

IN THE SUPREME COURT OF THE STATE OF IDAHO

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

Petitioners - Appellants,

vs.

THE IDAHO DEPARTMENT OF WATER RESOURCES,

Respondent - 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 FREIJE, AMBER HATROCK, BARBARA HERR, WENDY AND 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. NIPP, JOHN NOONEY, STEVE & PAM RODGERS, KIMBERLI ROTH, DAVID &

Supreme Court Docket No. 46062-2018

Case No. CV-2017-7491

LORI SCHAFER, 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 - Respondents.

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

RESPONDENT IDWR'S BRIEF

Appeal from the District Court of the First Judicial District of the State of Idaho,
in and for the County of Kootenai, Honorable Eric J. Wildman, District Judge, Presiding

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I. STATEMENT OF THE CASE

A. NATURE OF THE CASE

This is an appeal of a district court decision affirming 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. Those instructions addressed administering water rights pursuant to the *Final Decree* (“*Decree*”) entered in the Twin Lakes-Rathdrum Creek Drainage Basin water right adjudication. The Department upheld the instructions because it determined they correctly informed the watermaster how to distribute water pursuant to the plain language of the *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.” A.R. 181.¹ 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” that 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.*

¹ This brief will cite the agency record as “A.R.” followed by the Bates number provided on the specific page of the agency record and will cite the clerk’s record as “R.” followed by the Bates number provided on the specific page of the clerk’s record.

II. Decree

All surface and storage water rights in the Twin Lakes and Rathdrum Creek water system were decreed in a general stream adjudication.² A.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 *Decree*. A.R. 196-209. As part of 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*”). A.R. 1-172, 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. A.R. 175-79. None of the objectors filed claims “to a water right for storage purposes.” A.R. 188-89.

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

The Appellants in this case, 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 *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

² Kootenai County Civil Case No. 32572.

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.

A.R. 26.

The 1875 priority date for water right 95-0734 is the most senior priority date of the water rights confirmed in the *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.” A.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 *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.” A.R. 201.
- The second block of storage is located between 0.0 feet and 6.4 feet on the staff gauge and “maintains the reservoir at a minimum level of 6.4 feet on the staff gauge.” A.R. 201, 204. A 1969 district court decision, *Twin Lakes Imp. Ass’n. v. East Greenacres Irr. Dist.*, Kootenai County Case No. 18420, established the 6.4 foot minimum level for Twin Lakes. A.R. 201. The second block of storage “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.” A.R. 201. 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.* Water right 95-0974 has a priority date of March 23, 1906. A.R. 45.
- The third block of storage is located between 6.4 feet and 10.4 feet on the staff gauge. A.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.*; A.R. 45. Water right 95-0973 has a priority date of March 23, 1906. A.R. 45. Twin Lakes Rathdrum Creek Flood Control District 17 (“Flood Control District”) owns water right 95-0973. A.R. 1394.

In the *Decree*, the district 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 waters in Twin Lakes.” A.R. 205. “From November 1 of each year until March 31 of the next year, the two storage water rights enable Twin Lakes to be filled to the level of 10.4 feet on the Staff Gauge.” *Id.* “From April 1 to October 31 of each year, the rights to fill the lakes is superseded by the right of existing and future direct flow water rights to divert natural inflows to the lakes.” *Id.* The court also determined “water stored” pursuant to water rights 95-0973 and 95-0974 “is not unappropriated water subject to appropriation by others.” A.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.” A.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.” A.R. 192-93.

III. The Department’s Instructions

The Department issued its instructions to the watermaster of WD 95C in response to a water right owner’s written complaint requesting the watermaster’s removal. A.R. 210. The complaint alleged that the watermaster had been “releasing storage water from Twin Lakes contrary to the [*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.

A.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 Twin Lakes' seepage and evaporation losses exceed the natural inflow. The instructions also require the watermaster to consult with the Department regarding 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. A.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 appointed a hearing officer who held a prehearing

conference. A.R. 314-17, 1390. The hearing officer issued a scheduling order setting an October 2018 hearing date and a July 28, 2017 deadline for dispositive motions. A.R. 830-31.

On June 26, 2017, Sylte filed a motion for summary judgment and supporting memorandum. A.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 into Twin Lakes”; (2) application of the futile call doctrine to water right no. 95-0734 does not depend on the amount of natural tributary inflow; and (3) the instructions are “contrary to” the *Decree* and the prior appropriation doctrine. A.R. 930.

On July 7, 2017, TLIA filed a cross-motion for summary judgment and supporting memorandum. A.R. 1255-74. TLIA argued that Sylte’s summary judgment motion should be denied, but TLIA’s motion should be granted because Sylte’s request “to have storage water released into Rathdrum Creek” is “contrary to the Decree . . . and the prior appropriation doctrine.” A.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”). A.R. 1390-1407.³ The hearing officer denied Sylte’s motion for summary judgment and granted TLIA’s cross-motion. A.R. 1402.

The hearing officer relied on the *Decree*’s plain language to reject Sylte’s argument that it was entitled to delivery of water from Twin Lakes “irrespective of the amount of natural tributary inflow into Twin Lakes.” A.R. 1399. The hearing officer explained that accepting

³ 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 IDAPA 37.01.01.402. A.R. 1408. Sylte is correct that the Department’s position is that the Order is “a final agency action which Sylte had properly and timely appealed to the District Court.” *App. Br.* 9 n.3.

