

RECEIVED
FEB 16 2017
IDWR / NORTH

Michael P. Lawrence [ISB No. 7288]
Jack W. Relf [ISB No. 9762]
GIVENS PURSLEY LLP
601 West Bannock Street
P.O. Box 2720
Boise, Idaho 83701-2720
Office: (208) 388-1200
Fax: (208) 388-1300
www.givenspursley.com
Attorneys for Susan Goodrich and John Sylte

**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

**SYLTE'S APPEAL AND EXCEPTIONS
TO AMENDED PRELIMINARY
ORDER REMOVING A
WATERMASTER**

Susan Goodrich and John Sylte (together, "Sylte"), by and through their counsel of record, Givens Pursley LLP, and pursuant to Idaho Code Section 67-5245 and Rule 730 of the Rules of Procedure, IDAPA 37.01.01.730, of the Idaho Department of Water Resources ("IDWR" or "Department"), hereby appeal to the Director of IDWR and take exceptions to the *Order on Reconsideration; Amended Preliminary Order Removing a Watermaster ("Amended Order")*, served on February 2, 2017.

Sylte appeals and takes exceptions to the *Amended Order's* findings, conclusions, analyses, and interpretations that: (i) are contrary to the existing water rights decree; and (ii) could be interpreted as final determinations as to the administration of water rights in Water District 95C—specifically water right no. 95-0734. To protect their rights from potentially prejudicial determinations in the *Amended Order*, Sylte respectfully requests that the Director set

**SYLTE'S APPEAL AND EXCEPTIONS TO AMENDED
PRELIMINARY ORDER REMOVING A WATERMASTER - 1**
13461-3; 13551564_10

aside the *Amended Order* and issue a new order that eliminates and disclaims such findings, conclusions, analyses, and interpretations.¹

To be clear, Sylte does not appeal or take exceptions to the *Amended Order's* ultimate determination removing Water District 95C's Watermaster. Sylte simply seeks to ensure that water rights and parties' positions concerning water rights administration are not prejudiced by findings, conclusions, analyses, and interpretations in the *Amended Order* that could be interpreted to be the Department's final determinations as to how to implement the existing decree or how to administer water rights in Water District 95C.

COURSE OF PROCEEDINGS

On or about August 30, 2016, the Department received a written complaint requesting removal of the Watermaster in WD 95C.

On October 5, 2016, the Director of the Department issued a *Notice of Hearing; Scheduling Order* ("Notice") which, among other things, notified potentially interested parties that a hearing would be held "to gather testimony from the Complainant, the Watermaster, and others to determine whether the Director should remove the Watermaster pursuant to Section 42-605(9), Idaho Code." *Notice* at 1. The *Notice* also announced that the hearing officer would be the Department's Water Right Permits Section Manager, Shelley Keen. *Id.* The Department conducted the hearing on November 3, 4, and 10, 2016.

On January 3, 2017, the Hearing Officer issued his *Preliminary Order Removing a Watermaster* ("Order"), which was served on January 4, 2017. The *Order* contained a number

¹ Susan Goodrich and John Sylte, together with Gordon Sylte and Sylte Ranch Limited Liability Company, have concurrently filed a *Petition for Declaratory Ruling* for the purpose of initiating a proceeding to determine how the Department must administer water right no. 95-0734.

of findings of fact, conclusions of law, analyses, and interpretations concerning the administration of water rights in Water District 95C ("WD 95C") and the *Final Decree, In the Matter of the General Distribution of the Rights to the Use of the Surface Waters of Twin Lakes, Including Tributaries and Outlets*, Case No. 32572 (1st Jud. Dist. Ct. April 20, 1989) ("*Decree*").

