

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

IN THE MATTER OF CLARK'S REQUEST  
FOR REMOVAL OF THE WATER  
DISTRICT NO. 95C WATERMASTER,  
LAURIN SCARCELLO

Docket No. C-RWM-2016-001

**PRELIMINARY ORDER  
REMOVING A WATERMASTER**

**STATEMENT OF THE CASE AND PROCEDURAL HISTORY**

On August 30, 2016, the Idaho Department of Water Resources ("Department") received a written complaint ("Complaint") from Colby Clark ("Clark") requesting removal of the current watermaster of Water District 95C ("WD95C"), Laurin Scarcello ("Watermaster" or "Scarcello") pursuant to Idaho Code § 42-605(9). The Department may remove a watermaster if the Department finds that the watermaster has failed to perform his duties. Idaho Code § 42-605(9). In the complaint, Clark alleged the following:

- Complaint 1: Outflows from Twin Lakes exceed inflows from Fish Creek.
- Complaint 2: More water than necessary is being released from Twin Lakes to fulfill Water Right No. 95-734.
- Complaint 3: Water is being released pursuant to Twin Lakes Flood Control District's storage water right, no. 95-973, "in contravention of its decreed purposes."
- Complaint 4: Twin Lakes Flood Control District is "being used to ensure water delivery to Flood Control board members, friends, family, neighbors and for purposes outside the mission and objective of flood control and is directing the watermaster to release water for water delivery and other purposes outside of flood control concern."
- Complaint 5: "Water is being delivered to Rathdrum Creek water right holders over and above their water right priority at the expense of Twin Lakes water right holders and the stated purpose of Flood Control water rights storage rights."
- Complaint 6: "[T]he watermaster is not acting in accordance with watermaster guidelines contained in the watermaster handbook, but is instead acting outside existing law decreed in the 1989 District Court ruling, in contravention of established water rights and priorities, and is facilitating excessive water release from Twin Lakes."
- Complaint 7: Operation of Twin Lakes dam by the "watermaster/dam controller" is not in line with the 1977 General Operation Plan at Twin Lakes.
- Complaint 8: "Twin Lakes homeowners and water right holders are claiming financial damages as a result of deliberate lake mismanagement and disregard of fiduciary duty to manage lake levels in compliance with established law, water rights, and priorities."

On October 5, 2016, the Department issued a *Notice of Hearing; Scheduling Order* ("Notice") to notify Clark, Scarcello, and the water users in WD95C that the Department would conduct a hearing about the Complaint on November 3 and 4, 2016, near Rathdrum, Idaho. The Notice

required water users intending to participate in the hearing to notify the Department in writing by October 26, 2016. The Department mailed the notice to approximately 535 individuals and entities identified as holders of water rights in WD95C.

In addition to Clark and Scarcello, the following individuals submitted notices of intent (“NOIs”) to participate in the hearing and are Parties to this matter:

- Susan Ellis – in support of the request to remove the watermaster
- Don Ellis – in support of the request to remove the watermaster
- Paul F. Finman – in support of the request to remove the watermaster
- Terry Kiefer – in support of the request to remove the watermaster
- Michael Dempsey – seeking that the watermaster be retained
- Curran Dempsey – seeking that the watermaster be retained
- Susan C. Goodrich – seeking that the watermaster be retained
- John Sylte – seeking that the watermaster be retained
- Gordon Stephenson – no stated opinion on removal of the watermaster

Throughout this order, the term “Parties” refers to Clark, Scarcello, and all the individuals who submitted NOIs.

The Department conducted the hearing as scheduled on November 3 and 4, 2016. Due to the length of testimony, the Department extended the hearing for one additional day on November 10, 2016. The Department provided notice of the extended hearing by announcing it at the end of the hearing session on November 4, 2016, and by issuing a *Notice of Hearing* on November 7, 2016. The Department mailed the *Notice of Hearing* to each Party and, because of the short time frame, also hand-delivered or emailed the *Notice of Hearing* to each Party.

Each of the Parties testified at the hearing, and each Party was afforded the opportunity to examine each witness at the hearing. In addition to the Parties, Department employees Tim Luke and Morgan Case testified at the hearing.

Based on the testimony and the evidence in the record, the Department finds, concludes, and orders as follows:

## **FINDINGS OF FACT**

### **The Twin Lakes – Rathdrum Creek Watershed**

1. The Twin Lakes - Rathdrum Creek watershed is dominated by two interconnected lakes, the Twin Lakes, situated north of the City of Rathdrum in Kootenai County in northern Idaho. Exhibits 13, 14, and 27. Numerous small streams flow into Twin Lakes. Testimony of Morgan Case; Testimony of Tim Luke; Testimony of Terry Kiefer; Exhibits 14 and 27. The largest stream flowing into Twin Lakes is Fish Creek, which flows into the westernmost end of the upper (northernmost) of the Twin Lakes. Exhibits 13 and 14; Testimony of Tim Luke. The only surface outflow from the Twin Lakes is Rathdrum Creek, which flows from the

lower (southernmost) of the Twin Lakes southward toward the City of Rathdrum about three miles away. Exhibits 13, 14, and 27.

2. The outflow from Twin Lakes passes through a man-made control structure. Exhibits 13 and 14; Testimony of Tim Luke. When constructed, the control structure raised the level of the Twin Lakes, creating a reservoir of stored water that could be delivered through the control structure into Rathdrum Creek for irrigation use on the Rathdrum Prairie, particularly in East Green Acres Irrigation District. Exhibits 13 and 14. The control structure provided the additional benefit of regulating the outflow from Twin Lakes to prevent flooding along Rathdrum Creek.
3. In 1977 the United States Bureau of Reclamation established a *General Operation Plan* (“Plan”) for operating the Twin Lakes outlet control structure. Exhibit 15. The Plan calls for filling the lakes “to normal full level (10.4 feet) by June 1” and holding the lakes “as close as possible to the 10.4-foot level from June 1 to November 1.”

### **The Decree**

4. The *Final Decree, In the Matter of the General Determination of the Rights to the Use of the Surface Waters of Twin Lakes, Including Tributaries and Outlets*, Case No. 32572 (1<sup>st</sup> Jud. Dist. Ct. April 20, 1989) (“Decree”) determined the elements of the water rights from Twin Lakes and its tributaries. Exhibit 13; Testimony of Morgan Case. Since 1989, some rights to divert water from Twin Lakes and its tributaries have been established through the statutory permitting and licensing process. Testimony of Morgan Case.
5. For purposes of water right administration, the Decree superseded and replaced the Plan. Testimony of Morgan Case.
6. In Finding of Fact No. 10, the Decree describes three “blocks” of storage water in Twin Lakes relative to the staff gauge on the outlet control structure:
  - Water from the bottom of the lakes to 0.0 feet on the staff gauge. No water right exists for this water. It is the water naturally occurring in Twin Lakes.
  - Water from 0.0 feet to 6.4 feet on the staff gauge. The right to store this water is Water Right No. 95-0974.
  - Water from 6.4 feet to 10.4 feet on the staff gauge. The right to store this water is Water Right No. 95-0973.
7. Twin Lakes Improvement Association owns water right no. 95-0974, which authorizes the year-round storage of 5,360 acre-feet (“AF”) of water in Twin Lakes for Recreation Storage purposes.
8. Twin Lakes Rathdrum Creek Flood Control District 17 (“Flood Control District”) owns water right no. 95-0973, which authorizes the year-round storage of 3,730 AF of water in

Twin Lakes for Recreation Storage and Wildlife Storage purposes. The United States Bureau of Reclamation originally established water right no. 95-0973.