Sylte's argument would require the Department to deplete water stored in Twin Lakes pursuant to water rights 95-0973 and 95-0974. A.R. 1397. The hearing officer concluded that the *Decree's* plain language does not allow delivery of stored water to satisfy Sylte's water right. A.R. 1397-1400. Specifically, the hearing officer explained that the source of Sylte's water right is "natural flow," not "stored water." A.R. 1398-99. The hearing officer then quoted the *Decree's* statements 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 exceed natural tributary inflow, Sylte's water right "may divert the natural flow, *but not the stored waters*, on the basis of water right priority." A.R. 1399 (italics added in Order).

The hearing officer also concluded the instructions correctly guide the watermaster on when to consult with the Department with respect to a futile call. A.R. 1401-02. Finally, the hearing officer modified the instructions to include the *Decree's* 4.1 acre feet per annum (AFA) maximum annual diversion volume decreed for Sylte's water right. A.R. 1402. On October 3, 2017, Sylte filed a petition for judicial review of the Order with the district court. R. 7-17.

V. The District Court Affirmed the Instructions on Judicial Review

On judicial review Sylte argued that water right 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." R. 83. The Department, TLIA, and the Flood Control District asked the district court to affirm the Order. R. 127-91. On April 11, 2018, the district court issued its *Memorandum Decision* affirming the Order. R. 226-38.

The district court emphasized that water rights must be administered in accordance with a final decree's plain language. R. 229. The court began its analysis with the *Decree's* Conclusion of Law 14:

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. 231 (underlining in original). The district court concluded this language plainly gives Sylte's water right 95-0734 a unique administrative status as the only natural flow right protected from increased evaporation and seepage. *Id.*

The district court also concluded that the *Decree* prohibits the release of storage water to satisfy Sylte's water right 95-0734. R. 232. The court reasoned that the *Decree* did not award Sylte any right to Twin Lakes' stored waters because the Decree differentiates between storage rights and natural flow and the only two decreed storage water rights are not owned by Sylte. R. 232-33. Additionally, the court explained that Sylte's water right has a source of Rathdrum Creek, which has no storage capacity. R. 233-34. Further, the district court held that res judicata precludes Sylte from asserting that the *Decree* is contrary to Idaho's prior appropriation doctrine because that issue should have been raised in the prior adjudication. R. 234-35. The district court also held that the Department's instructions properly include a futile call instruction and a volume limit, and Sylte did not show any prejudice to a substantial right. R. 235-36. The court therefore affirmed all aspects of the Order. R. 236.

Sylte filed a petition for rehearing and again asked the district court to strike the volume limit included in the instructions. R. 250. The court denied Sylte's petition. R. 278-80. The court held that Sylte's due process rights were not violated because the volume limit applied to

Sylte as “a simple result of the operation of law” and Sylte had not shown prejudice to a substantial right. R. 279-80. Sylte timely filed its notice of appeal and amended notice of appeal to this Court. R. 253-77; R. 282-94.

II. ISSUES ON APPEAL

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

- (1) Whether the district court correctly affirmed the Department determination that the *Decree* entitles water right 95-0734 to Twin Lakes’ natural tributary inflow in priority, but not waters stored in Twin Lakes.
- (2) Whether the district court correctly affirmed the Department’s determination that the futile call doctrine’s application to water right 95-0734 depends on the natural tributary inflow to Twin Lakes.
- (3) Whether any error from the Department’s reference to general adjudication documents without official notice is harmless.
- (4) Whether the Department properly modified the watermaster instructions to include reference to the *Decree*’s 4.1 AFA limit for water right 95-0734.
- (5) Whether Sylte is entitled to attorney fees on appeal.

III. STANDARD OF REVIEW

On an appeal of an agency action from the district court, this Court reviews the district court’s decision to determine whether it correctly decided the issues presented to it. *City of Blackfoot v. Spackman*, 162 Idaho 302, 305, 396 P.3d 1184, 1187 (2017). This Court reviews the agency record independently of the district court’s decision. *Id.* Judicial review of the Department’s final decision is governed by the Idaho Administrative Procedure Act, chapter 52, title 67, Idaho Code. Idaho Code § 42-1701A(4). Courts review 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).

A strong presumption of validity favors an agency's actions. *Chisholm v. Idaho Dep't of Water Res.*, 142 Idaho 159, 162, 125 P.3d 515, 518 (2005). 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 way specified in Idaho Code § 67-5279(3) and that a substantial right 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

The central focus of this appeal is Sylte's claim that water right 95-0734 is entitled to the release of stored waters that have already been appropriated by others in priority pursuant to the *Decree*. While Sylte asserts it is entitled to a category of water it refers to as "natural, pre-dam outflow," the *Decree* does not recognize any such category of water. Instead, the *Decree* recognizes only two types of water, natural flow and stored waters, and plainly states that Sylte is entitled to the "natural flow, but not the stored waters." A.R. 205.

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

The *Decree* entered in the Twin Lakes – Rathdrum Creek Basin adjudication was a general adjudication decree and therefore “shall be conclusive as to the nature and extent of all water rights in the adjudicated water system.” Idaho Code § 42-1420(1). The Department’s Director shall administer water rights by distributing water in accordance with the final decree. Idaho Code § 42-1413.