On January 18, 2017, Sylte timely filed its *Petition for Reconsideration of Preliminary Order Removing a Watermaster* ("*Petition*") in which Sylte objected to, and asked the Hearing Officer to reconsider, remove, and disclaim, "all language in the *Order* purporting to make findings, conclusions, analysis, and/or interpretations of the *Decree* and the proper administration of water rights in Water District 95C, specifically water right no. 95-0734." *Petition* at 5. Sylte contended that "[s]uch interpretations of the *Decree* should be removed from the *Order* because they are wrong, and because they are not necessary or appropriate in this proceeding." *Petition* at 2.

The Hearing Officer issued his *Amended Order* in response to Sylte's *Petition*. In the "Answer to the *Petition*" section of the *Amended Order*, he stated:

The purpose of this proceeding is to determine whether the watermaster of Water District 95C ("WD95C"), Laurin Scarcello ("Scarcello"), should be removed pursuant to Idaho Code § 42- 605(9). Some understanding of the WD95C water rights, which were confirmed in the *Decree*, is necessary to understand and evaluate Scarcello's performance as watermaster. The Department provided its interpretation of the *Decree* in the September 20, 2016, letter the Department sent to Scarcello with a detailed set of written instructions ("*Instructions*"). The Preliminary Order can be modified in several places to rely on the *Instructions* where an interpretation of the *Decree* is required. Thus, the Hearing Officer amends the Preliminary Order to state as follows:

Amended Order at 2. Following the colon at the end of the text quoted above, the *Amended Order* set forth a substantially revised version of the *Order* that removes or alters many, but not all, of the findings, conclusions, analyses, and interpretations to which Sylte's *Petition* objected.

Attached to the *Amended Order* was a copy of the Department's "Explanatory Information to Accompany an Order Denying Petition for Reconsideration."

Sylte now appeals to the Director and takes exceptions to the *Amended Order*.

FACTUAL BACKGROUND

Sylte provides the following factual background to assist the Director's understanding of WD 95C's unique history and hydrology.

WD 95C includes Twin Lakes and Rathdrum Creek. The 1875 water right no. 95-0734 owned by the Sylte family's business is the most senior water right in WD 95C, as determined in a general stream adjudication decree entered in 1989.²

Following a court trial, on February 22, 1989, First Judicial District Court Judge Richard Magnuson issued his *Memorandum Decision, In the Matter of the General Distribution of the Rights to the Use of the Surface Waters of Twin Lakes, Including Tributaries and Outlets*, Case No. 32572 (1st Jud. Dist. Ct. Feb. 27, 1989) ("*Memorandum Decision*").

Among other things, the *Memorandum Decision* made findings and conclusions with respect to parties' objections to the Department's January 4, 1985 *Proposed Finding of Water Rights in the Twin Lakes – Rathdrum Creek Drainage Basin* ("*Proposed Finding*"). Judge Magnuson determined that it was necessary to "amend the Director's proposed findings of fact and proposed conclusions of law [in the *Proposed Finding*] to reflect and effectuate this Court's determinations regarding No. 95-0734, as set forth in this memorandum decision." *Memorandum*

² Water right no. 95-0734 was decreed to John and Evelyn Sylte, whose grandson is the John Sylte participating in this proceeding. Their son, Gordon Sylte, is the manager of Sylte Ranch Limited Liability Company, the current claimant of water right no. 95-0734 in the Coeur d'Alene-Spokane River Basin Adjudication ("CSRBA"). Gordon's wife is Susan Goodrich, who is participating in this proceeding. John, Gordon, and Susan have claimed a number of water rights in the CSRBA.

Decision at 21 (emphasis added). Accordingly, he instructed the Department to “prepare drafts of such proposed amendments.” *Id.*

On April 19, 1989, Judge Magnuson issued the *Decree*, in which he stated that “the *Memorandum Decision* is adopted as findings of fact and conclusions of law . . . , and is incorporated herein by reference.” *Decree* at 2-3. Judge Magnuson also stated that “[t]he *Memorandum Decision* directed IDWR to amend the general findings and conclusions in the Proposed Finding in accordance with the *Memorandum Decision*.” *Decree* at 3. He attached a copy of the amended *Proposed Finding* to the *Decree*, with insertions underlined and deletions struck through.