9. The Decree includes the following Conclusions of Law regarding the distribution of water rights in the Twin Lakes – Rathdrum Creek drainage, including the two storage water rights, nos. 95-0973 and 95-0974, and the most senior water right in the drainage, the 1875 stockwater right, no. 95-0734:

12. 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.

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. 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. Thus from April 1 to October 31 of each year the level of Twin Lakes will decrease due to evaporation and seepage losses, during the periods when direct flow water rights divert the natural inflows.

13. The priority system of water rights within the Twin Lakes – Rathdrum Creek Drainage Basin applies to all water rights on sources that are hydraulically connected. For example, an early priority water right on Rathdrum Creek is senior to a later priority water right on Fish Creek.

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.

10. Under the Decree, from April 1 to October 31 of each year, the watermaster of WD95C can distribute the natural inflow into Twin Lakes to holders of direct flow water rights in priority. Decree at Conclusion of Law No. 12; Exhibit 19. The Decree prohibits the distribution of stored water to satisfy direct flow rights. Decree at Conclusion of Law No. 14. Therefore, from April 1 to October 31 each year, it is contrary to the Decree to allow the outflow from Twin Lakes to exceed the natural inflow for the purposes of satisfying direct flow water rights, such as stockwater right no. 95-0734.



## The Water District

11. On August 7, 1989, the Department issued the *Order Creating Water District* establishing WD95C “for the distribution of surface water from Twin Lakes – Rathdrum Creek and its surface tributaries.” Exhibit 26; Testimony of Morgan Case.
12. Scarcello became the watermaster of WD95C in 2010 and has served in that capacity ever since. Testimony of Laurin Scarcello; Exhibit 34. When he became watermaster, Scarcello signed an *Official Oath* pledging to “support” the “laws of the State of Idaho” as required by Idaho Code § 42-605(10). Exhibit 34.
13. The Department’s *Watermaster Handbook* is a general reference for watermasters when they have questions about performing their duties. It is essentially a set of best practices for watermasters. Exhibit 20; Testimony of Tim Luke. Watermasters throughout Idaho vary in their adherence to the recommendations in the *Watermaster Handbook*. Testimony of Tim Luke.
14. The *Watermaster Handbook* does not contain guidance tailored specifically to WD95C. Testimony of Tim Luke; Testimony of Laurin Scarcello. When a watermaster requests specific guidance regarding job duties, the Department sometimes issues such guidance in writing. Exhibit 19; Exhibit 35.
15. WD95C officials have sought operational guidance from the Department in the past, including a very detailed written request in 1994. Testimony of Gordon Stephenson; Exhibit 29.
16. In 2002 the Department instructed watermasters around the state to, “refrain from authorizing, organizing and performing construction work involving the channels of natural watercourses.” Exhibit 35. The Department sent this instruction to Dan Park, one of Scarcello’s predecessors as watermaster of WD95C. Exhibit 35
17. Other than the 2002 letter, there is no record prior to 2016 of the Department offering written guidance to the watermaster of WD95C regarding how to deliver water in accordance with the Decree. Testimony of Tim Luke; Testimony of Morgan Case; Testimony of Laurin Scarcello, Testimony of John Sylte, Testimony of Gordon Stephenson.
18. There are no permanent flow measuring devices installed in Fish Creek or in any of the other small streams flowing into Twin Lakes. Testimony of Tim Luke.
19. Scarcello does not typically conduct flow measurements to determine the total natural tributary inflow of water into Twin Lakes. Testimony of Laurin Scarcello. He has never had water measurement training, and he stated when he was elected that he would require water measurement assistance due to his lack of training and his time constraints. Testimony of Laurin Scarcello. Terry Kiefer (“Kiefer”), who is a member of the WD95C advisory board, and others conduct such measurements on an irregular schedule. Exhibit 16; Testimony of Terry Kiefer; Testimony of Laurin Scarcello.

20. Kiefer's water measurement training has been minimal, and he admits that his water flow measurements may not be as accurate as measurements performed by professionals or others with more extensive training. Testimony of Terry Kiefer; Testimony of Morgan Case. Nevertheless, Kiefer strives to measure the flows of Fish Creek, and sometimes the flows of other Twin Lakes tributaries, to the best of his ability. Exhibit 16; Testimony of Kiefer.
21. Scarcello is critical of Kiefer's measurement efforts because Kiefer focuses his efforts on Fish Creek, the major tributary, and does not always measure the inflow to Twin Lakes from the several smaller tributaries. Testimony of Laurin Scarcello.
22. The outflow from Twin Lakes is automatically measured and recorded at fifteen minute intervals. Testimony of Morgan Case. The automated outflow measurement equipment has not been calibrated recently, and some evidence suggests it is somewhat inaccurate, possibly registering higher than actual flow. Testimony of Morgan Case. Nevertheless, in 2016 the automated outflow measurements were the best available information for water management decision-making purposes. Testimony of Morgan Case.
23. WD95C does not measure or scientifically estimate evaporation and seepage losses from Twin Lakes. Testimony of Terry Kiefer. Instead, evaporation and seepage losses are assumed to exceed natural inflow into Twin Lakes when the water level in the lakes is declining in the summer and fall. Testimony of Terry Kiefer; Testimony of Don Ellis.
24. Besides being watermaster of WD95C, Scarcello is also employed as dam tender for the Flood Control District. Testimony of Laurin Scarcello; Testimony of Morgan Case; Exhibit 11. As dam tender, Scarcello maintains and operates the Twin Lakes outlet control structure at the direction of the Flood Control District commissioners. Testimony of Laurin Scarcello.
25. Scarcello adjusts the outflow from Twin Lakes into Rathdrum Creek only after consulting the Flood Control District commissioners. Testimony of Laurin Scarcello; Testimony of Susan Ellis; Exhibit 11. Scarcello testified, "Flood Control directs me, and then I act accordingly. . . I make no personal decisions on gate operation." Scarcello also testified, "I've never made a decision that I didn't run by Flood Control. I guess I view Flood Control as my primary employer."
26. The Flood Control District commissioners do not rely on the Decree to decide how much water to allow to flow from Twin Lakes into Rathdrum Creek during the summer and fall, nor does the Department oversee Flood Control District decisions. Exhibit 11; Testimony of Gordon Stephenson; Testimony of Tim Luke.
27. The Flood Control District manages the outflow from Twin Lakes to prevent flooding along Rathdrum Creek and to maintain storage in Twin Lakes pursuant to its storage water right, no. 95-0973, for recreation and wildlife purposes. Testimony of Tim Luke; Testimony of Laurin Scarcello. Generally, the Flood Control District is most active in the late fall, when they release water from Twin Lakes to flush the bed of Rathdrum Creek free of debris. In the winter, the Flood Control District manages the Twin Lakes outflow to maintain sufficient flow in Rathdrum Creek to prevent ice dams in the creek channel. The Flood Control

District tries to maintain about two feet of storage space in Twin Lakes in the winter and early spring in case of a storm event. Testimony of Laurin Scarcello; Testimony of Gordon Stephenson. In late spring or early summer, the Flood Control District reduces the outflow from Twin Lakes to achieve the 10.4 storage level. Testimony of Laurin Scarcello.