1. The Decree’s plain language

Interpretation of a decree must begin with the decree’s plain language. *City of Blackfoot v. Spackman*, 162 Idaho 302, 306, 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 *Decree*'s plain language establishes three principles that demonstrate Sylte is not entitled to the already appropriated stored waters of Twin Lakes and is instead only entitled to natural tributary inflow. First, the *Decree* unambiguously prohibits Sylte from diverting Twin Lakes’ stored waters. A.R. 205. Second, the *Decree* unambiguously provides that no storage rights were decreed to Sylte. A.R. 201-02. Third, the *Decree* unambiguously details the elements of Sylte’s water right as natural flow, which is distinct from a storage water right. A.R. 26. Given these three principles, the only water that remains for Sylte to appropriate is the natural tributary inflow.

To begin, the *Decree*'s plain language unambiguously mandates that 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 *Decree* states in Conclusion of Law 14:

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.

A.R. 205 (underlining in original; italics added). Conclusion of Law 14's first sentence acknowledges Sylte's water right 95-0734's unique status as a downstream senior to Twin Lakes' two storage rights by protecting Sylte's water right. It protects Sylte's water right by requiring that seepage and evaporation are not counted against the natural tributary inflow. The second sentence plainly and unambiguously states that Sylte is not entitled to the waters stored in Twin Lakes.

Second, the *Decree* plainly details that Twin Lakes contains only three "blocks of storage," none of which are decreed to Sylte. A.R. 201-02. The *Decree* states that the first block of storage is the natural lake storage between the lake's bottom and staff gauge 0.0 feet. A.R. 201. The *Decree* explains that no water right was developed for the first block of water because it provides a base for the overlying storage rights.⁴ A.R. 201. The *Decree* plainly states the second block of storage is located between 0.0 feet and 6.4 feet on the staff gauge and was appropriated by TLIA. A.R. 201-02. The third block of storage was appropriated between 6.4 feet and 10.4 feet on the staff gauge and is now owned by the Flood Control District. A.R. 202. The *Decree* specifically states that the second and third blocks of storage are the "only two

⁴ The *Decree* describes the first block as a "base for the overlying storage rights" because TLIA's water right 95-0974 for recreation storage "maintains the reservoir at a minimum level of 6.4 feet on the Staff Gauge." A.R. 204. A 1969 district court decision established minimum and maximum levels for Twin Lakes. A.R. 201; *Twin Lakes Imp. Ass'n. v. East Greenacres Irr. Dist.*, Kootenai County Case No. 18420 (affirmed on appeal in *Twin Lakes Imp. Ass'n. v. East Greenacres Irr. Dist.*, 93 Idaho 922, 478 P.2d 872 (1970)). The minimum level is 6.4 feet on the Staff Gauge and the maximum level is 10.4 feet on the Staff Gauge. *Id.*

storage rights recognized as a result of this adjudication” and their waters are “not unappropriated water subject to appropriation by others.” A.R. 187, 189. Thus, the *Decree* did not decree any of the three blocks of stored waters to Sylte.

Third, the *Decree* recognized that natural flow rights are different from storage rights. The *Decree* states “[s]torage rights differ from direct flow rights in that water is impounded and stored for later use, while waters, subject to direct flow rights, are diverted for immediate use.” A.R. 186. The *Decree* concluded that “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.” A.R. 193.

The decreed elements of Sylte’s water right 95-0734 further specify that the water right is a natural flow right. “Water rights are defined by elements.” *City of Blackfoot*, 162 Idaho at 306, 396 P.3d at 1188. The source of water and a remark are two elements of a water right. Idaho Code § 42-1411(2)(b),(j). The *Decree* names the source of Sylte’s water right as “Rathdrum Creek,” not Twin Lakes. A.R. 26. The only two storage water rights in the *Decree* have Twin Lakes as their source. A.R. 45, 187, 202. Also, the *Decree* contains the following remark for Sylte’s water right: “For 300 head of stock. *Natural flow appropriation.*” A.R. 26 (emphasis added). That remark plainly provides that the source of Sylte’s appropriation is natural flow, not stored water. Because the source of Sylte’s water right is Rathdrum Creek and not Twin Lakes and the right specifies that it appropriates “natural flow,” the *Decree*’s defined elements of water right 95-0734 do not include water stored in Twin Lakes.

The *Decree* also relied on this Court’s precedent to support and explain why Sylte’s water right is not entitled to water stored in Twin Lakes. The *Decree* relies on *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.” A.R. 186. The *Decree* also cites *Washington County Irrigation District v. Talboy*, 55 Idaho 382, 389, 43 P.2d 943, 945 (1935), where this Court held that, once water is “diverted from the natural stream and stored,” it is “no longer ‘public water’ subject to diversion” by others. A.R. 191. Consistent with this precedent, the *Decree* concluded that “water stored” pursuant to water rights 95-0973 and 95-0974 was not “subject to appropriation by others.” A.R. 189. For that reason, only those two storage rights “are entitled to store water and to make beneficial use of stored waters in Twin Lakes.” A.R. 205. The *Decree*’s reliance on this Court’s precedent supports the *Decree*’s prohibition on the use of water stored in Twin Lakes to satisfy Sylte’s water right 95-0734.

2. The Department’s Order is correctly based on the *Decree*’s plain language.

The Order closely follows the *Decree*’s plain language and this Court’s precedent to correctly determine that Sylte’s water right 95-0734 is entitled to the natural tributary inflow to Twin Lakes, but not the water stored in Twin Lakes. After acknowledging that water right 95-0734’s senior priority date clearly entitles it to all the natural tributary inflow to Twin Lakes, the hearing officer evaluated Sylte’s argument that water right 95-0734 is entitled to more than natural tributary inflow. A.R. 1397-98.