As mentioned, the Sylte’s family business owns the most senior right in WD 95C—the 1875 water right no. 95-0734 diverted from Rathdrum Creek (tributary to sinks). The *Decree* recognized a number of junior priority water rights held by others with sources of Twin Lakes and Rathdrum Creek, two of which are storage water rights associated with Twin Lakes: nos. 95-0973 and 95-0974, which are 1906 priority rights currently held by Twin Lakes-Rathdrum Creek Flood Control District No. 17 and Twin Lakes Improvement Association, respectively.³

In his *Memorandum Decision*, Judge Magnuson made the following findings about the history and hydrology of the Twin Lakes and Rathdrum Creek water system:

Twin Lakes, originally known as Fish Lakes, is a body of water comprised of two lakes joined by a channel which flows from the upper lake to the lower lake. Fish Creek is the major tributary feeding Twin Lakes, and there are a number of smaller tributaries which also feed the lakes, some of which flow into the Upper Lake and some of which flow into the Lower Lake. Rathdrum Creek is

³ At places in the *Decree* and *Memorandum Decision*, Judge Magnuson mistakenly referred to these storage rights as nos. 95-0974 and 95-0975. In actuality, the *Decree* recognized storage water right no. 95-0973 in the name of the U.S. Bureau of Reclamation; the Bureau subsequently conveyed its interest in the water right to Twin Lakes-Rathdrum Creek Flood Control District No. 17. The *Decree* also recognized storage water right no. 95-0974 in the name of Twin Lakes Improvement Association. The *Decree* determined water right no. 95-0975 to be disallowed.

the only outlet from the lakes, and it begins at the lower end of Twin Lakes and flows southwesterly to Rathdrum Prairie.

Sometime around the turn of the century, the Spokane Valley Land & Water Company modified the natural features of the lakes for purposes of making water available for irrigation use in Rathdrum Prairie. The natural channel connecting the lakes was widened and deepened, and a dam and outlet structure was constructed at the lower end of Lower Twin Lake which enabled a portion of the water stored in Lower Twin Lake to be released downstream to Rathdrum Creek. The natural condition of Rathdrum Creek was also modified. Originally, Rathdrum Creek traveled a distance of approximately 4½ miles downstream from Lower Twin Lake to a place just south of the town of Rathdrum, where the waters disappeared into a sink area. This company constructed a ditch which captured the waters of Rathdrum Creek at the sink and carried them approximately four additional miles for the irrigation of lands in Rathdrum Prairie.

A portion of the storage made available by construction of the dam and outlet structure was conveyed by said company to predecessors of the Twin Lakes Improvement Association on April 5, 1906. The remainder of the storage made available by construction of the dam and outlet structure, and the company diversion works, were acquired by East Greenacres Irrigation District by condemnation in 1921. From that time until 1977, the East Greenacres Irrigation District controlled the dam.

The water level of Twin Lakes and the vegetation lines around the lakes were relatively the same, both before and after the construction of the dam. The primary result the dam had on the water level was to hold the water at a higher point longer through the summer months. . . .

Rathdrum Creek is the only natural outlet to Twin Lakes; however, the parties were not in agreement as to whether the outflow of Lower Twin Lakes (pre-dam construction) went over the top of the lip of Lower Twin Lakes at its lowest point, or whether its outlet was under water, surfacing to the top of the land at [a] lower level to form Rathdrum Creek, or whether it flowed over the top of the lip during periods of high water only and continued for the rest of the time underground as a spring.

In any event, before the dam was built the outflow water flowed in Rathdrum Creek for about four miles downstream to the John Sylte (#95-0734) place of diversion. Thereafter it flowed into a sink area and went back into the ground. . . .

From conflicting evidence, this Court finds it was more probably true than not that the outlet waters of Twin Lakes flowed over the top of the lip at periods of high water and through the natural pre-dam obstruction at all times, forming the source waters of Rathdrum Creek.

