right to request that the designation of an order be changed. *Id.* Sylte has chosen not to make such a request. Instead, Sylte insists that it must be deemed a preliminary order, contrary to what the Hearing Officer expressly communicated to the parties in his letter.

Regardless of the designation of the order, the outcome in this matter will be the same. If it is a final order, Sylte has asked for reconsideration and clarification in his request, which the Director can certainly entertain. If it is a preliminary order, Sylte has lodged exceptions, again allowing the Director to address Sylte's arguments.

Either way, the Director may rule on Sylte's challenge to the order. As indicated above, the Director should uphold and affirm the Hearing Officer's order.

III. CONCLUSION

For the reasons set forth above and in TLIA's previous briefing in this matter, Sylte's appeal, exceptions, and request for reconsideration and clarification should be denied. The Hearing Officer's prehearing order in this matter, denying *Sylte's Motion for Summary Judgment* and granting *TLIA's Amended Cross-Motion for Summary Judgment*, with the additional inclusion of Sylte's decreed annual diversion volume in the Instructions, should be upheld and affirmed in its entirety.

DATED this 4th day of October, 2017.

PARSONS BEHLE & LATIMER

By _____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of October, 2017, I served a true and correct copy of the foregoing document on the parties listed below by their designated method of service as indicated.

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