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Idaho Supreme Court
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Docket No. 46062-2018

In the Supreme Court 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.

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,

v.

IDAHO DEPARTMENT OF WATER RESOURCES; AND GARY SPACKMAN, IN HIS CAPACITY AS THE DIRECTOR OF THE IDAHO DEPARTMENT OF WATER RESOURCES,

Respondents-Respondents on Appeal,

v.

TWIN LAKES IMPROVEMENT ASSOCIATION, MARY A. ALICE, MARY F. ANDERSON, MARY F. ANDERSON ET AL., DEBRA ANDREWS, JOHN ANDREWS, MATTHEW A. BAFUS, 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, LEIF 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 & LORI SCHAFER, DARWIN R. SCHULTZ, MOLLY SEABURG, HAL SUNDAY, TCRV LLC, 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 on Appeal,

APPELLANT SYLTE'S REPLY 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, Presiding

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INTRODUCTION

This is the reply brief of Gordon Sylte, Susan Goodrich, John Sylte, and Sylte Ranch Limited Liability Company (collectively, "Sylte") in Appeal No. 46062-2018. On appeal, Sylte challenges the District Court's affirmation of the final agency action of the Idaho Department of Water Resources ("IDWR" or "Department").

On October 23, 2018, Sylte filed *Appellant Sylte's Opening Brief* ("*Sylte's Opening Brief*").[1]

The Respondents on appeal collectively have filed three briefs in response to *Sylte's Opening Brief:* (1) *Respondent IDWR's Brief* ("*IDWR Response*"); (2) *Response Brief of Twin Lakes Improvement Association et al.* ("*TLIA Response*"); and (3) *Twin Lakes Flood Control District No. 17's Brief in Response to Sylte's Opening Brief* ("*FCD Response*"). Because the Respondents' briefs are aligned in position and largely aligned in their arguments, Sylte submits this single reply brief ("*Reply Brief*") to address all of them rather than submit individual replies to each of them.

This main issue before this Court is narrow: did the Department's *Instructions* correctly limit the exercise of Sylte's 1875 water right no. 95-0734—the most senior right on the system—by limiting the amount of outflow from Twin Lakes to the lakes' natural tributary inflow? Sylte contends the answer is "no" based on the *1989 Decree* and Idaho's Prior Appropriation Doctrine.

[1] Unless otherwise indicated, defined terms used in this brief have the same meanings as in *Sylte's Opening Brief*.

To resolve this issue, this Court must decide whether Sylte's senior-most priority is entitled to be protected from interference by juniors. Fundamental Idaho Prior Appropriation doctrine and the *1989 Decree* require such protection.

Protection from interference by juniors means that Sylte is entitled to pre-dam conditions to satisfy the 1875 right (i.e. the natural pre-dam outflow from Twin Lakes). Judge Magnuson's findings demonstrate that natural pre-dam outflow from Twin Lakes into Rathdrum Creek consisted of natural lake storage flowing over and through the natural pre-dam obstruction. (Sylte's shorthand for this is Twin Lakes' "natural pre-dam outflow.") Moreover, Judge Magnuson's findings demonstrate that the natural pre-dam outflows at times exceeded Twin Lakes' inflows.

This issue is all Sylte asked to have decided when it initiated this proceeding. Sylte first petitioned the Department for a declaratory ruling on this question, asking for the *Instructions* to be reversed and set aside because they improperly limit Twin Lakes' outflow to its inflow. A.R. 213, 230. That remains Sylte's primary objective in this appeal. However, Sylte has raised other issues on appeal because, in deciding Sylte's petition for declaratory ruling on the question above (and without notice to Sylte), the Department improperly modified the *Instructions* and improperly relied on documents outside the record and outside the *1989 Decree*. (A.R. 1395-98, 1401-02).

The Respondents focus mainly on arguing that Sylte is not entitled to artificially stored waters in Twin Lakes. *See, e.g., IDWR Response* at 11-24; *TLIA Response* at 8-12; *FCD Response* at 8-10. But their arguments miss a fundamental and critical point: Sylte's 1875 water

right is senior to the storage rights in Twin Lakes and every other right on the system. The Respondents' arguments ignore the significance of Sylte's senior priority and the protection from interference that comes with seniority. Indeed, the word "priority" cannot even be found in the *FCD Response*.

The protection of senior water rights from interference by juniors is enshrined in Idaho's constitution, statutes, and over a century of case law. Nothing in the *1989 Decree* suggests that Judge Magnuson intended to disregard or contradict this bedrock principle of Idaho water law. In fact, his thorough examination of the history of the Twin Lakes-Rathdrum Creek water system and Sylte's 1875 appropriation demonstrates that he intended to protect Sylte's senior water right so it would be administered to give effect to Sylte's priority without interference by junior water rights.

At its core, this case is about whether a senior priority water right is protected from interference by junior water rights. In Idaho, first in time is first in right. This fundamental principle is what is at stake in this appeal.

ARGUMENT

Unlike the Respondents, Sylte asks this Court to give force and effect to all of the *1989 Decree*. "Idaho courts interpret water decrees using the same interpretation rules that apply to contracts." *Rangen, Inc. v. Idaho Dep't of Water Res.*, 159 Idaho 798, 367 P.3d 193, 202 (2016). This Court has held that a written instrument such as a decree must be read "as a whole and [to] give meaning to all of its terms to the extent possible." *Twin Lakes Vill. Prop. Ass'n, Inc. v. Crowley* ("*Twin Lakes*"), 124 Idaho 132, 138, 857 P.2d 611, 617 (1993) (citing *Magic Valley*

Radiology Assocs., P.A. v. Prof'l Bus. Servs., Inc., 119 Idaho 558, 565, 808 P.2d 1303, 1310 (1991)). "[V]arious provisions in a contract must be construed, if possible, so to give force and effect to every part thereof." *Twin Lakes*, 124 Idaho at 137, 857 P.2d at 616.

Among other things, in the sections that follow Sylte addresses:

- how Sylte's 1875 priority date protects it from interference of the natural flow furnished by the naturally stored waters of Twin Lakes;
- how Respondents disregard the significance of Sylte's senior priority, which the *1989 Decree* and Idaho law protect from interference by juniors;
- how Sylte is entitled to the natural outflow from Twin Lakes that existed when the 1875 right was appropriated;
- how the natural outflow from Twin Lakes at times exceeded its inflow when the 1875 right was appropriated;
- how, consistent with Idaho's Prior Appropriation Doctrine, Judge Magnuson ordered that Sylte's 1875 right must be administered to give effect to its priority and to protect it from interference by juniors; and
- how the doctrine of *res judicata* prohibits the Department from administering the water right differently than it was decreed.

First, however, Sylte wishes to clarify the Department's description of this Court's standard of review.

I. THE DEPARTMENT'S LEGAL CONCLUSIONS SHOULD NOT BE PRESUMED VALID.

IDWR's Response states: "A strong presumption of validity favors an agency's actions." *IDWR Response* at 10, *citing Chisholm v. Idaho Dep't of Water Res.*, 142 Idaho 159, 162, 125 P.3d 515, 518 (2005). But this Court should not presume that the Department's purely legal conclusions are valid. "This Court freely reviews questions of law." *Rangen, Inc. v. Idaho Dep't of Water Res.*, 159 Idaho 798, 367 P.3d 193, 199 (2016).