This Court finds 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. . . .

This Court finds the natural state of Rathdrum Creek in 1875 was definitely not the same as the natural state in 1906 or now, assuming no storage facilities had ever been built. There have been changes in the area which affect the inflow into Twin Lakes area and the natural storage of the water therein. These would include such factors as changes in the climate and changes in the timber canopy in this drainage basin because of logging operations. . . . In addition, the natural flow condition of 1875, regarding Water Right #95-0734, was changed as a result of the construction of the dam and the outlet structure. . . .

While such natural condition of Rathdrum Creek is found to have existed in 1875, it is apparent that such condition has not existed on a year-round basis at all times since the dam and outlet structure were constructed in 1906.

Since 1906, evaporation and seepage from the impounded water of Twin Lakes sometimes exceed natural tributary inflow to Twin Lakes. At such times, Twin Lakes is not a significant source of water to Rathdrum Creek, except for Water Right #95-0734. Therefore, 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 9-13.

Following the entry of the *Decree*, on August 7, 1989, the Department issued an *Order Creating Water District* establishing WD 95C. *Order Creating Water District* (Aug. 7, 1989).

On September 20, 2016, the Manager of IDWR's Northern Regional Office sent a letter—the "*Instructions*"—to the WD 95C Watermaster "[t]o clarify [his] duties as watermaster and resolve any potential discrepancies between [his] regulation and the legal requirements of the Decree." *Instructions* at 1.⁴ The *Instructions* stated that the Watermaster "must administer water rights according to these instructions, which are subject to further review and updates by the Department." *Instructions* at 3. The *Instructions* were issued in response to the same letter that initiated this watermaster removal proceeding. *Instructions* at 1.

⁴ The *Instructions* are not a final order or rule issued in accordance with Idaho's Administrative Procedure Act, I.C. § 67-5201 *et seq.*

According to the Department's findings in the *Amended Order*, "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." *Amended Order* at 6 (Finding of Fact No. 16).⁵

SPECIFIC EXCEPTIONS

Sylte takes exceptions to the following findings, conclusions, analyses, and interpretations in the *Amended Order*:

A. Exceptions to *Amended Order*'s "Findings of Fact" Section

Finding of Fact No. 2. The statement in this Finding that "[w]hen constructed, the control structure raised the level of the Twin Lakes, creating a reservoir of stored water . . ." is contrary to the *Decree* and must be removed. The *Decree* shows the deletion of language that had been included in IDWR's original *Proposed Finding*, which stated that the dam and outlet structure "provided the capability to raise the level of the lakes." *Decree* at xv.⁶ This deletion is consistent with the *Memorandum Decision*, which states: "The water level of Twin Lakes and the vegetation lines around the lakes were relatively the same, both before and after the construction of the dam. The primary result the dam had on the water level was to hold the water at a higher point longer through the summer months. . . ." *Memorandum Decision* at 10.

Finding of Fact No. 6. This Finding in the *Amended Order* omits language from the Findings of Fact attached to the *Decree*, resulting in an incomplete and misleading description of

⁵ Prior to 2016, the only guidance provided by the Department was a 2002 letter concerning "construction work involving the channels of natural watercourses," not water rights administration. *Amended Order* at 6 (Finding of Fact No. 15).

⁶ The portion of Finding of Fact No. 10 showing the deleted language is: "Near the turn of the century Upper Twin Lake was hydraulically connected to Lower Twin Lake by a man-made channel, and a dam and outlet

the three “blocks” of storage water in Twin Lakes. Specifically, while the first bullet point in Finding of Fact No. 6 (describing “[w]ater from the bottom of the lakes to 0.0 feet on the staff gauge”) correctly notes that this first block is “the water naturally occurring in Twin Lakes,” the second and third bullet points fail to include similar language when describing the other two blocks. The *Decree*, on the other hand, states that all of the water in Twin Lakes was “the natural lake storage” prior to dam construction. *Decree* at xv-xvi (Finding of Fact No. 10).⁷ Finding of Fact No. 6 should be deleted from the *Amended Order* in its entirety because it is not necessary for the determination of the watermaster removal. Alternatively, if Finding of Fact No. 6 remains, it must be revised to include language indicating that all of the water in Twin Lakes was “the natural lake storage” prior to dam construction so it is consistent with the *Decree*.