28. When flooding is not occurring, Rathdrum Creek water right owners benefit when the outflow from Twin Lakes is sufficient to flow down Rathdrum Creek to the points of diversion for their Rathdrum Creek water rights. Exhibit 2.
29. Owners of Twin Lakes lakefront property -- such as Clark, Susan and Don Ellis, and Kiefer - receive recreational benefits when the water level in Twin Lakes remains high. Clark also markets his lakefront property as a vacation rental for people seeking to enjoy the scenic and recreational benefits of Twin Lakes. Thus, the lakefront property owners rely on the Flood Control District to exercise its right to store water in Twin Lakes. Clark and Mr. and Mrs. Ellis contend their property values and their enjoyment of their property are diminished when outflows from Twin Lakes are allowed to exceed inflows in the summer and fall each year. Testimony of Colby Clark; Testimony of Susan Ellis.
30. Clark claims ownership of water right no. 95-0876, which was decreed in the Decree. Testimony of Morgan Case. Right no. 95-0876 authorizes the diversion of water directly from Twin Lakes for domestic purposes. Clark asserts ownership of water right no. 95-0876 on the basis of his ownership of the decreed place of use. Testimony of Morgan Case. Clark is also a member of the WD95C Advisory Board. Testimony of Colby Clark; Exhibit 36.
31. Some owners of lakefront property, such as Curran Dempsey and Michael Dempsey, prefer to have the lake level somewhat below 10.4 feet on the outlet gage so that they have land (a "beach") below the high water mark to recreate on.
32. The *Watermaster Handbook* (Exhibit 20) states on page 32 that a watermaster's annual report must include a list of the water rights delivered and the amount of water delivered to each right. Scarcello maintains no water delivery records. Testimony of Morgan Case.

### **Use of Storage Water**

33. There is no minimum stream flow water right for Rathdrum Creek for wildlife habitat or for any other purpose. Exhibit 14; Testimony of Tim Luke.
34. There is no water right authorizing the release of water stored in Twin Lakes into Rathdrum Creek for recreation and wildlife purposes. The *Memorandum Decision* (Exhibit 14) issued in connection with the Decree states:

The Court further concludes there is no basis for a claim that water stored in Twin Lakes by the Bureau of Reclamation for recreation and wildlife purpose properly includes the release of water to Rathdrum Creek for instream flows for recreation and wildlife purposes.

35. The Department instructed Scarcello, “The storage water rights do not authorize release of water for instream purposes.” Testimony of Tim Luke; Exhibit 19.
36. The Flood Control District believes it can use storage water right no. 95-0973 for instream purposes, such as keeping the Rathdrum Creek channel clear of debris or supporting the fishing derby in the City of Rathdrum. Testimony of Gordon Stephenson; Testimony of Laurin Scarcello.
37. Scarcello also believes the Flood Control District’s storage water right, no. 95-0973, authorizes the release of water to maintain a certain level of stream flow. The hearing recording contains the following exchange:

Hearing Officer: “What does the Flood Control District’s storage water right authorize?”

Scarcello: “To me, the release of water. They have to release water.”

Hearing Officer: “For what?”

Scarcello, “Obviously to mitigate flood damage. To maintain a certain level of stream flow. To help provide for proper water delivery. Riparian habitat, etc. I think there’s obligations that go with that beyond what the law states. I think that is simply common sense. I think largely the 1989 decree was issued and formulated in an era where there was a level of common sense, where there was some respect for your neighbors, that maybe they felt it wasn’t necessary to spell out every small detail because in that era largely people got along through this drainage.”

### **Channel Losses**

38. Some way downstream from the Twin Lakes outlet structure, Rathdrum Creek flows through parcels of land owned by Paul F. Finman (“Finman”). Due to the character of the Rathdrum Creek channel as it flows across Finman’s land, much of the water flowing out of Twin Lakes seeps into the ground before it leaves Finman’s property. Exhibit 11; Exhibit 37; Testimony of Laurin Scarcello; Testimony of Colby Clark.
39. Downstream from Finman’s property, Rathdrum Creek flows through various parcels of land owned by Sylte Ranch LLC, or members of the Sylte family, which includes Gordon Sylte, Susan Goodrich, and John Sylte (collectively “Syltes”). Syltes own a number of water rights authorizing the diversion of water from Rathdrum Creek for irrigation and stockwater purposes. Among the rights owned by Syltes is right no. 95-0734, which provides 0.07 cubic feet per second (“cfs”) for instream stockwater purposes with a priority of May 1, 1875. Again, right no. 95-0734 is the most senior water right in the Twin Lakes – Rathdrum Creek drainage. Testimony of Tim Luke.

40. Because of the condition of the Rathdrum Creek channel on Finman's property, much more than 0.07 cfs must pass through the Twin Lakes outlet structure to supply 0.07 cfs to the point of diversion for right no. 95-0734. Testimony of Laurin Scarcello.
41. For some time Scarcello has been aware of the Department's 2002 instructions to watermasters to "refrain from authorizing, organizing and performing construction work involving the channels of natural watercourses." Testimony of Laurin Scarcello. Nevertheless, Scarcello participated in multiple attempts to improve the passage of water in Rathdrum Creek across Finman's property. Testimony of Laurin Scarcello; Testimony of Don Ellis; Testimony of Paul Finman. As Scarcello explained: "The watermaster was told to take no work. I willingly took work because I thought it was ridiculous not to work." Scarcello himself is not certain whether he undertook the stream channel work on behalf of the Flood Control District or on behalf of WD95C. Testimony of Laurin Scarcello.
42. A futile call occurs when curtailing an upstream junior right provides no water to an unsatisfied downstream senior right because the water seeps into the channel before reaching the senior's point of diversion. See *Gilbert v. Smith*, 97 Idaho 735, 739, 552 P.2d 1220, 1224 (1976). When a futile call occurs, the obligation to deliver water to a downstream senior water right can be waived in order to prevent wasting of the water resource. See *id.* As the *Watermaster Handbook* (Exhibit 20) states:
- Several Idaho Court cases have stipulated that the watermaster may disregard the call of a senior downstream water user if, in the judgment of the watermaster, the water will not reach its point of diversion or an inadequate amount of said water will reach its point of diversion (i.e.; a futile call.)
- Due to the seriousness of a futile call with respect to the Prior Appropriation Doctrine, the watermaster of WD95C should consult the Department when futile call conditions appear to exist.
43. In addition to its presence in the *Watermaster Handbook*, the futile call concept was explained at the August 4, 2016, Flood Control District meeting where Scarcello was present. Exhibit 11<sup>1</sup>.