The hearing officer explained a key point: that accepting Sylte’s argument would require the watermaster to draw from water already appropriated and stored in Twin Lakes pursuant to water rights 95-0973 and 95-0974 to attempt to satisfy Sylte’s right. A.R. 1399. The hearing officer concluded that such a result “is contrary to the plain language of the *Decree*.” *Id.* In doing so, the hearing officer focused on the plain language in the *Decree* that establishes the three principles explained above.

To support his conclusion that Sylte was requesting already appropriated stored waters, the hearing officer explained that, while the *Decree* entitles Sylte to “waters from the source of their appropriation,” the source of Sylte’s water right is “natural flow,” not “stored water.” A.R. 1398-99. The hearing officer noted that the *Decree*’s reliance on *Boise City Irrigation & Land Co.* for the rule that once an appropriator diverts water he becomes “the owner of the corpus of the water lawfully diverted.” A.R. 1398-99. The hearing officer also relied on *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 the water stored by water rights 95-0973 and 95-0974 is already appropriated and owned, so it could not be “the source of [Sylte’s] appropriation.” R. 1399.

The hearing officer further supported his conclusion that stored waters could not be the “source of Sylte’s appropriation” by quoting the *Decree*’s plain statements 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 *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). Given the *Decree*’s plain language, the hearing officer properly determined that the *Decree* and this Court’s precedent require that water right 95-0734 is entitled to the natural tributary inflow, but not water stored in Twin Lakes.

3. The district court correctly based its decision on the *Decree*’s plain language.

The district court correctly upheld the Department’s instructions by relying on the same three principles established in the *Decree*’s plain language. R. 232-36. The district court first cited Conclusion of Law No. 14 to support its conclusion that the *Decree* gives Sylte’s water right a “unique administrative status” relative to other natural flow water rights. R. 231. That unique status protects Sylte’s senior water right from seepage and evaporation losses. *Id.*

In addition to this unique protection, the district court noted that Sylte’s argument “assumes and requires the release of the lakes’ stored waters to satisfy the right when the amount of natural tributary inflow is insufficient.” R. 232. The court recognized the *Decree*’s differentiation between storage water rights and direct flow water rights: “[s]torage rights differ from direct flow rights in that water is impounded and stored for later use, while waters, subject to direct flow rights, are diverted for immediate use.” R. 232. The district court also noted the *Decree*’s description of its two categories of water rights: storage rights “utilize the storage capacity of the lake,” and direct flow rights “utilize the flows passing through the lake.” R. 233. With only these two categories of source water, the court held that, other than natural flow, “there is no other source of water that could be released into Rathdrum Creek to satisfy the right except for the lakes’ stored water.” R. 232 n.4.

Further, the court held the *Decree*’s plain limit of storage to two water rights made it “clear that water right 95-734 is a direct flow water right that may only be satisfied by flows passing through the lake.” R. 233. The district court correctly relied on the *Decree*’s plain language to determine the Department’s Order and instructions properly limit Sylte’s right to the natural tributary inflow, but not Twin Lakes’ stored waters.

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

Sylte contends water right 95-0734 “is entitled to releases of what used to be natural lake storage in amounts up to what had naturally flowed out of Twin Lakes” in 1875 because “natural flow” includes water that was naturally stored in Twin Lakes prior to 1906. *App. Br.* 35-36 (emphasis in original).

Sylte’s argument for “releases of what used to be natural lake storage” is based on the premise that prior to dam construction in 1906, Twin Lakes’ natural outflows sometimes exceeded natural inflows and sometimes waters stored in the lake would flow down to Sylte’s point of diversion. *App. Br.* 25-29, 36. The findings Sylte relies on for that premise include the following: “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”; “an appropriator is entitled to maintenance of stream conditions substantially as they were at the time the appropriators made their appropriation”; water flowed “through the natural pre-dam obstruction at all times”; “the primary result the dam had on the water level was to hold the water at a higher point longer through the summer months”; and “the water level of Twin Lakes and the vegetation lines around the lakes were relatively the same, both before and after the construction of the dam.” A.R. 182, 183, 185 (underlining in original). Sylte argues a claim to Twin Lakes’ “natural pre-dam outflow” is not a claim that Sylte is entitled to water stored by the 1906 storage water rights. *App. Br.* 34. Sylte contends that releases of “natural pre-dam outflow” are actually just “natural flow” that includes water naturally stored in Twin Lakes prior to dam construction. *App. Br.* 37.

However, Sylte’s argument that water right 95-0734 is entitled to “releases of what used to be natural lake storage” in the form “natural pre-dam outflow” runs into a repeated and recurring problem. The problem is that besides natural tributary inflow to Twin Lakes, the only

water that could possibly be “released” from Twin Lakes is water that is already appropriated and stored in Twin Lakes pursuant to storage water rights 95-0973 and 95-0974. The district court accurately described this problem: “If the natural tributary inflow is insufficient to satisfy water right 95-734, *there is no other source of water that could be released* into Rathdrum Creek to satisfy the right except for the lakes’ stored water.” R. 232 n.4 (emphasis added).