Finding of Fact Nos. 7 and 8. These Findings in the *Amended Order* omit language from the *Decree*, resulting in an incomplete and misleading description of the storage water rights associated with Twin Lakes. Specifically, while these Findings correctly state that the storage water rights authorize “year-round storage,” they omit language from the *Decree* stating that these rights can fill only from November 1 to March 31. *Decree* at xix (Conclusion of Law No. 12); *see also Proposed Finding* at 21 (condition on both storage rights stating that “filling can occur only 11-1 to 3-31”). These Findings of Fact Nos. 7 and 8 should be deleted from the

structure was constructed at the outlet to Lower Twin Lake, ~~that provided the capability to raise the level of the lakes.~~ *Decree* at xv (underlining and strikethrough in original).

⁷ Finding of Fact No. 10 in the *Decree* describes three “blocks” of water in Twin Lakes. The first “block” of water, which has no associated water right, is “the natural lake storage located between the bottom of the lake and Staff Gauge height 0.0 feet” *Decree* at xv (Finding of Fact No. 10.a). The second and third “blocks” of water, which are associated with storage right nos. 95-0974 and 95-0973, also were “at one time part of the natural lake storage, but [were] made available for appropriation by excavation of the outlet from Lower Twin Lakes,” and are located between Staff Gauge heights 0.0 and 6.4 feet, and between heights 6.4 and 10.4 feet, respectively. *Decree* at xv-xvi (Finding of Fact No. 10.b and 10.c).

Amended Order in their entirety because they are not necessary for the determination of the watermaster removal. Alternatively, if Finding of Fact Nos. 7 and 8 remain, they must be revised to include language indicating that these rights can fill only from November 1 to March 31 to be consistent with the *Decree*.

Finding of Fact No. 9. This Finding in the *Amended Order* quotes the Conclusions of Law attached to the *Decree*, but only a portion of them—specifically, Nos. 12, 13, and 14—and no portions of the *Memorandum Decision*, resulting in an incomplete and misleading characterization of the *Decree*. Finding of Fact No. 9 should be deleted from the *Amended Order* in its entirety because it is not necessary for the determination of the watermaster removal. Alternatively, if Finding of Fact No. 9 remains, it must be revised to reference all findings of fact and conclusions of law in the *Decree* and *Memorandum Decision*.

Finding of Fact Nos. 41 and 42. These Findings in the *Amended Order* describe, in general terms, the futile call doctrine, as well as circumstances related to the WD 95C Watermaster’s potential knowledge of the doctrine. Finding of Fact Nos. 41 and 42 should be deleted from the *Amended Order* in their entirety because they are not necessary for the determination of the watermaster removal. Alternatively, if Finding of Fact No. 41 remains, it must be revised to delete the language that “Due to the seriousness of a futile call with respect to the prior appropriation doctrine, the watermaster of WD95C should consult with the Department when futile call conditions appear to exist,” because this proceeding is to determine whether the WD 95C Watermaster failed to perform his duty, I.C. § 42-605(9), and is not a proceeding to determine Department policies concerning the administration of water rights in WD 95C.

Finding of Fact No. 54. This Finding in the *Amended Order* states that “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.”

This sentence should be deleted in its entirety because it is not necessary for the determination of the watermaster removal, and because it could be interpreted as determining the correctness of statements and policies set forth in the *Instructions*—an issue Sylte disputes, as discussed below. Deleting this sentence will not change the thrust of this Finding. Alternatively, if this sentence remains in the *Amended Order*, it must be revised to say that the *Instructions* merely describe the Department's most recent guidance on the subject of water rights administration in WD 95C, which would make the sentence consistent with the *Instructions*' statement that they “are subject to further review and updates by the Department.” *Instructions* at 3.