There is no dispute that the questions in this case concerning the *1989 Decree* and Idaho's Prior Appropriation doctrine are purely legal. Those purely legal issues are reviewed by this Court *de novo*, despite this being review of an agency action. *Id.* Thus, insofar as those questions are concerned, the Department's actions in this case should not be presumed valid.

II. SYLTE'S SENIOR PRIORITY RIGHT IS PROTECTED FROM INTERFERENCE BY JUNIORS.

A. The *1989 Decree* and Idaho law protect Sylte's senior priority.

Judge Magnuson recognized the significance of Sylte's senior priority date. He said:

> An appropriator is entitled to maintenance of stream conditions substantially as they were at the time the appropriators made their appropriation, if a change in stream conditions would result in interference with the proper exercise of the right. Bennett v. Nourse, 22 Ida. 249, 125 P. 1038 (1912). At the time the appropriation (No. 95-0734) was made in 1875, there was always water in Rathdrum Creek to serve said water right.
>
> The holders of water right #95-0734 are therefore entitled to waters from the source of their appropriation *on a basis of priority over* those storage rights Nos. 95-0974 and 95-0975. The waters of this basin are to be administered in such manner as to *give effect to such priority*.

Memorandum Decision at 13 (A.R. 185) (underlining in original; italics added). This passage clearly and unambiguously demonstrates Judge Magnuson's intent to protect Sylte's 1875 right from interference by juniors, consistent with Idaho's Prior Appropriation Doctrine.

The *1989 Decree* is conclusive on this point. *Crow v. Carlson*, 107 Idaho 461, 465, 690 P.2d 916, 920 (1984). *See also Sylte's Opening Brief* at 22-25 (discussing the applicability of *res judicata* to the *1989 Decree*, including the *Memorandum Decision*, *Final Decree*, and *Proposed Findings* as amended). And the Department cannot lawfully disregard it. This Court has held that "the Director's duty to administer water according to technical expertise is governed by water right decrees. The decrees give the Director a quantity he must provide to each water user in priority." *In re SRBA*, 157 Idaho 385, 394, 336 P.3d 792, 801 (2014). Moreover, "the Director cannot distribute water however he pleases at any time in any way; he must follow the law." *Id.* at 393, 336 P.3d at 800.[2]

Judge Magnuson expressly stated his intention that administration of Sylte's 1875 right would be consistent with this fundamental principle of Idaho's Prior Appropriation Doctrine. He cited *Bennett v. Nourse* and stated that the waters of the basin are to be administered to give effect to Sylte's senior priority over the 1906 Storage Rights.

Sylte's Opening Brief at 32-33 discussed four of this Court's cases that require the same conclusion as *Bennett v. Nourse*: *Carey Lake Reservoir Co. v. Strunk*, 39 Idaho 332, 227 P. 591

[2] TLIA contends that the *Instructions* are mere "details" properly left to the "discretion" of the Director and IDWR. *TLIA Response* at 7. TLIA is wrong. This case is not about the Director's discretion over details of water rights administration. This case is about whether the Department's *Instructions* "follow the law." *In re SRBA*, 157 Idaho at 393, 336 P.3d at 800. Following the law is not discretionary for the Director.

(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). All of them stand for the longstanding principle that senior water rights must be protected from changes in stream conditions and interference by caused by junior water rights. Judge Magnuson clearly intended to apply this principle to the administration of Sylte's 1875 right.

The Department dismisses these cases cited by Sylte as irrelevant. *IDWR Response* at 21-22. And the Department says Sylte contends "the *Decree's* plain language is inconsistent with the prior appropriation doctrine." *Id.* at 21. But the Department is wrong. The *1989 Decree* incorporates and is consistent with, rather than rejects, Idaho's Prior Appropriation Doctrine, including the principles set forth in the cases cited above. As described in *Sylte's Opening Brief* at 32-33, the circumstances in this case are analogous to the circumstances in those cases, where this Court confirms that a downstream senior user protection from interference by juniors.

B. The Respondents disregard the protections secured by a senior priority date.

"Priority in time is an essential part of western water law and to diminish one's priority works an undeniable injury to that water right holder." *A & B Irr. Dist. v. Idaho Dep't Of Water Res.*, 153 Idaho 500, 514, 284 P.3d 225, 239 (2012) (quoting *Jenkins v. State, Dept. of Water Res.*, 103 Idaho 384, 388, 647 P.2d 1256, 1260 (1982)). The bedrock principle of priority is embedded in Idaho's constitution and statutes. Idaho Const. art. XV § 3 ("Priority of appropriation shall give the better right as between those using the water...."); I.C. § 42-106

("As between appropriators, the first in time is first in right."). And for more than a century this Court has consistently affirmed its importance. *See, e.g., Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 811, 252 P.3d 71, 92 (2011), *citing Bower v. Moorman*, 27 Idaho 162, 181, 147 P. 496, 502 (1915) ("The first appropriator of water for useful or beneficial purposes has the prior right thereto, and the right, once vested, will be protected and upheld, unless abandoned.").

The Respondents disregard the significance of priority.[3] They contend that Sylte's 1875 priority need not be given the full protection it is entitled to because (they allege) Judge Magnuson did not intend it to have full protection afforded under the law. *See, e.g., IDWR Response* at 22 (arguing that the *1989 Decree's* language "preclude[s] Sylte's argument" that this Court's decisions apply to Sylte's 1875 right). In short, they argue that Sylte's 1875 right is something less than a true senior priority right. This Court must reject the Respondents' position.

The Department's position about priority is that Sylte's 1875 priority benefits it only "by requiring that seepage and evaporation are not counted against the natural tributary inflow." *IDWR Response* at 12. The Department's argument is based on amended Conclusion of Law No. 14, which in full 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

[3] FCD and TLIA don't address Sylte's senior priority in any meaningful way. The *FCD Response* never uses the word "priority," and certainly never addresses its relevance to this case. And, while the *TLIA Response* includes the word "priority" four times (at pp. 4 and 11), it does not attempt to refute Sylte's contention that its senior priority entitles it to protection from interference by juniors.

> 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.

Final Decree at xix (A.R. 205) (underlining in original *Amended Proposed Findings* to depict IDWR's amendment to *Proposed Findings*). The Department asserts that the first sentence of Conclusion of Law No. 14 recognizes a "unique status [that] protects Sylte's senior water right from seepage and evaporation losses." *IDWR Response* at 16 (citing the District Court's analysis).

The Department reads too much into the first sentence of Conclusion of Law No. 14. Other than excluding Sylte's 1875 right from limitations imposed on other rights, the sentence does not otherwise say how Sylte's 1875 right will be administered. It certainly does not say that Sylte's 1875 right is limited to Twin Lakes' inflow. Other rights are so limited (and also limited by Twin Lakes increased evaporation and seepage caused by the 1906 dam). The only reasonable or appropriate way to read the sentence is that the exclusion of Sylte's 1875 right from the sentence means that no other part of the sentence applies to it.