### **Water District Operations in 2015**

44. In most years, the water supply in the Twin Lakes – Rathdrum Creek drainage is sufficient to minimize conflict among the owners of rights to store or divert water within the drainage. Testimony of Susan Ellis. However, the water supply in the Twin Lakes – Rathdrum Creek drainage was diminished in 2015 due to regional drought conditions. Testimony of Tim Luke. On July 9, 2015, Scarcello attended a special meeting of the WD95C advisory board

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<sup>1</sup> Exhibit 11 is titled *Twin Lakes – Rathdrum Creek Flood Control District No. 17 Minutes of the Meeting June 2, 2016*. However, it documents the commissioners adopting the meeting minutes from June 2, 2016, so it cannot be from June 2, 2016. It also documents an August 2, 2016, meeting between Scarcello and Finman. Gordon Stephenson, a Flood Control District commissioner, testified the meeting occurred on August 4, 2016. Exhibit 12, Scarcello's watermaster report, also documents that the Flood Control District meeting occurred on August 4, 2016.

to discuss the water delivery problems exacerbated by the ongoing drought. Exhibit 37. At the meeting, the advisory board discussed the Decree requirement that when evaporation and seepage losses from Twin Lakes exceed inflow, no water is to be passed through the Twin Lakes outflow structure, except for what is needed to satisfy Syltes' stockwater right, no. 95-0734. Exhibit 37. The meeting attendees also discussed the Decree provision that outflow from Twin Lakes cannot exceed inflow for the purpose of satisfying direct flow water rights. Exhibit 37. Thus, despite lacking specific guidance from the Department, by midsummer in 2015, if not earlier, Scarcello was aware of the Decree requirement to limit outflows when inflows cannot overcome seepage and evaporation losses.

45. During the late summer and fall of 2015, the water being passing through the Twin Lakes outlet structure into the Rathdrum Creek channel did not reach the Syltes' property. Testimony of Don Ellis; Exhibit 2. Even so, Scarcello continued to release water into the Rathdrum Creek channel without seeking advice from the Department regarding a possible futile call. Testimony of Don Ellis.

### **Water District Operations in 2016**

46. On May 31, 2016, the water level in Twin Lakes was 10.45 feet. Exhibit 18. The next day -- June 1, 2016 -- Scarcello increased the outflow from Twin Lakes to 12.88 cfs to deliver water to Syltes to satisfy their Rathdrum Creek water rights, including their irrigation water rights. Exhibit 18, Testimony of Colby Clark. The lake level also began declining on June 1, 2016. Exhibit 18. By June 2, 2016, the lake level fell below 10.4 feet, and it continued to decline in the ensuing days. Exhibit 18. The declining lake level signified that the ongoing release of water from Twin Lakes was likely depleting the Flood Control District's storage right, no. 95-0973. Exhibit 18; Testimony of Colby Clark.
47. Kiefer began measuring inflows into Twin Lakes on July 13, 2016. Exhibit 16. In 2016, Kiefer's measurements were the best information available regarding the inflow of water into Twin Lakes. Testimony of Terry Kiefer; Testimony of Morgan Case. Nevertheless, Scarcello discounted the usefulness of Kiefer's measurements because of Kiefer's lack of training and because he does not always measure the flow of all the tributaries to Twin Lakes. Testimony of Laurin Scarcello.
48. Because of Kiefer's measurements, by July 13, 2016, Scarcello knew that outflows from Twin Lakes were exceeding inflows from Fish Creek, the most significant tributary to Twin Lakes. Testimony of Terry Kiefer; Exhibit 16. However, on July 13, 2016, inflows from other Twin Lakes tributaries may have been sufficient to keep the total inflow greater than the outflow from Twin Lakes. Testimony of Terry Kiefer. By July 21, 2016, the outflow from Twin Lakes exceeded the total inflow from Fish Creek and the other tributaries. Testimony of Terry Kiefer, Exhibit 16. Through the end of July and all of August 2016, outflows from Twin Lakes continued to exceed inflows from Fish Creek and other tributary streams. Testimony of Terry Kiefer; Testimony of Morgan Case; Exhibit 16.



49. The August 4, 2016, meeting minutes of the Flood Control District meeting (Exhibit 11) state that Scarcello estimated losing two-thirds of the flow of Rathdrum Creek as it crossed Finman's property.
50. On August 4, 2016, the Flood Control District "moved to instruct Laurin Scarcello to close the Twin Lakes outlet gates to around 10 CFS out and monitor." Exhibit 11; Exhibit 12; Testimony of Terry Kiefer; Testimony of Gordon Stephenson. Neither the Flood Control District meeting minutes (Exhibit 11) nor Scarcello's report (Exhibit 12) provide a reason for settling on 10.0 cfs. On August 8, 2016, Scarcello adjusted the outflow from Twin Lakes to about 9.85 cfs. Exhibit 17; Exhibit 12. From August 8, 2016, to the middle of September 2016, the outflow from Twin Lakes steadily declined to a low of 1.35 cfs. Exhibit 18. Scarcello adjusted the Twin Lakes outflow downward at least twice more in August and early September 2016. Exhibit 12. The lake level continued to decline steadily until October 6, 2016. Exhibit 11.
51. Because Scarcello does not keep water delivery records, it is uncertain exactly how much water the Syltes received to satisfy their water right(s) during July and the first part of August in 2016. Testimony of Morgan Case.
52. In his watermaster report (Exhibit 12), Scarcello reported that on August 20, August 28, and September 1, 2016, none of the flow of Rathdrum Creek that entered Finman's property left Finman's property in the Rathdrum Creek channel. Thus, no Rathdrum Creek water was available to satisfy Syltes' stockwater right, no. 95-0734, from at least August 20, 2016, to September 1, 2016.
53. On August 29, 2016, the WD95C Advisory Board adopted a resolution that "when the Watermaster is activated, and the lake level is below 10-4, the dam outflow will not exceed the tributary inflow, in accordance with the decree." Exhibit 10. Scarcello was the lone dissenting vote. Testimony of Colby Clark. The WD95C Advisory Board adopted the resolution because it was concerned that Scarcello was violating the Decree by releasing storage water to satisfy Rathdrum Creek natural flow water rights. Testimony of Colby Clark.
54. The WD95C Advisory Board can advise the watermaster, Scarcello, but cannot direct his actions regarding the distribution of water. Testimony of Tim Luke; Testimony of Terry Kiefer; Testimony of Colby Clark.
55. On August 30, 2016, the Department received Clark's Complaint requesting removal of Scarcello as watermaster of WD95C pursuant to Idaho Code § 42-605(9). Exhibit 8.
56. On September 20, 2016, the Department issued Scarcello a letter with a detailed set of written instructions ("Instructions") to "clarify your duties as watermaster and resolve any potential discrepancies between your regulation and the legal requirements of the Decree . . . ." Exhibit 19. The Instructions describe how the two Twin Lakes storage water rights and the natural flow water rights from Rathdrum Creek, Twin Lakes, and Twin Lakes' tributaries are to be administered. The Instructions required that, if "release of all 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."