Finding of Fact No. 55. This Finding in the *Amended Order*, which in part states that “[i]n September and October 2016, futile call conditions in Rathdrum Creek prevented the delivery of water to Sylte to satisfy stockwater right no. 95-0734,” should be deleted in its entirety because it is not necessary for the determination of the watermaster removal, and determines the correct application of the futile call doctrine—an issue Sylte disputes. As discussed below, Sylte contends that “futile call conditions” were not present in 2016 with respect to water right no. 95-0734, and the *Instructions* do not correctly apply the futile call doctrine.

Finding of Fact No. 56. This Finding in the *Amended Order* states in part that: “However, the fact that water was being released at all is also significant.” This sentence should be deleted in its entirety because it is not necessary for the determination of the watermaster removal, and because it could be interpreted as determining the correctness of the *Instructions* and/or the application of futile call doctrine—issues Sylte disputes. Deleting this sentence will not change the thrust of this Finding.

B. Exceptions to Amended Order's "Analysis" Section

Analysis: Watermaster's Duty. On page 16 of the *Amended Order*, the second paragraph in this section contains the following statements: "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." These sentences should be deleted from the *Amended Order* in their entirety because they are not necessary for the determination of the watermaster removal, and because they could be interpreted as determining the how water rights should be administered in WD 95C—an issue Sylte disputes. By contrast, the other sentences in this paragraph do not have these problems because they merely describe what the *Instructions* require.

Analysis: Scarcello's Defense. On page 17 of the *Amended Order*, the second full paragraph contains the following statements which should be deleted in their entirety:

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 aware of the futile call concept, which is 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 water rights. 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.

In addition, on page 18, in this same section of the *Amended Order*, the first full paragraph contains the following statements which should be deleted in their entirety:

Also, during the summer of 2016, Scarcello allowed the Flood Control District's storage water to be gradually released from Twin Lakes under questionable circumstances. Scarcello suggested the release of storage water may have been for some Flood Control District purpose. *See* Findings of Fact 35 and 36. 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 appears to be no valid justification for Scarcello's releases of storage water into the Rathdrum Creek channel.

All of the above-quoted sentences should be deleted from the *Amended Order* in their entirety because they are not necessary for the determination of the watermaster removal, and because they could be interpreted as determining the correctness of the *Instructions*, the Department's policies concerning the administration of water rights, and/or the application of futile call doctrine—issues Sylte disputes. Deleting these sentences will not change the thrust of the *Amended Order's* Analysis section.

C. Exceptions to *Amended Order's* "Conclusions of Law" Section

Conclusion of Law Nos. 5 and 6. These Conclusions in the *Amended Order* should be deleted or amended because they are not necessary for the determination of the watermaster removal, and because they could be interpreted as determining the correctness of the *Instructions*, the Department's policies concerning the administration of water rights, and/or the application of futile call doctrine—issues Sylte disputes. Deleting Conclusion of Law Nos. 5 and 6 will not change the thrust of the *Amended Order's* Conclusions of Law.

Conclusion of Law No. 8. This Conclusion's references to "2015 and 2016" and to the Department's "Instructions" (capital "I") should be deleted because they are not necessary for the determination of the watermaster removal, and because they could be interpreted as determining the correctness of the *Instructions*, the Department's policies concerning the administration of water rights, and/or the application of futile call doctrine—issues Sylte disputes. Deleting this language will not change the thrust of the *Amended Order's* Conclusions of Law.