As originally set forth in the *Proposed Findings*, Conclusion of Law No. 13 said: "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." (A.R. 20). The language "with the exception of Water Right No. 95-0734" was added at the end of the sentence by the Department in its effort to comply with Judge Magnuson's instruction to "amend the Director's [*Proposed Findings*] to reflect and effectuate this Court's determinations

regarding No. 95-0734 [i.e. Sylte's 1875 right], as set forth in this memorandum decision," *Memorandum Decision* at 21 (A.R. 193).

This amendment is consistent with Judge Magnuson's conclusion in the *Memorandum Decision* that "when evaporation and seepage from the impounded waters of Twin Lakes exceed natural tributary inflow to Twin Lakes, the Rathdrum Creek appropriators, except for John and Evelyn Sylte, No. 95-0734, are not entitled to the release of water from Twin Lakes, and the direct flow appropriators upstream from the outlet at the lower end of Lower Twin Lakes are entitled to divert the natural tributary inflow to Twin Lakes in accordance with their priorities." *Memorandum Decision* at 12-13 (A.R. 184-85).

But the amendment to Conclusion of Law No. 14's first sentence does not capture the rest of Judge Magnuson's findings and conclusions that immediately followed:

> An appropriator is entitled to maintenance of stream conditions substantially as they were at the time the appropriators made their appropriation, if a change in stream conditions would result in interference with the proper exercise of the right. Bennett v. Nourse, 22 Ida. 249, 125 P. 1038 (1912). At the time the appropriation (No. 95-0734) was made in 1875, there was always water in Rathdrum Creek to serve said water right.
>
> The holders of water right #95-0734 are therefore entitled to waters from the source of their appropriation on a basis of priority over those storage rights Nos. 95-0974 and 95-0975. The waters of this basin are to be administered in such manner as to give effect to such priority.
>
> This Court concludes the rights of all the other Objectors are limited to the natural tributary inflows to Twin Lakes, less evaporation and seepage from Twin Lakes.

Memorandum Decision at 13 (A.R. 185) (underlining in original). As already discussed, these statements by Judge Magnuson mean that, in the administration of water rights, Sylte's 1875

priority must be given effect and water right no. 95-0734 protected from changes in original stream conditions and interference by juniors.

III. SYLTE IS ENTITLED TO TWIN LAKES' NATURAL PRE-DAM FLOW IN RATHDRUM CREEK, AND IS NOT CLAIMING ARTIFICIALLY STORED WATERS.

All three of the Respondents' briefs argue that Sylte is claiming an entitlement to storage water. *See FCD Response* at 8-9; *IDWR Response* at 11-14, 17-24; *TLIA Response* at 10-11. This is incorrect. Sylte seeks only the natural flow to which it is entitled under the *1989 Decree*.

A. Sylte's natural flow is the pre-dam outflow furnished by Twin Lakes' natural storage.

Throughout this case, Sylte has claimed only that it is entitled to the natural flow under stream conditions that existed when its 1875 right was appropriated. This is the natural pre-dam outflow.

Judge Magnuson expressly concluded that such natural flow was "furnished from the water of Twin (Fish) Lakes." *Memorandum Decision* at 11 (A.R. 183). He also found that Twin Lakes held the same amount of water prior to dam construction in 1906 as it did afterward, and that all of the water held back by the dam was "natural lake storage" prior to the dam. *Memorandum Decision* at 10 (A.R. 182); *Final Decree* at xv-xvi (A.R. 201-02).[4] In other words, when Sylte's 1875 right was appropriated, the natural flow in Rathdrum Creek was furnished from Twin Lakes' natural lake storage. This is the natural flow to which Sylte claims an entitlement.

[4] TLIA mistakenly contends that the only natural lake storage in Twin Lakes is below 0.0 on the staff gauge. *TLIA Response* at 10. As discussed in the main text, Judge Magnuson clearly found that all of the water in Twin Lakes was natural lake storage prior to the advent of the 1906 Storage Rights.

The Department contends that "[i]f Sylte's source of water was Twin Lakes, the Decree would have named Twin Lakes as the source." *IDWR Response* at 19. This argument completely ignores Judge Magnuson's finding that, in 1875, the direct flow water in Rathdrum Creek that supplied Sylte's 1875 right was "furnished from the water of Twin (Fish) Lakes." *Memorandum Decision* at 11 (A.R. 183).

The Department cites the second sentence of Conclusion of Law No. 14 as preventing Sylte access to "stored waters."[5] *IDWR Response* at 15. However, as discussed in *Sylte's Opening Brief* at 35-37, this "stored waters" language must be read to mean the artificially stored waters under the 1906 Storage Rights. To give force and effect to the entire *1989 Decree*, Conclusion of Law No. 14 must not be read as prohibiting the delivery to Sylte of all the natural flow that was furnished from Twin Lakes in 1875, even if some of that water was later appropriated by the 1906 Storage Rights. Reading it as Respondents suggest would render meaningless all of Judge Magnuson's express findings about the nature of the water system when Sylte's 1875 right was appropriated.

To be clear, Sylte does not contend that it holds a storage right or is entitled to anything but natural flow.[6] It is simply asking to have its senior-most natural flow right administered in

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[5] The second sentence of Conclusion of Law No. 14 reads: "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." *Final Decree* at xix (A.R. 205) (underlining in original *Amended Proposed Findings* to depict IDWR's amendment to *Proposed Findings*).

[6] FCD oddly contends that Sylte should have claimed a storage right in the prior adjudication. *FCD Response* at 9. Of course, this argument fails to recognize that Sylte does not need a storage right because it is entitled to the pre-dam natural flow furnished by Twin Lakes' natural lake storage. But it

accordance with its priority as naturally sourced from Rathdrum Creek and furnished from the waters of Twin Lakes in 1875.

FCD contends that Sylte wants more water delivered to the 1875 right "than there is natural flow water available." *FCD Response* at 8. Similarly TLIA asserts that Sylte is arguing that it "should not be limited to natural flow." *TLIA Response* at 10. And the Department similarly attempts to characterize Sylte's argument for Twin Lakes' natural pre-dam outflow as being somehow distinct from a natural flow right. *IDWR's Response Brief* at 19-20. These arguments mischaracterize Sylte's position.

Again, Sylte recognizes that its 1875 right is limited to natural flow. Sylte's position in this appeal and in the proceedings below is that the *1989 Decree* does not limit the natural flow available to Sylte to Twin Lakes' tributary inflow. Rather, by virtue of Sylte's 1875 priority, the natural flow to which it is entitled is the amount of outflow furnished by the waters of Twin Lakes prior to the dam's construction (i.e. the natural pre-dam outflow). This pre-dam outflow at times exceeded Twin Lakes' inflow. *See infra* Section IV; *Sylte's Opening Brief* at 25-29.[7]

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also fails to recognize that Sylte's predecessor did not artificially divert water into storage in 1875—the Twin Lakes system created natural lake storage at the time. Without artificially diverting water into storage, it seems unlikely that an 1875 storage right would have been decreed even if Sylte had claimed one in the prior adjudication.

[7] It is not clear that anyone knows what amounts of natural outflow escaped from Twin Lakes prior to dam construction. To Sylte's knowledge, these amounts have not yet been quantified, although they could be. In any case, this Court does not need to know precise amounts to determine the question presented here, which is whether prior to dam construction Twin Lakes' natural outflow at times exceeded its inflows. As discussed in the main text, the answer to that question is "yes."

Accordingly, the Department's *Instructions* improperly limited Sylte's 1875 right to Twin Lakes' tributary inflow.