Sylte’s argument for release of what was once Twin Lakes natural storage could therefore only amount to asking for a change in storage rights that are already decreed. While the *Decree*’s Finding of Fact 10 states that all three blocks of storage were “natural lake storage,” the *Decree* also details the location, volume, and extent of the water right for all three blocks. None of that water is now available for release to Sylte.⁵ The decreed elements of water rights 95-0973 and 95-0974 allow the two 1906 storage rights to appropriate the natural tributary inflow in priority from November 1 to March 31. A.R. 45, 205. The 1906 storage rights only appropriate this water when Sylte’s right is satisfied by natural tributary inflow. After the 1906 storage rights appropriate their water, it is owned by TLIA and the Flood Control District. *See Washington Cty. Irr. Dist*, 55 Idaho 382, 43 P.2d 943. It cannot later be unappropriated and “released” to Sylte as “pre-dam natural outflow.” Consistent with that, the *Decree* plainly states that the objectors, including Sylte’s predecessor, did not submit or “disclose any claim to a water right for storage purposes.” A.R. 188.

Sylte admits facts that necessitate the conclusion Sylte is not entitled to release of any stored waters. Sylte admits the *Decree* recognized only two storage rights. *App. Br.* 35. Sylte

⁵ The *Decree* states the first block’s natural lake storage has no water right developed “because it is a base for the overlying storage rights.” A.R. 201. TLIA’s water right 95-0974 for recreation storage utilizes this base, which “maintains the reservoir at a minimum level of 6.4 feet on the Staff Gauge.” A.R. 204.

admits that the *Decree* gives Sylte no right to divert water stored under those storage rights. *Id.* Sylte admits the *Decree* finds storage rights are distinct from direct flow water rights. *Id.* All of these admissions, combined with the plain elements of both Sylte's water right and the 1906 storage water rights, add up to only one conclusion: Sylte is not entitled to any release of any stored water already appropriated in Twin Lakes.

Water right 95-0734's elements could have expressly carved out a storage right or a third category of water called "natural pre-dam outflow," but did not. The *Decree* names the source of Sylte's water right as "Rathdrum Creek." A.R. 26. But Sylte now argues water right 95-0734 is entitled to releases of "natural pre-dam outflow" from Twin Lakes. If Sylte's source of water was Twin Lakes, the *Decree* would have named Twin Lakes as the source. It did not. Further, Sylte's water right contained the following remark: "For 300 head of stock. *Natural flow appropriation.*" A.R. 26 (emphasis added). If Sylte's claimed "natural pre-dam outflow" was a part of its "natural flow appropriation," the *Decree* could have stated as much. Certainly that type of addition would be appropriate in a situation that Sylte describes as at the very least "counterintuitive." *App. Br.* 28. But the remark does not mention release of storage, another block of storage, or "natural pre-dam outflow." Additionally, the *Decree* did not elsewhere describe any separate block of water, location of storage, or acre-feet of storage that could comprise Sylte's claimed "natural pre-dam outflow." The fact that water right 95-0734's decreed elements specify a natural flow right from Rathdrum Creek and the *Decree* did not create a category of water called "natural pre-dam outflow" further demonstrates that no such category exists.

In sum, the *Decree* only recognizes two categories of water: (1) natural flow and (2) storage water. Neither Sylte, the Department, nor this Court can now create a new third category

of water called “natural pre-dam outflow.” The *Decree* does not allow for the release of storage water, nor does it create a third category of water called “natural pre-dam outflow.”

Sylte also argues Conclusion of Law 12 does not apply to Sylte’s water right because the conclusion only applies to rights with a source of Twin Lakes, tributary to Rathdrum Creek.

App. Br. 37-38. Conclusion of Law 12 states:

Only two water rights identified herein, Nos. 95-0973 and 95-0974, are entitled to store water and to make beneficial use of stored waters in Twin Lakes. *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.

A.R. 205 (emphasis added). Sylte is correct that Conclusion of Law 12’s second sentence refers to “water rights with a source of Twin Lakes tributary to Rathdrum Creek” and does not refer to its Rathdrum Creek sourced water right. However, the district court correctly explained that this specific reference does not mean that Sylte’s water right is something other than a natural flow water right. R. 233-34. This is because every other water right in the system, besides the two 1906 Twin Lakes storage rights, is a natural flow water right. No other sources of storage water exist. Therefore, Sylte’s right in Rathdrum Creek is a natural flow water right, and the only water available to that right is tributary inflow. The district court correctly held “all other water rights on the system with a source other than Twin Lakes, including 95-734, are direct flow rights by their very nature,” and accordingly Sylte is not entitled to Twin Lakes’ stored waters. R. 234.

Importantly, Sylte acknowledges, and the district court emphasized, that Conclusion of Law 12’s first sentence unambiguously provides that water rights 95-0973 and 95-0974 are the only two storage rights in Twin Lakes. *App. Br.* 37; R. 233. Because these stored waters were

already appropriated and owned by someone else, this sentence alone precludes Sylte's argument that water right 95-0734 is entitled to releases of those stored waters.

Sylte additionally contends that limiting water right 95-0734 to natural tributary inflow is contrary to the prior appropriation doctrine because it "effectively and impermissibly puts junior water rights (including the 1906 Storage Rights) in priority ahead of the 1875 right." *App. Br.*

29. Sylte consequently asks this Court to "protect Sylte's 1875 water right from interference." *Id.* at 7. In other words, Sylte argues that the prior appropriation doctrine means the Department and the district court cannot read the *Decree* as they have. *Id.* at 29-34.