ADDITIONAL GROUNDS SUPPORTING EXCEPTIONS AND APPEAL

Sylte appeals and takes exceptions to the above-listed findings, conclusions, analyses, and interpretations in the *Amended Order* concerning the administration of water rights in WD95C because they are contrary to the *Decree*, because they are not necessary or appropriate in this proceeding to remove a Watermaster, and because Sylte is concerned that (left unaltered) they potentially could prejudice parties' positions with respect to the administration of water rights in WD 95C.

The Department's administration of water in WD 95C is limited by Idaho's prior appropriation doctrine and the *Decree* and *Memorandum Decision*. Idaho Code Section 42-602 requires that the Director, through a watermaster, distribute water in water districts in accordance with the prior appropriation doctrine. The Idaho Supreme Court has held that Idaho Code Section 42-602's requirement "means that the Director cannot distribute water however he pleases at any time in any way; he must follow the law." *A & B Irrigation Dist. v. State* ("*A&B IV*"), 157 Idaho 385, 393, 336 P.3d 792, 800 (2014).

Except for certain exceptions inapplicable here, "[t]he decree entered in a general adjudication shall be conclusive as to the nature and extent of all water rights in the adjudicated

water system.” *Idaho Ground Water Assoc. v. Idaho Dep’t of Water Res.* (“*Rangen II*”), 160 Idaho 119, 369 P.3d 897, 905 (2016) (quoting I.C. § 42-1420(1)). “[T]he 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 other words, the decree is a property right to a certain amount of water: a number that the Director must fill in priority to that user.” *A&B IV*, 157 Idaho at 394, 336 P.3d at 801.

In WD 95C, the more detailed findings and conclusions in the *Memorandum Decision* are necessary to properly implement the *Decree*. The *Decree* adopted and incorporated by reference the *Memorandum Decision* as the Court’s specific findings of fact and conclusions of law. *Decree* at 2-3. The amended *Proposed Finding* attached to the *Decree* (which Judge Magnuson called the “general findings and conclusions”) reflects the Department’s revisions ordered by Judge Magnuson “to reflect and effectuate this Court’s determinations regarding No. 95-0734” set forth in the *Memorandum Decision*. *Memorandum Decision* at 21. In short, it would violate the *Decree* to administer water rights or interpret the amended *Proposed Finding* inconsistently with the *Memorandum Decision*.

Sylte contends that the *Instructions* violate the *Decree* and *Memorandum Decision*, and Idaho’s prior appropriation doctrine, by limiting the amount of water flow in Rathdrum Creek, and thus the amount capable of delivery to water right no. 95-0734, to the total natural tributary inflow to Twin Lakes. *Instructions* at 2 ¶ 5; see also *Instructions* at 2 ¶ 4 (allowing diversion by “direct flow water rights” up to the amount of total natural tributary inflow) and ¶ 6 (similar). Also, Sylte contends that the *Instructions* improperly require a futile call determination “[i]f release of all of the natural tributary inflow does not satisfy delivery of water right no. 95-734 within a 48-hour period” *Instructions* at 2 ¶ 7.

Sylte strongly disputes the correctness of the *Instructions*, which is why the *Petition for Declaratory Ruling* was filed concurrently with this filing. *See, supra*, note 1. That proceeding will provide a forum to answer the question of how to administer water rights in WD 95C under the *Decree* and *Memorandum Decision* and Idaho's prior appropriation doctrine, based on a record developed specifically for that purpose, following proper notice to all affected parties so they can meaningfully participate and present evidence and legal argument on that question. The Department cannot lawfully end-run the necessary process for determining how to implement the *Decree* and *Memorandum Decision* by making findings of fact and conclusions of law on that subject in this proceeding.

The appropriate administration of water rights in WD 95C has been the subject of debate for many years. *See Amended Order* at 6 (Finding of Fact No. 14) (describing a 1994 request for Department guidance which never was fulfilled). However, "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." *Amended Order* at 5 (Finding of Fact Nos. 15-16).

It was only after the filing of the complaint that initiated this proceeding that the Department issued any such guidance. The Department's September 20, 2016 *Instructions* announced, for the first time, the Department's take on the *Decree*.