B. The artificially stored water in Twin Lakes was not "already appropriated" when Sylte's 1875 natural flow right originated.

The Department argues that, "beside 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." *IDWR Response* at 18 (emphasis added). But this ignores the fact that Twin Lakes' natural lake storage was not "already appropriated" when Sylte's 1875 right originated. Instead, it was Sylte's 1875 right that was "already appropriated" when the 1906 Storage Rights came into existence.

Judge Magnuson determined that prior to dam construction, Twin Lakes' natural lake storage furnished the waters in Rathdrum Creek that satisfied Sylte's 1875 right on a continuous year-round basis. *Memorandum Decision* at 11 (A.R. 183). This water was unappropriated in 1875—no other water right existed at the time. It is this unappropriated water that Sylte's 1875 right is entitled to, free from interference by juniors.

The Department and FCD cite *Washington Cty. Irr. Dist. v. Talboy*, 55 Idaho 382, 43 P.2d 943 (1935) ("*Talboy*"), to support their argument that Sylte is not entitled to the water stored in Twin Lakes under the 1906 Storage Rights. *IDWR Response* at 14; *FCD Response* at 9-10. But *Talboy* does not address the issue presented in this case: whether an upstream junior appropriator may interfere with the delivery of water to a downstream senior. *Talboy* instead involved a dispute between co-tenants in a reservoir, and their relative rights to use of the stored

water. *Talboy*, 55 Idaho at 384, 43 P.2d at 945. In short, *Talboy* does not control this matter. The Department's and FCD's arguments based on *Talboy* ignore the significance of Sylte's senior priority.

To be clear, Sylte does not dispute that water lawfully stored is "the property of the appropriators and owners of the reservoir, impressed with the public trust to apply it to a beneficial use." *Talboy*, 55 Idaho at 384, 43 P.2d at 945. Judge Magnuson concluded 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." *Memorandum Decision* at 14 (A.R. 186) (emphasis added). But the water must be lawfully stored. Because the *1989 Decree* and Idaho law do not allow the 1906 Storage Rights to interfere with Sylte's 1875 right, water is not lawfully stored under those rights if it interferes with Sylte's 1875 right.[8]

In short, the 1906 Storage Rights are entitled to store water in Twin Lakes and, once stored, it is the property of the storage right holders, but only to the extent that it does not interfere with Sylte's 1875 right. The *1989 Decree* and the prior appropriation doctrine do not allow the dam or the 1906 Storage Rights to interfere with Sylte's 1875 right.[9]

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[8] The Department mischaracterizes Sylte's argument as "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." *IDWR Response* at 22 (emphasis added). As stated in the main text, Sylte contends that water is not lawfully stored under the 1906 Storage Rights if it interferes with Sylte's 1875 right.

[9] It is worth noting that, for many years after the 1906 Storage Rights came into existence, water stored under storage water right no. 95-0973 was released down Rathdrum Creek for irrigation uses below Sylte's diversion. *Memorandum Decision* at 9-10 (A.R. 181-82) (describing how the dam originally was

IV. TWIN LAKES' NATURAL PRE-DAM OUTFLOW AT TIMES EXCEEDED ITS INFLOW.

A. Judge Magnuson's findings demonstrate that pre-dam outflow to Rathdrum Creek exceeded Twin Lakes' inflow during summer months.

Having established that the *1989 Decree* and Idaho law protect Sylte's 1875 right from interference by juniors and, accordingly, that Sylte is entitled to have water furnished by Twin Lakes' natural lake storage outflow to Rathdrum Creek as it did prior to construction of the dam in 1906, the question remaining is whether that outflow is limited to Twin Lakes' tributary inflow. This was the question presented in Sylte's original challenge to the Department's *Instructions* (A.R. 213-14, 218-19, 230), and the primary question this Court is asked to resolve in this appeal.

As set forth in *Sylte's Opening Brief* at 25-29, the answer is that outflows to Rathdrum Creek to satisfy the 1875 right should not be limited to Twin Lakes' inflows because Judge Magnuson's findings demonstrate that, prior to dam construction, Twin Lakes' outflows at times exceeded inflows. Accordingly, Sylte requests that this Court set aside and reverse the *Instructions*, which improperly limited Sylte's 1875 right by limiting Twin Lakes' outflows to its inflows.

Nothing in the record supports a different conclusion, and Respondents point to nothing. The only information about the nature of the Twin Lakes' pre-dam outflows is contained in

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built "for purposes of making water available for irrigation use in Rathdrum Prairie."). In other words, the right was not appropriated simply to hold water in Twin Lakes as long as possible, which is TLIA's and FCD's apparent goal now.

Judge Magnuson's findings and conclusions in the *1989 Decree*, which is *res judicata* on the subject.

To summarize, Judge Magnuson found that all of the water stored under the 1906 Storage Rights was originally the "natural lake storage." *Final Decree* at xv-xvi (A.R. 201-02) (*Amended Proposed Findings'* Finding of Fact No. 10).[10] In other words, the 1906 Storage Rights did not create any new storage—the same volume of water was stored in Twin Lakes prior to dam construction.

The difference the dam made, according to Judge Magnuson, "was to hold the water at a higher point longer through the summer months." *Memorandum Decision* at 10 (A.R. 182). This means that prior to dam construction Twin Lakes' water level dropped faster than after dam construction.

The water level dropped faster because water was able to escape from Twin Lakes, through its natural outlet, to Rathdrum Creek. *Memorandum Decision* at 11 (A.R. 183) ("the outlet waters of Twin Lakes flowed over the top of the [outlet's] lip during periods of high water and through the natural pre-dam obstruction *at all times*, forming the source waters for Rathdrum Creek" (underlining in original; italics added)).

The only logical conclusion from these findings is that, prior to dam construction, Twin Lakes' outflows through the pre-dam obstruction at times exceeded inflows through the summer months. Anyone with a bathtub knows that the water level will drop if you turn the spigot off

[10] The *Amended Proposed Findings* attached to the *Final Decree* strikes text saying that the dam "provided the capability to raise the level of the lakes." *Id.* at xv (A.R. 201).

and pull the drain plug (or have a leaky plug)—in other words, if outflows exceed inflows. The only explanation for why Twin Lakes' water level dropped faster at times prior to the dam's construction than after is that water flowed out of Twin Lakes into Rathdrum Creek in excess of the amount of water flowing into Twin Lakes. This is the condition of Rathdrum Creek and Twin Lakes when Sylte's 1875 right was appropriated, and this is why the *Instructions'* tributary inflow limitation must be reversed and set aside.

The Respondents attempt to make evaporation and seepage the only issue Judge Magnuson intended to address in his findings and conclusions about Sylte's 1875 right. *IDWR Response* at 12, 15-16, 23-24; *TLIA Response* at 8, 12. This is a red herring. Nowhere do Respondents explain why. There is no reason (in the *1989 Decree* or otherwise) to conclude that escaping Twin Lakes' evaporation and seepage is the only benefit of being senior to the 1906 Storage Rights. The greater benefit is that the *1989 Decree* and Idaho law prevent juniors from changing the system or interfering with delivery of water to the senior's detriment. This means that Sylte is protected from the dam's changes to the amount of "seepage" (i.e. outflow) from Twin Lakes to Rathdrum Creek. *Sylte's Opening Brief* at 38-40.