The district court rejected Sylte's prior appropriation argument because principles of res judicata, including a final, appealable judgment on the merits, precluded Sylte from asserting the *Decree*'s plain language was contrary to the prior appropriation doctrine. R. 234-35. The court emphasized that if Sylte was dissatisfied with how the *Decree* memorialized water right 95-0734, then Sylte was required to timely appeal. R. 234. Sylte did not. *Id.* The court also emphasized that if Sylte took issue with how the *Decree* might be inconsistent with Idaho's prior appropriation doctrine, then Sylte was required to timely appeal. *Id.* Sylte did not. *Id.* Because the district court's review was limited to whether the Department's administration was consistent with the *Decree*'s plain language, the court held it could not consider whether the *Decree*'s plain language was inconsistent with prior appropriation. *Id.*

Sylte concedes that the doctrine of res judicata applies to the *Decree*. *App. Br.* 22. Sylte also concedes that "[t]here is no exception to res judicata that would relieve the *Decree* from its operation in this case." *Id.* at 23. Given those concessions, and the fact that the Department based its instructions on the *Decree*'s plain language, Sylte cannot argue that the *Decree*'s plain language is inconsistent with the prior appropriation doctrine.

Despite *res judicata*, Sylte continues to argue that the Department's instructions and Order do not properly follow Idaho prior appropriation law by citing many Idaho Supreme Court cases that stand for the principle of first in time is first in right and the principle that senior rights are protected from injury caused by subsequent appropriations. *App. Br.* 29-34. 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 (1963), and *Ward v. Kidd*, 87 Idaho 216, 392 P.2d 183 (1964). *App. Br.* 32-33.

Even if the *Decree's* finality did not preclude Sylte's argument, none of the cases Sylte cites dictate the result that Sylte desires: that a downstream senior natural flow water right holder is entitled to on demand delivery and release of waters stored upstream that were lawfully appropriated pursuant to the decreed elements of those storage rights. 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," which is "natural flow," and not waters stored in Twin Lakes. A.R. 26, 185, 205. 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 *Decree* and this Court's precedent.

Additionally, Sylte repeatedly implies that the *Decree* rejected a Department conclusion that water right 95-0734 is limited to natural tributary inflow. *App. Br.* 20, 34, 45. In support of this argument, Sylte quotes from the *1989 Memorandum Decision*:

To accept the department's interpretation of the facts as they pertain to the 1875 Sylte water right (#95-0734), would be to deprive the holders of such right of the use of the water to which they are entitled to and to which use they have a prior right to those possessing the storage rights.

A.R. 186. However, in using this quote Sylte's omits the fact that the *Decree* does not expressly specify what "department interpretation" it referred to. Nowhere does the *Decree* state that the "interpretation" was that Sylte is only entitled to the natural tributary inflow.

It is more likely the amendments to the Department's *Proposed Findings* after trial show the *1989 Memorandum Decision* was referring to a pre-trial Department interpretation that, when seepage and evaporation losses from Twin Lakes exceed the total natural tributary inflow to Twin Lakes, Sylte's water right is not entitled to *any* of that tributary inflow. The *Decree* directed the Department to prepare drafts of proposed amendments to the Director's findings of facts and conclusions of law "to reflect and effectuate this Court's determinations regarding No. 95-0734, as set forth in this memorandum decision." A.R. 193. The Department's draft is reflected in the underlined amended facts and conclusions attached to the Final Decree. A.R. 198; 200-05. In Conclusion of Law 14, the Department added references to water right 95-0734:

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.

These underlined revisions are consistent with the *1989 Memorandum Decision's* finding that water flowed through the dam, so therefore water right 95-0734 is entitled to tributary inflow even when seepage and evaporation exceed that inflow. Importantly, the amendments also mandate that Sylte's water right cannot divert Twin Lakes' stored water. The more logical reading of "the Department's interpretation" is only that, before trial, the Department did not conclude that Sylte's water right was entitled to any tributary inflow to Twin Lakes when seepage and evaporation losses exceed that inflow.

Regardless of what “the Department’s interpretation” was, the *Decree* includes the above-quoted revisions as part of a final decree in a general adjudication. A final decree “shall be conclusive as to the nature and extent of all water rights in the adjudicated water system,” Idaho Code § 42-1420(1), and the Director shall administer water rights by distributing water in accordance with the final decree. Idaho Code § 42-1413. The *Decree* does not allow the Department to release storage water from Twin Lakes to satisfy Sylte’s water right. The *Decree* plainly requires the opposite:

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.

A.R. 205 (underlining in *Decree*, italics added). Because the *Decree* plainly does not allow Sylte to divert the already appropriated stored waters, the district court correctly affirmed the Department’s instructions allowing Sylte to divert natural tributary inflow regardless of evaporation and seepage, but not Twin Lakes’ stored water.

C. The futile call doctrine applies to water right 95-0734 based on the natural tributary inflow to Twin Lakes.

When upholding the Department’s futile call instructions, the district court correctly emphasized that “[n]o water right is immune from futile call if the elements of the doctrine are established and proven.” R. 235. The Department’s instructions 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.

A.R. 211. Sylte argues that the instructions' futile call procedure with respect to water right 95-0734 violates the *Decree* because "delivery of water to water right no. 95-0734 is not limited by the amount of natural tributary inflow to Twin Lakes." *App. Br.* 40.