Because the *Instructions* were issued three weeks after the complaint initiating this proceeding, and therefore did not exist at the time of the Watermaster's alleged improprieties giving rise to the complaint, their relevance to the Watermaster's removal is questionable. In any case, however, even assuming the *Instructions* are relevant to the question of whether the Watermaster disobeyed the Director's direction and supervision over the distribution of water, this simply is not the appropriate proceeding for determining whether the *Instructions* correctly

implement the *Decree* and *Memorandum Decision* or, for that matter, what the correct implementation might be. The Department's *Notice* made no mention of the *Instructions*, and provided no indication that their correctness would be an issue in this proceeding.

In any case, however, there simply is no reason in this proceeding to determine how to implement the *Decree* and *Memorandum Decision* or the correctness of the *Instructions*. The purpose of this proceeding is "to determine whether the Director should remove the Watermaster pursuant to Section 42-605(9), Idaho Code." *Notice* at 1. Under Idaho Code Section 42-605(9), "[t]he director of the department of water resources may remove any watermaster whenever such watermaster fails to perform the watermaster's duty." A watermaster's duties are set forth in Idaho Code Section 42-607:

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

Determining whether a watermaster failed to perform these duties may (indeed, almost certainly will) require evidence of how the watermaster administered water rights. At the same time, however, recognizing this does not open the door for making final determinations of how specific water rights are to be administered or how the *Decree* and *Memorandum Decision* are to be implemented. It is enough, in a proceeding such as this, to find that a watermaster did or did not abide by the Department's direction or the decree he is charged with implementing.

CONCLUSION

Sylte respectfully requests that the Director set aside the *Amended Order* and issue a new order that eliminates and disclaims all findings, conclusions, analyses, and interpretations that: (i) are contrary to the *Decree* and *Memorandum Decision*; or (ii) could be interpreted as final determinations as to the administration of water rights in WD 95C—specifically water right no. 95-0734. To eliminate doubt, Sylte requests the Director expressly state in any forthcoming order that findings, conclusions, analyses, and interpretations made in this proceeding are not intended to be final determinations as to the administration of water rights in WD 95C under the *Decree* and *Memorandum Decision* and Idaho's prior appropriation doctrine.

Respectfully submitted this 16th day of February, 2017.

GIVENS PURSLEY LLP



Michael P. Lawrence

Attorneys for Susan Goodrich and John Sylte

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of February, 2017, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

DOCUMENT FILED:

Idaho Department of Water Resources
7600 N Mineral Drive, Suite 100
Coeur d'Alene, ID 83815-7763
FAX: 208-762-2819

☐ U. S. Mail
☐ Hand Delivered
☐ Overnight Mail
☒ Facsimile
☐ E-mail

SERVICE COPIES TO:

Colby Clark
30701 N. Clagstone Rd.
Athol, ID 83801

☒ U. S. Mail
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile
☐ E-mail

Michael Dempsey
3224 S. Whipple Road
Spokane Valley, WA 99206

☒ U. S. Mail
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile
☐ E-mail

Laurin Scarcello
22389 N. Kevin Road
Rathdrum, ID 83858

☒ U. S. Mail
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile
☐ E-mail

Curran Dempsey
5011 S. Cheney Plaza Road
Rosalia, WA 99170

☒ U. S. Mail
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile
☐ E-mail

Don and Susan Ellis
P.O. Box 804
Rathdrum, ID 83858

☒ U. S. Mail
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile
☐ E-mail

Gordon Stephenson
21228 N. Circle Road
Rathdrum, ID 83858

☒ U. S. Mail
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile
☐ E-mail

Paul Finman
764 S. Clearwater Loop
Post Falls, ID 83854

☒ U. S. Mail
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile
☐ E-mail

Terry Keifer
16846 N. Reservoir Road
Rathdrum, ID 83858

☒ U. S. Mail
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile
☐ E-mail



Michael P. Lawrence