In short, Judge Magnuson's findings lead to only one conclusion: at times Twin Lakes' outflows exceeded its inflows prior to the 1906 dam construction. Accordingly, administration of Sylte's 1875 right should not be limited by Twin Lakes' inflows. The Department's *Instructions* must be set aside and reversed because they impose such a limitation on Sylte's right.

B. TLIA's secondary sources are not relevant to this case.

Instead of pointing to anything in the *1989 Decree* that supports a conclusion that pre-dam outflows were limited to inflows, TLIA relies on several secondary sources: a couple of articles about a different water system (Jackson Lake and the Upper Snake River), and a Department policy manual for that same area. *TLIA Response* at 11.

Sylte will address these sources' lack of merit below. However, it first must be recognized that they are not binding precedent on this Court. In addition, it is not proper to use these outside documents to interpret the *1989 Decree*, which TLIA has conceded to be "unambiguous." (R. 149); *Brown v. Greenheart*, 157 Idaho 156, 166, 335 P.3d 1, 11 (2014) ("In the absence of ambiguity, a document must be construed by the meaning derived from the plain wording of the instrument."). Indeed, these sources are not even in the record on appeal. Also, these documents address issues in a completely different water district located at a different end of the state. In short, these documents have nothing to do with this case. They are irrelevant.

Two of these secondary sources are articles about Jackson Lake and the Upper Snake River: *See* Jerry R. Rigby, *The Development of Water Rights and Water Institutions in the Upper Snake River Valley*, THE ADVOCATE, Vol. 53, No. 11/12 (Nov./Dec. 2010) ("*Rigby Article*"); R.A. Slaughter, *Institutional History of the Snake River 1850-2000*, University of Washington (2004) ("*Slaughter Article*").

The bottom line is that Jackson Lake is not Twin Lakes. Although both lakes involve dams constructed at the outlets of natural lakes, Jackson Lake's dam actually increased the

amount of storage in the lake.[11] As already discussed, Judge Magnuson found that the dam at Twin Lakes did not increase the amount of storage. *Memorandum Decision* at 10.

This distinction matters because Jackson Lake held stored water that was released above and beyond the natural flow and was not available to the senior natural flow users. Thus, it makes sense that when the additional storage created in Jackson Lake was released downstream to the storage right holders, senior natural flow water users "were ordered to close their headgates later in the season even though there was water in the river." *Rigby Article* at 53. *See also Slaughter Article* at 6 ("Jackson Lake storage produced the irony of natural flow rights holders having their water shut off while there was substantial flow in the river, the flow belonging to storage rights holders downstream in the Minidoka Project.") That happened because "[d]ue to releases from Jackson Dam, the water in the River was considered storage water . . . and not natural flow water . . . ." *Id.* Obviously, however, this did not mean that the senior natural flow users were not entitled to their natural flow. *Id.* (describing the state's desire to "manage and shepherd the storage water down the rivers 'on top' of the river's surface water to the storage water's intended users").

[11] *See* Jackson Lake Dam Overview, available at the Bureau of Reclamation's website: https://www.usbr.gov/projects/index.php?id=162 ("Jackson Lake Dam, a temporary rockfilled crib dam was completed in 1907 by the Bureau of Reclamation at Jackson Lake to store 200,000 acre-feet for the Minidoka Project until the storage requirements could be determined. A portion of this dam failed in 1910, and in 1911 a concrete gravity structure with earth embankment wings was built at the site. The new dam increased storage capacity to 380,000 acre-feet. In 1916, further construction raised the dam 17 feet to a structural height of 65.5 feet, with a total storage capacity of 847,000 acre-feet (active 847,000 acre-feet).").

Not surprisingly, the Upper Snake senior natural flow users and the junior storage users squabbled about "what amount of water flowing down the Snake below Jackson was storage water and what amount was natural flow water." *Id.* Critically though, the senior natural flow users were always entitled to the amount of water that naturally flowed to their headgates prior to the dam's construction.

Notably, the *Rigby Article* does not address the amount of natural flow to which the senior users were entitled, or how the amount was determined. Accordingly, it is unknown whether and how that issue—which is the main issue in this case— was presented and ultimately dealt with. All the article says with respect to resolving disputes concerning the amounts of natural flow versus storage water is that a "Committee of Nine" was formed and continues to serve as "a forum for stakeholders to work out their differences among themselves . . . ." *Id.* at 54. No such forum exists in WD 95C.

Thus, Jackson Lake bears only a passing resemblance to the situation presented in this case, which is much less complicated in any event. Here, Judge Magnuson found that the dam constructed at Twin Lakes' outlet created no new storage, and that the natural outflow furnished from Twin Lakes' natural lake storage prior to dam construction is the water that satisfied water right no. 95-0734. Sylte is entitled to this amount of outflow, which is the natural flow, not storage water.

The third source referenced by TLIA is a manual of water right accounting policies and procedures used by the Upper Snake River's Water District 1. *See* TONY OLENICHAK, CONCEPTS, PRACTICES, AND PROCEDURES USED TO DISTRIBUTE WATER WITHIN WATER DISTRICT

#1 (Mar. 2, 2015) ("*Olenichak Paper*"). Although it too has nothing to do with Twin Lakes or Rathdrum Creek, the policies described in the *Olenichak Paper* support Sylte's position, not TLIA's. For example, it states:

> The priority date of a water right indicates when the water right was first developed and its relative delivery sequence when compared to other water rights with different priority dates. The earliest (or senior) priority water right is delivered *natural flow* ahead of later (or junior) priority water rights when the *natural flow* is not sufficient to fill all water rights in a reach.

Olenichak Paper at 28 (italics in original). This statement of how senior and junior priority rights are administered in Water District 1 is consistent with how Sylte seeks to have water rights administered in WD 95C—that is, according to priority.

Judge Magnuson found that, before the dam was constructed, the natural outflow furnished from Twin Lakes' natural lake storage was available in the reach where water right no. 95-0734 is diverted and satisfied water right no. 95-0734. Accordingly, Sylte is entitled to have its senior priority right satisfied by the natural pre-dam outflow without impairment by junior priority rights such as the 1906 Storage Rights.

V. THE 1875 RIGHT'S VOLUME ELEMENT DOES NOT DICTATE TWIN LAKES' OUTFLOWS.

TLIA contends that Sylte "insists that the [1875] water right must be satisfied on a continuous, year-round basis," but argues that doing so would "exceed the 'max amount'" of 4.1 acre-feet ("AF") per year imposed by the *1989 Decree*. *TLIA Response* at 13. This argument mischaracterizes Sylte's position and the *1989 Decree.* In any case, the decreed volume limit does not dictate the amount of outflow from Twin Lakes to which Sylte is entitled.

A. Sylte's senior priority means it will be delivered water before others in times of scarcity.

First, Sylte does not claim that it is entitled to divert its 1875 right "always" or on a "continuous, year-round basis." Rather, Sylte claims that it is entitled to have water to satisfy its right under the conditions that existed in 1875 when, in the words of Judge Magnuson, there was "always" sufficient water in Rathdrum Creek, furnished from Twin Lakes, to supply Sylte's right on a "continuous, year-round basis."[12] Those conditions existed because, as Judge Magnuson found, "the outlet waters of Twin Lakes flowed over the top of the [outlet's] lip during periods of high water and through the natural pre-dam obstruction *at all times*, forming the source waters for Rathdrum Creek." *Memorandum Decision* at 11 (A.R. 183) (underlining in original; italics added). As already discussed, Sylte is entitled to the natural pre-dam outflow of water from Twin Lakes, which at times exceeded inflows. *See supra* Section IV.A.