57. In September and October of 2016, futile call conditions in Rathdrum Creek prevented the delivery of water to Syltes to satisfy stockwater right no. 95-0734. Testimony of Morgan Case. However, there is no record that Scarcello sought a formal futile call determination by the Department. Testimony of Morgan Case.
58. After October of each year, the watermaster of WD95C does not actively distribute water until May or so of the next year. Testimony of Laurin Scarcello. Therefore, there has been little time to evaluate Scarcello's response to the Instructions. What is discernible is that in early October Scarcello complied with the portion of the Instructions requiring him to limit outflows from Twin Lakes to no more than inflows while the lake level is declining. Testimony of Morgan Case. However, the fact that water was being released at all is also significant. Scarcello violated the Instructions by continuing to allow water to flow from Twin Lakes while the lake level continued to decline and while Sylte could not receive water due to the losses occurring in the Rathdrum Creek channel on Finman's property without consulting with the Department about a futile call with respect to delivery of right no. 95-0734. Testimony of Morgan Case; Exhibit 18. As Scarcello explained:

I let that water run a little bit longer this year than maybe I should've, but I wanted those leaks [in Rathdrum Creek on Finman's property] documented in terms of measurement.

59. Scarcello has stated in the presence of Department staff that he likes to keep water in Rathdrum Creek for wildlife and other purposes. Testimony of Morgan Case. Scarcello also believes the Flood Control District has an obligation to see that the 1875 Sylte water right, no. 95-0734, is satisfied. Testimony of Laurin Scarcello.
60. Gordon Sylte is a Flood Control District commissioner. Testimony of Laurin Scarcello.
61. Scarcello admits that working as watermaster for WD95C and as dam tender for the Flood Control District could be a conflict of interest. Testimony of Laurin Scarcello. But WD95C had difficulty finding someone, other than Scarcello, willing to be the watermaster. Testimony of Laurin Scarcello; Testimony of John Sylte.

### **Laurin Scarcello**

62. Scarcello is a deeply-rooted community member with an active, hard-working commitment to community well-being. Testimony of Laurin Scarcello.
63. Scarcello has strong personal misgivings about the Decree. Testimony of Terry Kiefer; Testimony of Susan Ellis; Testimony of Laurin Scarcello. Scarcello believes Rathdrum Creek should not be allowed to go dry because water in the creek is valuable for aesthetic

and wildlife purposes and because a dry creek bed impedes water right delivery by absorbing water. Testimony of Terry Kiefer; Testimony of Laurin Scarcello. Scarcello also believes the Decree does not adequately consider the needs of Rathdrum Creek water users, such as Syltes. Testimony of Laurin Scarcello. Scarcello also believes keeping the lake level high financially harms the Easterday family, which owns low-lying ranch land at the upper end of the upper lake, along Fish Creek. Testimony of Laurin Scarcello.

64. Because of his misgivings about the Decree, Scarcello believes the Twin Lakes - Rathdrum Creek watershed community should work together to implement "common sense" water administration, regardless of the Decree. Testimony of Laurin Scarcello. Scarcello thinks he, as watermaster, has some authority to interpret and implement the Decree to achieve a better outcome for the community. On this point, Scarcello's testimony included the following exchange:

Clark: "Can you reinterpret the decree and the administration of water rights because you do not agree with it?"

Scarcello: "Yes."

Scarcello's testimony at the hearing also included the following statements about the Decree:

"This Decree is not in the best interest of the community."

"This community has been saddled with a poor law slash Decree, but has managed to make things work."

"This Decree and lake level needs review from top to bottom."

"The 1989 Decree is incomplete and poorly thought out and should be considered special interest."

"The 1989 Decree, which we are obligated to follow, needs to be revisited, specifically the 10.4 lake level on the dam gage. This is a flood control reference and in no way a summer pool. All laws are subject to some degree of interpretation. *Roe vs. Wade* and capital punishment are continually debated to this day, but ultimately each person has to follow your own moral ethics. I believe I have followed our laws and applied them over a broader spectrum, as they should be."

### **APPLICABLE STATUTES**

Idaho Code § 42-602 states:

The director of the department of water resources shall have direction and control of the distribution of water from all natural water sources within a water district to the canals, ditches, pumps and other facilities diverting therefrom. Distribution of

water within water districts created pursuant to section [42-604](#), Idaho Code, shall be accomplished by watermasters as provided in this chapter and supervised by the director.

The director of the department of water resources shall distribute water in water districts in accordance with the prior appropriation doctrine. The provisions of [chapter 6, title 42](#), Idaho Code, shall apply only to distribution of water within a water district.

Idaho Code § 42-605(9) states:

The director of the department of water resources may remove any watermaster whenever such watermaster fails to perform the watermaster's duty, upon complaint in that respect being made to the director in writing, by one (1) person owning or having the right to the use of a water right in such district, which right has been adjudicated or decreed by the court or is represented by valid permit or license issued by the department of water resources provided, that upon investigation the director, after a hearing with the other water users of said district, which shall be held in the district or at some location convenient to the water users of the district, finds such charge to be true, and the director may appoint a successor for the unexpired term.

## ANALYSIS

### Watermaster's Duty

The statutory standard for removing a watermaster is whether he has failed to perform his duties. Idaho Code § 42-609(5). The watermaster's duties are to distribute water in accordance with the Prior Appropriation Doctrine. Idaho Code § 42-602. In WD95C, the Decree establishes the water rights and their priorities so that water can be distributed in accordance with the Prior Appropriation Doctrine. Therefore, it is Scarcello's duty as watermaster to distribute water in accordance with the Decree.

To distribute water according to the Decree in the summer and fall, Scarcello must attempt to satisfy Syltes' stockwater right from Rathdrum Creek. To satisfy Syltes' right, Scarcello must allow up to the amount of tributary inflow to pass through Twin Lakes and into Rathdrum Creek. Once the water in Rathdrum Creek is sufficient to satisfy Syltes' right, Scarcello must distribute the remaining tributary inflow into Twin Lakes to other water rights by priority. If Syltes' water right cannot be satisfied by the natural inflow to Twin Lakes because the water sinks in the Rathdrum Creek channel, Scarcello should seek a futile call determination from the Department in accordance with the Instructions so he can stop seeking to satisfy Syltes' right and can distribute the water to others in priority. The Decree prohibits Scarcello from using water stored in Twin Lakes to satisfy Syltes' right or to maintain Rathdrum Creek flows for instream values.