As already discussed, Sylte's argument is without merit because the *Decree* plainly states that water right 95-0734 is entitled to the tributary inflow to Twin Lakes, but not water stored in Twin Lakes. Accordingly, as the hearing officer and the district court determined, a futile call decision for Sylte's water right 95-0734 depends upon the amount of natural tributary inflow to Twin Lakes available to satisfy the right. R. 231-234; A.R. 1401. The instructions thus properly require the watermaster to consult with the Department regarding a futile call when "release of all of the natural tributary inflow does not satisfy delivery of water right no. 95-734 within a 48-hour period."⁶ Because no water right is immune from a futile call, and the Department based its instructions regarding a futile call on the *Decree*'s plain language, the district court correctly affirmed the Department's futile call instructions.

D. The hearing officer's citation to documents filed in a general adjudication did not prejudice Sylte's substantial rights.

Sylte contends that the Department improperly relied on two documents outside the record and such reliance was prejudicial because Sylte did not have an opportunity to further explain the meaning of those documents. *App. Br.* 43-44. The Department's Order quoted from

⁶ Sylte complains that the hearing officer improperly relied on the Director's ability to "exercise discretion" to determine a futile call because the Director does not have discretion to "pick a junior water right over a senior water right." *App. Br.* 40-41, n. 17. However, the hearing officer never held that the Director could "pick" a junior right over a senior right. Instead, the hearing officer only cited this 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 conclude the Director's discretion is critical in the case by case futile call balancing analysis and in finding that the instructions' 48 hour standard reasonably implements the Director's discretion. A.R. 1401-02. The hearing officer accurately reflected the law.

Sylte's predecessor's *Objection to Proposed Findings of Water Rights* ("Sylte's *Objection*") and the Department's *Notice of Entry of Final Decree* ("*Notice of Entry*"). A.R. 1395, 1398, 1399. Both documents were filed in the Twin Lakes general adjudication. However, even if the Court assumes *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, 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). Indeed, the Court "must disregard all errors and defects that do not affect any party's substantial rights." I.R.C.P. 61. The appellant bears the burden of showing a substantial right is affected and the error is prejudicial. *Baughman v. Wells Fargo Bank, N.A.*, 162 Idaho 174, 179, 395 P.3d 393, 398 (2017).

This Court has held errors are harmless when a decision is correct on other grounds. *See, e.g., Banning v. Minidoka Irr. Dist.*, 89 Idaho 506, 510, 406 P.2d 802, 803 (1965) (holding that a court erred in denying a motion for change of venue, but finding that "the error was harmless because . . . we find the ruling correct on other grounds"); *Darrar v. Chase*, 81 Idaho 398, 402–03, 342 P.2d 703, 705 (1959) ("where the record discloses matters fatal to final recovery, this court will recognize it in the first instance and disregard any errors which do not affect the final result").

Here, the district court correctly held that Sylte failed to establish the Department's actions prejudiced Sylte's substantial rights because the Department would have reached the same result in its Order regardless of the documents in question.⁷ R. 236. The Department's

⁷ Sylte does not explain how the Department's decision would have changed if Sylte "had an opportunity to explain their meaning," other than contending that the documents actually do not

Order relied on the *Decree*'s plain language to determine the instructions were consistent with the *Decree*. The Order cited Sylte's *Objection* only to highlight that Sylte had already raised the same issue in the general adjudication that Sylte raises here: that Sylte's water right is entitled to Twin Lakes' stored waters to satisfy the right. A.R. 1395. The Order also cited Sylte's *Objection* to point out that Sylte already acknowledged no vested right in the first block of storage water "located between the bottom of the lake and Staff Gauge height 0.0 feet." A.R. 1399. Both citations are consistent with the *Decree*'s plain language that the Order relied on, so neither citation prejudices Sylte.

Additionally, the Order only cited the *Notice of Entry* to support its conclusion that the *Decree*'s plain language entitles Sylte's water right to the natural tributary inflow, but not the waters stored in Twin Lakes. The Order only stated that the *Notice of Entry*'s contents were "worth noting" to "reinforce the point" of the *Decree*'s meaning. A.R. 1398. Both phrases indicate the hearing officer would have reached the same conclusion independent of the *Notice of Entry*. Because the Department reached its decision in the Order based on the *Decree*'s plain language and only cited Sylte's *Objection* and the *Notice of Entry* to further emphasize its conclusion, the citation of the documents does not prejudice Sylte.

Further, any error in quoting these documents is not prejudicial because the Court will not consider the *Objection* and the *Notice of Entry* in this appeal. *See Taylor v. McNichols*, 149 Idaho 826, 836, 243 P.3d 642, 652 (2010) (holding district court's error in taking judicial notice of documents from an underlying case in reviewing a 12(b)(6) motion was harmless because the Court's *de novo* standard of review on appeal meant the Court would consider only the pleadings

support the Department's conclusions. *App. Br.* 44. Nowhere does Sylte argue those documents change the *Decree*'s plain language.

and not the documents judicially noticed). The two documents the Department quoted are not in the record on appeal. This Court instead reviews the Decree's plain language freely as a question of law. *Idaho Ground Water Ass'n v. Idaho Dep't of Water Res.*, 160 Idaho 119, 125, 369 P.3d 897, 903 (2016). Because this Court's decision will not consider those documents, any error will not be prejudicial to Sylte's substantial rights.