That said, TLIA has a point that "there can be no guarantee that a natural flow right will 'always' flow." *TLIA Response* at 12. This likely is true as a general proposition across Idaho. However, contrary to TLIA's assertion, Sylte does not claim that it is entitled to a "guarantee of a permanent, uninterrupted supply." *TLIA Response* at 12-13. Sylte understands that it might

[12] Contrary to TLIA's assertion that "there can be no factual or legal basis for the 'always' and "continuous, year-round' arguments made by Sylte," *TLIA Response* at 13, Sylte simply is quoting the plain language of the *1989 Decree*. Judge Magnuson expressly found that "At the time the appropriation (No. 95-0734) was made in 1875, there was always water in Rathdrum Creek to serve said water right." *Memorandum Decision* at 13 (A.R. 185). Similarly, Judge Magnuson also found that "at the time the John Sylte and Evelyn Sylte 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." *Memorandum Decision* at 11 (A.R. 183).

have no recourse against other water users if, for some reason beyond anyone's control, the amount of natural pre-dam outflow that existed under conditions in 1875 became unavailable to supply Sylte's right. This could happen, for example, during a time of such drastic scarcity that every water user is affected. Luckily for Sylte, however, the 1875 right's senior-most priority means all other users would be curtailed first until there was not even enough water to satisfy Sylte. I.C. § 42-607.[13] In such a case Sylte realizes that its 1875 right might also stop receiving water, but only after everyone else stops receiving theirs.

In any case, this hypothetical does little to help resolve this case except to point out the benefit of having the most senior water right on the system. As already discussed, Judge Magnuson determined that the benefit of Sylte's 1875 priority date is that it must be administered according to the conditions that existed in 1875, and on the basis of priority over the 1906 Storage Rights, without changes to conditions or interference by junior rights.

B. The volume limit measures the amount diverted not delivered.

Concerning the volume limitation, Sylte does not claim that it is entitled to divert its 1875 right all day, every day, all year, as suggested by TLIA. *TLIA Response* at 13 (calculating the volume if Sylte's right was diverted non-stop for a year). *See also IDWR Response* at 31 (citing Idaho's policy against waste as prohibiting Sylte from having water available all the time).

[13] I.C. § 42-607 states: "It shall be the duty of said watermaster to distribute the waters of the public stream, streams or water supply, comprising a water district, among the several ditches taking water therefrom according to the prior rights of each respectively, in whole or in part, and to shut and fasten, or cause to be shut or fastened, under the direction of the department of water resources, the headgates of the ditches or other facilities for diversion of water from such stream, streams or water supply, when in times of scarcity of water it is necessary so to do in order to supply the prior rights of others in such stream or water supply . . . ." (Emphasis added).

Rather, Sylte contends that it is entitled to have water delivered to its headgate so it can be diverted in Sylte's discretion as authorized by the 1875 right's elements, so long as the right is in priority and Sylte has not diverted the maximum annual volume of 4.1 AF.

Simply put, once Sylte has diverted 4.1 AF of water under the 1875 right in priority and in Sylte's discretion, the volume limit is met. But until that happens each year, Sylte is entitled to have sufficient water delivered to its headgate to satisfy the right. The distinction between "diverted" and "delivered" is one reason why Sylte challenged the hearing officer's *sua sponte* amendment to the *Instructions*. *See Sylte's Opening Brief* at 46-48.[14]

It is a well-settled tenet of Idaho's prior appropriation doctrine that a natural flow appropriator has the right to determine whether and when to divert water within the parameters of a water right:

> Priority of appropriation having been established, as well as the amount of the water appropriated, and the beneficial use thereof, it seems to us that the functions of the court under the statute have reached their limit. For the court to dictate the manner in which the appropriator shall use the water so appropriated, so long as it is adapted to a useful or beneficial purpose, is going beyond its province. . . . We are of the opinion that, so long as the appropriator of water applies the same to a beneficial or useful purpose, he is the judge, within the limits of his appropriation, of the times when and the place where the same shall be used.

McGinnes v. Stanfield, 6 Idaho 372, 374-75, 55 P. 1020, 1021 (1898) (emphasis added). This is because water needs and the ability to use water (among other factors) are variable, making it

[14] The other reason Sylte challenged the hearing officer's *sua sponte* amendment to the *Instructions* was that it occurred without notice or an opportunity for Sylte to be heard on the subject. Contrary to TLIA's assertion that Sylte's challenge to the *sua sponte* amendment to the *Instructions* is "beyond reason," *TLIA Response* at 14, these are good reasons to challenge the amendment.

unrealistic and inappropriate to require a natural flow user to divert all flows that are "delivered" to its headgate:

> A water right is the right, in due order of priority and within the maximum appropriated, to use that amount of water which reasonably suffices for the owner's needs at any particular time. The factors variable, the amount is variable, not only season to season, but day by day, even hour to hour. Consequently it is obvious the court cannot justly prescribe any fixed schedule. It must be left to the honest judgment of the [water right] owner in application, subject to control by the court's water master, who interferes in any the owner's abuse, and prescribes limits for immediate use.

United States v. American Ditch Assoc., 2 F.Supp. 867, 869 (D. Idaho 1933) (emphasis added).

In short, the satisfaction of Sylte's annual volume limit does not depend on whether water is delivered to the headgate, but instead depends on whether Sylte diverts water under the right. There is no justification under the *1989 Decree* or Idaho law for TLIA's and IDWR's suggestions that Sylte's 1875 right is otherwise limited by the annual volume limitation. To accept TLIA's and IDWR's arguments would be to hold that a natural flow water user can be shut off as soon as the decreed volume of natural flow has reached their headgate each year, regardless of whether the water user needed or diverted all of that water. The cases quoted above demonstrate that, in Idaho, the when and where to divert and use water is within the good judgment of the natural flow appropriator, not the State.

IDWR's double-speak on this subject is particularly troubling. On one hand, the Department assures the Court that the *Instructions'* "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." *IDWR Response* at 30. Immediately afterward, however, the

Department says "Sylte continues to mistakenly suggest that water right no. 95-0734 is entitled to have .07 cfs flow by Sylte's point of diversion at all times," and that to prevent this "the hearing officer properly modified the instructions to include the maximum annual diversion volume . . . ." *IDWR Response* at 31.[15]

The Department's elusive position on this subject is precisely why Sylte challenged the "delivered" language used by the hearing officer when he *sua sponte* amended the *Instructions*.[16] It also is why, on rehearing, Sylte again asked the District Court to strike the Department's language.