## **Complaint Allegations**

**Complaint 1: Outflows from the Twin Lakes dam exceed inflows from Fish Creek. As of August 4, 2016, inflows were 6.6 cfs from the Fish Creek Tributary and outflows were 12.5 cfs and outflow has continued to exceed inflow continuously before and after that time.**

Outflows from Twin Lakes consistently exceeded inflows from Fish Creek and other Twin Lakes tributaries in July and August of 2016. *See Finding of Fact No. 48.*

**Complaint 2: On August 4<sup>th</sup> and continuing for a time thereafter, more water than necessary is being released to fulfill Sylte Water right 95-0734 ( 0.07 cfs at the point of diversion).**

Scarcello does not keep water delivery records. Therefore, it is uncertain whether Syltes' stockwater right was fulfilled in July or the first part of August 2016. Scarcello estimated on August 4, 2016, that two-thirds of the flow of Rathdrum Creek was lost as it crossed Finman's property. By August 20, 2016, none of the flow of Rathdrum Creek left Finman's property. Scarcello reduced the outflow from Twin Lakes on August 16, 2016, and September 1, 2016, but did not seek advice from the Department regarding a futile call. The fact that Scarcello continued to distribute water into Rathdrum Creek from Twin Lakes and did not seek advice from the Department regarding a futile call even though no water could get to Syltes' ranch to satisfy right no. 95-0734 means that Scarcello allowed more water to be released from Twin Lakes than was necessary. Scarcello admitted to this. *See Finding of Fact No. 58.*

**Complaint 3: Storage water right 95-0975 (currently owned by Flood Control) is currently being used for water delivery to members of the Flood Control board, for stream bed maintenance, and to keep the creek flowing for the beautification of the community, in contravention of its decreed purposes, which are as stated in the District court ruling:**

- a. For flood control purposes- which do not apply at this time.**
- b. For the benefit of recreation, fish and wildlife of Twin Lakes (this purpose specifically applies to Twin Lakes and not to Rathdrum Creek as no claim for this purpose for Rathdrum Creek was filed).**

In August of 2016, the Flood Control District directed Scarcello to release 10 cfs of water from Twin Lakes, even though that amount exceeded WD95C's best available information about inflows to Twin Lakes. The result was a gradual decline in the Twin Lakes water level within the storage space allocated for the Flood Control District's water right, no. 95-0973. Therefore, the Flood Control District's stored water was being released at its direction.

The Decree is clear that the Flood Control District's storage water right is not to be depleted to satisfy downstream natural flow rights, such as right no. 95-0734, or to maintain instream flows for wildlife and recreation purposes. However, as noted in Finding of Fact No. 36, the Flood Control District believes it can use its storage water right for other instream purposes, such as keeping the Rathdrum Creek channel clear of debris. Because there is no stated purpose in the Flood Control District's meeting minutes or in Scarcello's report, it is not clear why the Flood Control District directed Scarcello to release 10 cfs into the Rathdrum Creek channel in August

of 2016. Clearing debris from the Rathdrum Creek channel does not make sense for that time of year, nor does any other public safety objective consistent with the Flood Control District's mission. To dispel the appearance of a conflict of interest, Scarcello should have explained in his report, Exhibit 12, how the 10 cfs release comported with the Decree. Because no written explanation is provided, and because testimony at the hearing provided no satisfactory explanation, the only conclusion can be that Scarcello's action was contrary to the Decree as it appeared.

**Complaint 4: The Flood Control district is acting outside of their stated purpose in statute and formational documents/ mission statement. For reference, Idaho Code Section 42—3102, states: “POLICY OF STATE. It is hereby recognized by the legislature that the protection of life and property from floods is of great importance to this state. It is therefore declared to be the policy of the state to provide for the prevention of flood damage in a manner consistent with the conservation and wise development of our water resources and thereby to protect and promote the health, safety and general welfare of the people of this state.”** The Flood Control District is instead being used to ensure water delivery to Flood control board members, friends, family, neighbors and for purposes outside the mission and objective of flood control and is directing the watermaster to release water for water delivery and other purposes outside the flood control concerns. John Eixenberger admitted as much in the presence of Morgan Case when he attended the Water District meeting on 2016-8-29.

Although the Flood Control District did, in August of 2016, direct Scarcello to set the outflow from Twin Lakes at a level that depleted its storage, the exact purpose of the Flood Control District's decision is not clear from the record. Because of the time of year, the need to maintain a flow of water in the Rathdrum Creek channel to keep the channel clear of debris that could cause flooding later in the year is dubious. In fact, in his watermaster report, Scarcello stated that he left a small flow in Rathdrum Creek on September 1, 2016, “to maintain creek bed trouble spots” on Finman's property. Distributing water into the creek bed to keep it wet is not authorized by the Decree, nor does it make sense for flood control purposes. If water equal to the inflow into Twin Lakes could not pass Finman's property to satisfy Syltes' stockwater right, Scarcello should have sought a futile call determination from the Department so he could have conserved water in Twin Lakes for other purposes recognized in the Decree.

**Complaint 5: Only TLIA and BoR have a right 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 water from Twin Lakes only if the diversions do not injure the storage water rights in Twin Lakes (FD page xix).**

Conclusion of Law no. 12 from the Decree 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.

The Twin Lakes Improvement Association owns right no. 95-0973. The Flood Control District owns right no. 95-0974.

**Complaint 6: The watermaster is not acting in accordance with watermaster guidelines contained in the watermaster handbook, but is instead acting outside existing law decreed in the 1989 District Court ruling, in contravention of established water rights and priorities, and is facilitating excessive water release from Twin Lakes.**

This allegation can be divided into two parts. First, is Scarcello's behavior as watermaster consistent with the Department's general guidance offered in the *Watermaster Handbook*? At the hearing, there was sufficient evidence to conclude that Scarcello does not comply with the *Watermaster Handbook* guidance on daily record-keeping of water deliveries and on water measurement. However, nonconformance with some of the guidance in the *Watermaster Handbook* is not necessarily a failure by Scarcello. For example, the *Watermaster Handbook* recommends the watermaster conduct water measurements needed for water distribution. Scarcello conducts no water measurements personally. However, measurements are accomplished. Kiefer measures inflow to Twin Lakes and relays the data to Scarcello. Somewhat more concerning than the measurement situation, however, is Scarcello's failure to keep daily water delivery records. With the water measurements, the task is being accomplished by someone, just not by Scarcello. As for the water delivery records, nobody is accomplishing the task. Water delivery records are critical to establishing that a watermaster has performed his or her duties diligently and credibly. The fact that Scarcello does not keep water delivery records seriously undermines the ability to ascertain that Scarcello has upheld the Decree. Even more concerning than the lack of delivery records is that by August 20, 2016, Scarcello was aware that water he released into the Rathdrum Creek channel would not reach Syltes' ranch. Scarcello was also aware of the futile call concept set forth in the *Watermaster Handbook*. Nevertheless, Scarcello continued to distribute water into the Rathdrum Creek channel without seeking a futile call determination from the Department. While the *Watermaster Handbook's* guidance regarding futile call conditions is phrased permissively -- "[T]he watermaster may disregard the call of a senior downstream water user . . . ." -- Scarcello has not satisfactorily explained why he did not seek a futile call determination in order to conserve water for other purposes authorized by the Decree. Scarcello's puzzling judgment regarding futile call conditions led to the Department's more strongly-worded Instructions:

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 second part of the allegation is whether Scarcello's behavior as watermaster is inconsistent with the Decree. During the summer of 2016, Scarcello allowed the Flood Control District's

storage water to be gradually released from Twin Lakes. The Decree prohibits use of storage water to satisfy rights that divert the natural flow within the Twin Lakes - Rathdrum Creek drainage. It also prohibits the use of storage water to maintain instream flows in Rathdrum Creek. Scarcello suggested the release of storage water may have been for some Flood Control District purpose. *See* Findings of Fact 36 and 37. However, the record provides no satisfactory reason for releasing the storage water in the summer and fall for a purpose consistent with the Flood Control District's public safety mission. Given the lack of such an explanation, there is no basis on which to justify Scarcello's releases of storage water into the Rathdrum Creek channel. Scarcello's actions were inconsistent with the Decree.

**Complaint 7: The operation by the watermaster/dam controller of the Twin Lakes Dam is not in alignment with the published "General Operation Plan at Twin Lakes" published in 1977, which are also mostly aligned with the 1989 District Court ruling (notwithstanding the Operation Plan predates the ruling). This has resulted in very low water levels for Twin Lakes homeowners in the summer time, the reduced usefulness of the lake, inability to launch and utilize watercraft and docks, lack of lake desirability, loss of rental income, diminished property values, etc.**

The Decree, not the Plan, establishes the water rights for the Twin Lakes – Rathdrum Creek drainage. The Department and the watermaster are obligated to distribute water in accordance with the Decree, not the Plan.

**Complaint 8: Twin Lakes homeowners and water right holders are claiming financial damages as a result of deliberate lake mismanagement and disregard of fiduciary duty to manage lake levels in compliance with established law, water rights, and priorities.**

The watermaster's duty, as stated in Idaho Code § 42-602, is to distribute water in accordance with the Prior Appropriation Doctrine. The law describes no fiduciary duty on the part of the watermaster to make judgments based on the financial interests of anyone. Evaluating any financial responsibility is beyond the scope of this proceeding.

### **Scarcello's Defense**

At the hearing, Scarcello defended his actions by explaining that the following circumstances complicate water distribution in WD95C and make it difficult for him to perform his watermaster duties:

- Lack of regular, accurate measurement of inflows to Twin Lakes
- Significant water loss in the Rathdrum Creek channel
- Until September 20, 2016, lack of detailed instruction from the Department
- Flood Control District influence
- Scarcello's personal misgivings about the Decree

Regarding the measurement challenge, Scarcello honestly made it clear when he assumed the watermaster role that he did not have time to conduct the necessary measurements, and the water district members elected him anyway. WD95C agreed to allow Scarcello to rely on

measurements performed by others, such as Kiefer. However, in 2016 Scarcello chose not to rely on Kiefer's measurements, even though they were the best information available. Instead, Scarcello relied on the direction of the Flood Control District. In fact, in his testimony Scarcello repeatedly attempted to cast doubt on the quality of Kiefer's measurements, even though he needed Kiefer to accomplish them. Despite being critical of Kiefer's efforts, Scarcello made no effort to assist Kiefer or to improve upon his work. By not relying on Kiefer's measurements, Scarcello failed to base his water distribution decisions on the best data available to him. Scarcello's unwillingness to rely on Kiefer's assistance, despite agreeing to do so and despite having no better information, casts a long shadow of doubt on his commitment to the Decree and his accountability to WD95C.

Regarding the significant loss of water in the Rathdrum Creek channel, Scarcello's participation in the attempts to modify the creek channel puts him at odds with the Department's direction that the watermaster should not perform stream channel maintenance work. Scarcello does not claim to have conducted the stream channel work on behalf of a specific entity, such as WD95C or the Flood Control District. Nevertheless, Scarcello's participation reinforces that he is either unable to perceive the appearance of a conflict of interest in his roles or that he subordinates his watermaster role to his other roles or to his own perception of propriety.

Regarding the lack of detailed instruction from the Department, such instruction did not appear necessary until drought conditions brought scrutiny upon Scarcello's water distribution decisions. Having such instructions earlier would have made evaluation of Scarcello's performance much easier because the instructions establish a clear standard of performance. However, in the short time the Instructions were available to Scarcello, he did not follow them as well as should have been expected. Instead, according to the testimony of Morgan Case, and by Scarcello's own admission, Scarcello distributed water into Rathdrum Creek in September and October of 2016 while the lake level continued to decline and while the Syltes could not receive water due to the losses occurring in the Rathdrum Creek channel on Finman's property. Under such conditions, the Instructions are clear that Scarcello should have consulted the Department regarding determination of a futile call with respect to delivery of right no. 95-0734.

The Flood Control District's influence occupies a central place in this matter. Whether intended or not, the Flood Control District exerts a strong influence on Scarcello's performance as watermaster of WD95C. The August 4, 2016, Flood Control District meeting is emblematic of the Flood Control District's influence over Scarcello. According to the August 4, 2016, Flood Control District minutes (Exhibit 11), the commissioners discussed setting the gate "for an outflow as recommended by the 'Water Master [sic].'" Had the Flood Control District left the outflow determination to Scarcello, he would have been empowered to base his determination on the provisions of the Decree. However, the Flood Control District ultimately "moved to instruct" Scarcello to implement a 10 cfs outflow. As Scarcello testified, because of his employment relationship with the Flood Control District, he does not feel empowered to contravene a Flood Control District directive, even if it may be inconsistent with his duties as watermaster. In essence, when distribution of water pursuant to the Decree conflicts with the Flood Control District's interest, Scarcello is not able to perform on behalf of WD95C. Scarcello demonstrated this conflict in 2016 by failing to limit the outflow from Twin Lakes to match the best available information about inflows when instructed by the Flood Control District to do otherwise.

Regarding Scarcello's personal misgivings about the Decree, the quotes in Finding of Fact no. 64 show that Scarcello has little admiration for the Decree. Throughout his testimony, Scarcello remained defiant of the authority of the Decree, even though it establishes the water rights he was elected to distribute. His attitude makes it difficult to believe that Scarcello would uphold and defend the integrity of the Decree by following it in the future.