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

Sylte's arguments throughout this proceeding have consistently put the elements of water right 95-0734 directly at issue. Sylte's *Petition for Declaratory Ruling* asked the Department to set aside and reverse the watermaster instructions as "contrary to the existing decree" and "not in accordance with the prior appropriation doctrine." A.R. 213. Sylte's motion for summary judgment 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) the application of the futile call doctrine to water right no. 95-0734 does not depend on the amount of natural tributary inflow; and (3) the instructions are "contrary to" the *Decree* and the prior appropriation doctrine. A.R. 930.

The hearing officer evaluated Sylte's *Petition for Declaratory Ruling* and summary judgment motion and relied upon the decreed 4.1 AFY volume limit to respond to Sylte's argument that water right 95-0734 "must be satisfied on a continuous year-round basis." A.R. 1400. In rejecting this 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.

A.R. 1400 (citations and footnotes omitted). The hearing officer recognized that the instructions did not include the decreed 4.1 AFA diversion volume, so he modified the instructions accordingly. A.R. 1402.

Sylte argues the Department violated procedural due process by modifying the instructions to include water right 95-0734’s decreed 4.1 AFA diversion volume. *App. Br.* 46-48. Sylte contends the Department erred in two ways: (1) by addressing an issue that no party raised in the administrative proceeding and (2) by mischaracterizing water right 95-0734’s volume limit. *Id.*

The district court twice rejected both of Sylte’s arguments. The district court held that the 4.1 AFA limit did not prejudice Sylte’s substantial rights because the *Decree* unambiguously limited water right 95-0734 to a 4.1 AFA diversion volume. R. 235. The court specified: “Since the right was decreed with an annual volume limitation, the law requires that it be administered with that limitation. I.C. § 1413(2).” *Id.*

In denying Sylte’s *Petition for Rehearing*, the district court again rejected Sylte’s notice argument by emphasizing the obvious: that Idaho law requires the Department to administer water right 95-0734 “in accordance with the final decree.” R. 280. The district court explained that Sylte had notice and opportunity to be heard on the 4.1 AFA limit in the prior adjudication—therefore any disagreement with that limit should have been appealed in the prior proceeding. R. 279-80. The court concluded that the Department’s Order did not prejudice Sylte’s substantial rights because the decreed volume limit was “undisputed” and only “a simple result of the operation of law.” R. 279, 280.

The volume limit is imposed by a final decree. While Sylte attempts to distinguish a lack of notice in the administrative proceeding from the inclusion of the volume limit in the *Decree*, *App. Br.* 47 n. 21, the volume limit remains the same regardless. As a result, no amount of notice and opportunity for hearing can now change that limit.

Sylte also had notice of the 4.1 AFA limit because modifying the instructions to include the decreed volume limit was within the issues raised in the administrative proceeding. Sylte's *Petition for Declaratory Ruling* and motion raised the issue of how to administer water right 95-0734 pursuant to the *Decree*. The hearing officer evaluated Sylte's arguments and answered the question Sylte asked. Therefore, including the volume limit in the Department's instructions did not prejudice Sylte.

Sylte also argues that the Department incorrectly determined how to administer that volume limit because the Order included the following language: "unless or until the maximum annual diversion volume of 4.1 acre feet has been delivered." *App. Br.* 47 (emphasis added in *App. Br.*). Sylte argues that water right 95-0734 is entitled to have water delivered to its point of diversion "on a continuous year-round basis, only to be curtailed when the right has diverted the volume limit in priority." *Id.*

The district court was correct to reject this argument and state that Sylte was making "a distinction without a difference." R. 280. As the Department's counsel confirmed during oral argument, the use of the word "delivered" did not mean that the Department would count water that flows past the point of diversion against Sylte's annual diversion limit. Tr. pp. 34 L.7 – 35 L.2. As the district court also found, Sylte has not shown that the water right had been or would be administered otherwise. R. 280.

Further, Sylte continues to mistakenly suggest that water right 95-0734 is entitled to have .07 cfs flow by Sylte's point of diversion at all times. *App. Br.* 47. A minimum flow past Sylte's point of diversion at all times is contrary to the *Decree's* plain language and would not take into account whether Sylte is diverting the water and putting it to beneficial use. 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. Sylte's water right is limited to 4.1 AFA. A.R. 26. When 4.1 AFA is diverted, delivered, and put to beneficial use, Sylte is no longer entitled to .07 cfs at Sylte's point of diversion.

This Court's precedent requires water must be put to beneficial use. "Integral to the goal of securing maximum use and benefit of our natural water resources is that water be put to beneficial use." *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 727, 735, 947 P.2d 400, 408 (1997). Water users are not entitled to waste water. *Id.* Sylte's water right is no exception.

The result of accepting Sylte's argument would be that the watermaster must curtail upstream juniors to ensure that .07 cfs flows past water right 95-0734's point of diversion at all times, even if Sylte does not intend to divert the water. Idaho's policy against waste and its requirement 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 foundation” by “ignor[ing] Sylte’s arguments” and the *Decree*. *App. Br.* 20.

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 *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 *Decree*’s plain language and Idaho law. Therefore, Sylte is not entitled to attorney fees on appeal or before the district court pursuant to Idaho Code § 12-117.

V. CONCLUSION

The Department respectfully requests that the Court affirm the district court’s judgment affirming the Department’s Order upholding and modifying the Department’s instructions to the watermaster of WD 95C. The Department also respectfully requests this Court deny Sylte’s request for attorney fees and costs on appeal and before the district court.

RESPECTFULLY SUBMITTED this 20th day of November 2018.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of November 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:

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