It is cold comfort to Sylte that the District Court described the difference between "diverted" and "delivered" as a "distinction without a difference" because the Department's attorney represented at oral argument that the Department would not administer the water right based on the amount simply delivered to Sylte's headgate. (R. 293). The Department's shifting positions on this subject makes clear that it has not fully abandoned the administration of Sylte's 1875 right based on the amount delivered. Accordingly, the Department's *sua sponte* and

[15] In connection with its argument about the administration of Sylte's volume limitation, the Department makes a glancing reference to the maximum use doctrine and the state's policy against waste. *IDWR Response* at 31 (citing *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 727, 735, 947 P.2d 400, 408 (1997)). But this case is not about waste. There have been no allegations, and there is nothing in the record to suggest, that Sylte does not put the 1875 water right to full beneficial use once it is diverted. As already discussed, this case is about priority and the meaning of the *1989 Decree*.

[16] Without citation, TLIA incorrectly states that "Sylte asked IDWR to revise the Instructions to the Watermaster." Similarly, without citation, the Department wrongly asserts that "modifying the instructions to include the decreed volume limit was within the issues raised in the administrative proceeding." *IDWR Response* at 30. In truth, Sylte asked that the *Instructions* be "set aside and reversed." *Sylte's MSJ* at 1-2 (R. at 900-01); *Sylte's MSJ Brief* at 24 (R. at 930).

improperly worded addition of the annual volume limitation to the *Instructions* violated Sylte's substantial rights.

To be clear, Sylte does not argue that the elements of water right no. 95-0734 as set forth in the *1989 Decree* included a 4.1 AF per year volume limit. Nor does Sylte contend that "water rights should be administered only for their diversion rate, not their diversion volume." *TLIA Response* at 15. Sylte simply challenges the fact that the Department modified the *Instructions* with improper language for administering the volume limitation, and it did so without giving Sylte notice or an opportunity to weigh in.

For these reasons set forth above, in addition to those set forth in *Sylte's Opening Brief* at 46-48, Sylte requests that this Court set aside and reverse the hearing officer's *sua sponte* revision to the *Instructions*.

VI. SYLTE DOES NOT CLAIM IMMUNITY FROM THE FUTILE CALL DOCTRINE SO LONG AS IT IS APPLIED CORRECTLY.

There is no disagreement that the futile call doctrine applies to water right no. 95-0734. Contrary to the District Court's statements quoted by the Department, *IDWR Response* at 24, Sylte does not contend that water right no. 95-0734 is "immune" from the futile call doctrine.

Although Sylte recognizes that the futile call doctrine applies to its water rights the same as it does all others, Sylte disputes how the Department's *Instructions* require the futile call doctrine to be applied concerning Sylte's 1875 right using the same incorrect tributary inflow limitation addressed above. The futile call doctrine simply is an aspect of water rights administration. Sylte's 1875 right should not be administered based on Twin Lakes' tributary

inflow, the application of the futile call doctrine to the 1875 right also should not be administered based on Twin Lakes' tributary inflow. *See Sylte's Opening Brief* pp. 38-41 (further discussing the *Instructions'* misapplication of the futile call doctrine).[17]

In short, Sylte does not argue that water right no. 95-0734 is immune from the futile call doctrine. But it must be properly applied. A futile call must be based on a determination that "due to seepage, evaporation, channel absorption or other conditions beyond the control of the appropriators the water in the stream will not reach the point of the prior appropriator in sufficient quantity for him to apply it to beneficial use." *Gilbert v. Smith*, 97 Idaho 735, 739, 552 P.2d 1220, 1224 (1976). It only applies if the water "flowing in its natural channels would [not] reach the point of downstream diversion." *Id.* As already explained, the natural flow of water to which Sylte is entitled is the natural pre-dam outflow of Twin Lakes' natural lake storage, and not Twin Lakes' tributary inflow. Thus, the futile call doctrine applied to Sylte's 1875 right must be based on Twin Lakes' natural pre-dam outflow and not the lakes' tributary inflow.

[17] The Department complains about Sylte's comment that the hearing officer held that the Director could "pick" a junior right over a senior right. *IDWR's Response* at 25 n. 6. While it is true that the hearing officer did not use the word "pick," he did conclude that the Director has discretion for "balancing" interests in a futile call analysis. *IDWR Order* at 13 (A.R. 1402). The Department doubles down on this alleged "futile call balancing analysis" in its response brief here on appeal. *IDWR's Response* at 25 n.6. But Idaho's futile call doctrine contains no such balancing. This Court's thorough description of the doctrine in *Gilbert v. Smith*, 97 Idaho 735, 739, 552 P.2d 1220, 1224 (1976), provides a mechanical, non-discretionary method for applying the doctrine: "if due to seepage, evaporation, channel absorption or other conditions beyond the control of the appropriators the water in the stream will not reach the point of the prior appropriator in sufficient quantity for him to apply it to beneficial use, then a junior appropriator whose diversion point is higher on the stream may divert the water." As admonished by the *Gilbert* Court, this doctrine does not "permit an upstream junior appropriator to interfere with the water right of a downstream senior appropriator so long as the water flowing in its natural channels would reach the point of downstream diversion." *Gilbert*, 97 Idaho at 739, 552 P.2d at 1224.

VII. CONSIDERATION OF DOCUMENTS OUTSIDE THE RECORD WAS NOT HARMLESS ERROR.

The Department contends that "the hearing officer's reference to the [off-record] documents is harmless error." *IDWR Response* at 25-28. TLIA agrees. *TLIA Response* at 15 (calling the review of off-record documents "harmless").

The Department and TLIA argue that the Department would have reached the same conclusion regardless of its citation to those documents. *TLIA Response* at 16; *IDWR Response* at 26. However, the discussions of these documents in their briefs on appeal demonstrate that the error was not harmless. Neither the Department nor TLIA make any reasonable argument that it was proper for the hearing officer to reference off-record (and outside-*1989 Decree*) documents.

As explained in *Sylte's Opening Brief* at 42-46, it was improper for the hearing officer to cite, quote, or rely on any documents not in the record or outside the four corners of the *1989 Decree*, which all parties agree is unambiguous. The Department does not argue it was proper; rather it was harmless. TLIA contends it was not improper because they were "part of the court proceedings." *TLIA Response* at 16.

First, it was not proper for the hearing officer to reference documents outside the record or outside the *1989 Decree* because it violated IDWR's own procedures and Sylte's due process rights for the Department to reference documents outside the record. Sylte addressed this in *Sylte's Opening Brief* at 42-46. Also, because there is no dispute that the *1989 Decree* is unambiguous, there was no justification for looking outside its four corners to determine its meaning. *Brown v. Greenheart*, 157 Idaho 156, 166, 335 P.3d 1, 11 (2014) ("In the absence of

ambiguity, a document must be construed by the meaning derived from the plain wording of the instrument.").

In addition, the Department's and TLIA's "harmless error" arguments are undercut by the fact that the Department cites to the same off-record documents to support its arguments in this appeal. *See, e.g, IDWR Response* at 27 (citing A.R. 1395 and A.R 1398). If references to these documents were harmless error, the Department would not continue to try to explain what it thinks they mean to influence this Court on appeal.

By the way, Sylte is not afraid of these documents. To remove any air of mystery surrounding them, Sylte explained what they mean in the proceedings below. Sylte invited this Court to review those documents and Sylte's explanation in *Sylte's Opening Brief* at 44-46.

In short, by improperly considering documents which were not only outside the record, but also irrelevant to interpreting the plain language of the *1989 Decree*, the Department violated is own procedures and Sylte's due process rights. This was not harmless error.