### **CONCLUSIONS OF LAW**

1. Clark owns Water Right No. 95-876, thus satisfying the Idaho Code § 42-605(9) qualification for filing the Complaint.
2. Pursuant to Idaho Code § 42-602, the Department "shall distribute water in water districts in accordance with the prior appropriation doctrine." The Decree established the water rights and their priorities within WD95C. Therefore, the Director must see to the distribution of water in WD95C as determined in the Decree.
3. While the distribution of water within a water district is accomplished by the district's watermaster, the watermaster's actions are supervised and directed by the Director of the Department. Idaho Code §§ 42-602.
4. The Department has discretion in deciding whether or not to remove a watermaster if the Department finds that the watermaster has failed to perform his duties. Idaho Code § 42-605(9). The word "may" in Idaho Code § 42-605(9) indicates a duty that is permissive, not mandatory. *Rife v. Long*, 127 Idaho 841, 849, 908 P.2d 143, 150 (1995).
5. Scarcello failed to perform his watermaster duties in 2016. In September and October of 2016, Scarcello continued to deliver water into the Rathdrum Creek channel when it could not satisfy Syltes' water right, no. 95-0734. Scarcello should have sought a futile call determination as required by the Instructions, which would have relieved him of the obligation to satisfy Syltes' water right and allowed him to distribute the water to others in priority. In 2016, Scarcello also violated the Decree by turning water from the Flood Control District's storage water right into the Rathdrum Creek channel without clear justification that doing so served any purposes other than those prohibited by the Decree.
6. Scarcello disagrees with the Decree's provisions and cannot separate his duties as watermaster of WD95C from his allegiance to his employer, the Flood Control District, when the interests of the two entities do not align. For these reasons, it is unlikely Scarcello will alter his performance as watermaster to follow the Decree and the Department's Instructions in the future.
7. The Department should remove Scarcello from his position as watermaster of WD95C for failure to perform his duties in 2016 and for lack of confidence that Scarcello will be able to implement the Decree by following the Department's Instructions in the future. Because the watermaster does not usually actively distribute water in WD95C until after being elected at

the annual meeting in May each year, the Department should evaluate whether it is necessary to appoint a successor for the unexpired term, pursuant to Idaho Code § 42-605(9).

**ORDER**

IT IS HEREBY ORDERED that Laurin Scarcello is REMOVED as watermaster of Water District 95C. The hearing officer recommends that the Department consider whether it is necessary to appoint a successor for the unexpired term, pursuant to Idaho Code § 42-605(9).

Dated this 3rd day of January 2017.



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Shelley W. Keen  
Hearing Officer



## **CERTIFICATE OF SERVICE**

I hereby certify that on January 4, 2017, I mailed a true and correct copy, postage prepaid, of the foregoing **PRELIMINARY ORDER REMOVING A WATERMASTER** to the person (s) listed below:

**RE: Clark's Request for the Removal of Water District No. 95C Watermaster**

**COLBY CLARK  
9836 W TWIN LAKES RD  
RATHDRUM ID 83858**

**LAURIN SCARCELLO  
22389 N KEVIN RD  
RATHDRUM ID 83858**

**SUSAN ELLIS  
PO BOX 804  
RATHDRUM ID 83858**

**DON ELLIS  
PO BOX 804  
RATHDRUM ID 83858**

**PAUL FINMAN  
764 S CLEARWATER LOOP  
POST FALLS ID 83854**

**TERRY KEIFER  
16846 N RESERVOIR RD  
RATHDRUM ID 83858**

**MICHAEL DEMPSEY  
3224 S WHIPPLE RD  
SPOKANE VALLEY WA 99206**

**CURRAN DEMPSEY  
5011 S CHENEY PLAZA RD  
ROSALIA WA 99170**

**GORDON STEPHENSON  
21228 N CIRCLE RD  
RATHDRUM ID 83858**

**SUSAN GOODRICH  
8626 W SYLTE RANCH RD  
RATHDRUM ID 83858**

**JOHN SYLTE  
8419 W SYLTE RANCH RD  
RATHDRUM ID 83858**

  
\_\_\_\_\_  
**Jean Hersley  
Technical Records Specialist II**



## **EXPLANATORY INFORMATION TO ACCOMPANY A PRELIMINARY ORDER**

**(To be used in connection with actions when a hearing was held)**

The accompanying order is a **Preliminary Order** issued by the Idaho Department of Water Resources (Department) pursuant to section 67-5243, Idaho Code. **It can and will become a final order without further action of the Department unless a party petitions for reconsideration or files an exception and brief as further described below:**

### **PETITION FOR RECONSIDERATION**

Any party may file a petition for reconsideration of a preliminary order with the hearing officer within fourteen (14) days of the service date of the order as shown on the certificate of service. **Note: the petition must be received by the Department within this fourteen (14) day period.** The hearing officer will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5243(3) Idaho Code.

### **EXCEPTIONS AND BRIEFS**

Within fourteen (14) days after: (a) the service date of a preliminary order, (b) the service date of a denial of a petition for reconsideration from this preliminary order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this preliminary order, any party may in writing support or take exceptions to any part of a preliminary order and may file briefs in support of the party's position on any issue in the proceeding to the Director. Otherwise, this preliminary order will become a final order of the agency.

If any party appeals or takes exceptions to this preliminary order, opposing parties shall have fourteen (14) days to respond to any party's appeal. Written briefs in support of or taking exceptions to the preliminary order shall be filed with the Director. The Director retains the right to review the preliminary order on his own motion.

### **ORAL ARGUMENT**

If the Director grants a petition to review the preliminary order, the Director shall allow all parties an opportunity to file briefs in support of or taking exceptions to the preliminary order and may schedule oral argument in the matter before issuing a final order. If oral arguments are to be heard, the Director will within a reasonable time period notify each party of the place, date and hour for the argument of the case. Unless the Director orders otherwise, all oral arguments will be heard in Boise, Idaho.



### **CERTIFICATE OF SERVICE**

All exceptions, briefs, request for oral argument and any other matters filed with the Director in connection with the preliminary order shall be served on all other parties to the proceedings in accordance with Rules of Procedure 302 and 303.

### **FINAL ORDER**

The Department will issue a final order within fifty-six (56) days of receipt of the written briefs, oral argument or response to briefs, whichever is later, unless waived by the parties or for good cause shown. The Director may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order. The Department will serve a copy of the final order on all parties of record.

Section 67-5246(5), Idaho Code, provides as follows:

Unless a different date is stated in a final order, the order is effective fourteen (14) days after its service date if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:

- (a) The petition for reconsideration is disposed of; or
- (b) The petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.

### **APPEAL OF FINAL ORDER TO DISTRICT COURT**

Pursuant to sections 67-5270 and 67-5272, Idaho Code, if this preliminary order becomes final, any party aggrieved by the final order or orders previously issued in this case may appeal the final order and all previously issued orders in this case to district court by filing a petition in the district court of the county in which:

- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or
- iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days of this preliminary order becoming final. See section 67-5273, Idaho Code. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.