VIII. SYLTE IS ENTITLED TO AN AWARD OF ATTORNEY FEES AND COSTS AND RESPONDENTS ARE NOT.

FCD and TLIA each request an award of attorney fees on appeal. *FCD Response* at 10; *TLIA Response* at 4-6. TLIA also argues that Sylte is not entitled to an award of attorney fees on appeal, *TLIA Response* at 6, but FCD makes no such argument. The Department does not request an award of attorney fees or costs, and it opposes Sylte's request. *IDWR Response* at 31-32.

Should Sylte prevail in this appeal, Sylte requests that this Court award it attorney fees and costs because the Respondents' positions are contrary to the *1989 Decree* and Idaho law, and therefore are without foundation in fact or law. *Sylte's Opening Brief* at 19-21 addressed Sylte's request for attorney fees and costs. Nothing in the Respondents' response briefs changes the analysis that Respondents' positions are without foundation in fact or law

Should Sylte not prevail on appeal, this Court should not award fees or costs as requested by FCD and TLIA. FCD and TLIA both cite I.C. § 12-117 as a basis for an award of fees and costs (*TLIA Response* at 4-5; *FCD Response* at 10), but this statute does not apply to them.

Rather, Section 12-117 provides for awards of fees and costs "in any proceeding involving as adverse parties a state agency . . . and a person." I.C. § 12-117(1). In other words, the statute provides for awards of fees and costs to the state agency or the party adverse to the agency. This Court has held that Section 12-117 is not a basis for an award of fees to a party who is aligned with the agency. *Neighbors for Pres. of Big & Little Creek Cmty. v. Bd. of Cty. Comm'rs of Payette Cty.*, 159 Idaho 182, 192, 358 P.3d 67, 77 (2015) ("AEHI is not adverse to the County; indeed, their respective attorneys signed the same brief. Therefore, AEHI is not entitled to an award of attorney fees [under Section 12-117]."). "The purpose of I.C. § 12-117 is to serve as a deterrent to groundless or arbitrary action and to provide a remedy for persons who have borne unfair and unjustified financial burdens defending against groundless charges or attempting to correct mistakes agencies should never have made." *Neighbors for a Healthy Gold*

Fork v. Valley Cty., 145 Idaho 121, 138, 176 P.3d 126, 143 (2007).[18] In this case, FCD and TLIA are not adverse to the Department; they are aligned with the Department. Therefore, TLIA and FCD are not entitled to an award of fees under Section 12-117.

TLIA also cites I.C. § 12-121 as a basis for its request of attorney fees (FCD does not). *TLIA Response* at 4. But they cannot obtain an award under that statute because it applies only to "civil action[s]," and this judicial review proceeding is not a "civil action." *Krempasky v. Nez Perce Cty. Planning & Zoning*, 150 Idaho 231, 239, 245 P.3d 983, 991 (2010) ("A party can only be awarded attorney fees under I.C. § 12-121 in a 'civil action.' This is a petition for judicial review from an administrative decision and thus is not a civil action. Thus, no attorney fees will be awarded . . . ." (internal citations omitted)).

But even if TLIA or FCD could obtain an award of fees under the statutes they cite (which they cannot), they would not be entitled to an award if they prevail because, as

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[18] I.C. § 12-117 was amended in 2000 to allow awards of fees to state agencies in addition to the party adverse to the agency. As explained in the Statement of Purpose for the 2000 amendment:

> Idaho law presently allows for the recovery of attorney fees against public agencies in cases where the public agency frivolously pursues or defends the administrative action or civil judicial proceeding. There is no general provision for an award of attorney fees in favor of the public agency where the other party to the action frivolously pursues or defends the administrative or civil action. This legislation amends Idaho Code 12-117 to provide that attorney fees may be awarded to state agencies as well as to other public entities where the public entity is the prevailing party and where the party against whom the judgment is rendered has acted without a reasonable basis in fact or law.

Statement of Purpose, R.S. 09456, which became, S.B. 1333, 2000 Idaho Sess. Laws, ch. 241. This Statement of Purpose confirms that Section 12-117 allows awards of fees only to the state agency and the party adverse to the state agency. As noted in the main text, the Department has not requested an award of fees under Section 12-117.

demonstrated above and in *Sylte's Opening Brief*, Sylte has acted with a reasonable basis in law and fact. Concerning the main issue on appeal (i.e. whether the *Instructions* improperly limit Sylte's 1875 right), Sylte's positions are based on the text of the *1989 Decree* and Idaho's constitution, statutes, and case law. Concerning the other issues, Sylte's positions are based on fundamental legal principles such as Due Process. In short, Sylte's positions have a reasonable basis in law and fact.[19]

In sum, as set forth in *Sylte's Opening Brief* at 19-21, Sylte requests an award of attorney fees and costs if it prevails. If Sylte does not prevail, the other parties are not entitled to awards of fees or costs.

CONCLUSION

The primary question for this Court on appeal is narrow but important: is a senior water right holder protected from changes in stream conditions and interference caused by upstream juniors? Sylte asks this Court to answer this question in the affirmative, and to confirm Idaho's longstanding history of upholding the constitutionally mandated principle that first in time is first in right. Sylte also asks this Court to give effect to the entire *1989 Decree*, including Judge

[19] Because, as discussed in the main text, TLIA is not entitled to an award of fees if it prevails on appeal, it is not necessary to address TLIA's arguments based on *City of Blackfoot v. Spackman*, 162 Idaho 302, 311, 396 P.3d 1184, 1193 (2017), or TLIA's other rhetoric. *TLIA Response* at 5. Nevertheless, Sylte will take this opportunity to set the record straight. There is no merit to TLIA's allegation that "Sylte has been attempting for decades to manipulate and control the storage in Twin Lakes for its own purposes." *Id.* Nothing in the record supports this unfounded accusation. From Sylte's perspective, water rights administration was largely acceptable until the Department issued the *Instructions* in 2016, which changed the status quo and forced Sylte to initiate this proceeding. The fact that the Department and the District Court did not agree with Sylte's well-reasoned positions does not make them unreasonable.

Magnuson's findings and conclusions about the nature of Twin Lakes and Rathdrum Creek when Sylte's 1875 right was appropriated, and to determine that Twin Lakes' natural lake storage furnished water to Rathdrum Creek in amounts that at times exceeded the lakes' inflow, and that it is this natural flow to which Sylte is entitled.

In summary, for the reasons set forth above and in *Sylte's Opening Brief*, Sylte respectfully requests that this Court: (1) reverse and set aside the District Court's *Judicial Review Order*, the *IDWR Order*, and the Department's *Instructions*; (2) hold that Sylte is entitled to releases of water from Twin Lakes in the amount of Twin Lakes' pre-dam natural outflow rather than the amount of natural tributary inflow entering Twin Lakes; (3) determine that the Department prejudiced Sylte's substantial rights by reviewing and citing documents outside the agency record and by *sua sponte* adding a volume limitation to the *Instructions*; and (4) awarding Sylte its attorney fees and costs on appeal and in the proceedings below.

Respectfully submitted on the 12th day of December, 2018.

GIVENS PURSLEY LLP

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of December, 2018, I caused to be filed and served true and correct copies of the foregoing document to the person(s) listed below by the method indicated:

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