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IDWR / NORTH

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

IN THE MATTER OF CLARK'S REQUEST FOR)	Docket No. C-RWM-2016-001
REMOVAL OF THE WATER DISTRICT NO 95C)	
WATERMASTER, LAURIN SCARCELLO)	COMPLAINANT'S RESPONSE
)	TO SYLTE'S APPEAL AND
)	EXCEPTIONS

Colby Clark hereby responds to the Sylte's Appeal and Exceptions to Amended Preliminary Order Removing A Watermaster ("Appeal") filed by Susan Goodrich and John Sylte (collectively hereinafter "Sylte"). The Appeal should be denied in full as it is self-contradictory, makes incorrect assumptions, and incorrect conclusions of law. The Amended Preliminary Order Removing a Watermaster filed in this proceeding should become final as it stands without alteration or modifications, with the exception of the stipulated addition to Finding of Fact #6 adding, "It is water naturally occurring in Twin Lakes" to bullet points #2 and #3.

AUTHORITY FOR THIS RESPONSE

The Explanatory Information to Accompany An Order Denying Petition for Reconsideration, states in relevant part, "If any party files an exception and/or brief [the Appeal filed by the Syltes], opposing parties [Colby Clark] shall have fourteen (14) days to respond to

the exception and/or brief.” See also IDAPA Rule 730.02.c.

As the Syltes served their Appeal on February 16, 2017, Mr. Clark has until March 2, 2017 to file and serve this Response.

A. RESPONSE TO SPECIFIC EXCEPTIONS

Response to Sylte Finding of Fact No. 6: The Sylte water right never included water below the 10’4” mark as such water was inaccessible to them at the time their water right was created in 1875.

Finding of Fact #6 should not be stricken as it is key to understanding the context of the ruling, as well as the nature and disposition of the lake and storage water levels. The Decree states that all of the water in Twin Lakes was “the natural lake storage” prior to dam construction.¹ Colby Clark agrees that each of the three blocks of water are naturally occurring in Twin Lakes. *Mr. Clark agrees that, the following language should be added to the second and third bullet points: “It is water naturally occurring in Twin Lakes.”*

Because all water from 10’4” and below was natural lake storage, prior to the dam downstream water users (including 95-0734) would not have had access to any of the stored waters below 10’4”. Hence, their water right (which pre-dates the dam) could not include any of the water below the 10’4” mark which was completely inaccessible to the Sylte’s prior to the dam’s installation.

At the time the 1875 Sylte water right was established, there was no capability to manually lower the lake level below 10’ 4”, which was the lake’s natural state. Only by lowering the level

¹ See the Decree at xv-xvi; Finding of Fact 10(a), (b) and (c).

at the dam (implemented in 1906) did those naturally stored waters become accessible to downstream water users. However, this new accessibility did not give the Syltes any right, whatsoever, to use that water below the 10'4" mark *as that water was already subject to water rights* of Twin Lakes Improvement Association (95-0975) and Flood Control (95-0974).² The Syltes have no right to use waters below the 10'4" mark as that water was inaccessible to them at the time their 1875 water right was created. (See Footnote #2).

Furthermore, 95-0734 is only an "in stream" flow-water right that authorizes Sylte animals to stand in and drink water from Rathdrum Creek at their point of division. At no time did it ever allow the Sylte's to pump water from Twin Lakes or Rathdrum Creek. As such, water right 95-0734 has no claim to water located at Twin Lakes at any level. Rather the water must flow to their point of diversion miles away from the lake. With the lake naturally at 10'4", there is no way the Sylte's could have accessed water below 10'4" when their water right was established prior to the dam.

Further, 95-0734 does not come with an implied promise or guarantee of year-round water. Although water may typically have flowed year round down Rathdrum Creek in 1875, there is no evidence provided that it has always been the case throughout history or that there were never lapses in water flow, due to environmental conditions. Droughts are a naturally occurring cycle that affect every region of the planet.

The 1875 water right is limited by its time of creation (pre dam - lake at 10'4") and also by

² See the detailed analysis of this point in this Response starting on page 12 under the title, "D. The Syltes Water Right Is Limited to Tributary Inflow and Does not Allow the Watermaster to Drop the Dam below 10'4" as the Sylte's Water Right Cannot Impinge Upon the Two Storage Water Rights or on the stated purpose of Twin Lakes as Recreation."

how they can access the water (in stream flow at their point of diversion). The Sylte water right does not include water below the 10'4" mark on the lake.

Response to Sylte Finding of Fact No. 7, 8, and 9:

These facts should not be stricken as they are key to understanding the the ownership of the water rights that were illegally infringed upon and otherwise impacted, due to Mr. Scarcello's deliberate over-release of water to downstream users beyond their respective rights. The facts clearly identify that Mr. Scarcello utilized water belonging to Twin Lakes Improvement Association (95-0975) and Flood Control (95-0974) to facilitate the illegal service of of 95-0734.

Response to Sylte Finding of Fact No. 41 and 42:

These facts should not be stricken as they are key to understanding the the water right administration and stewardship duties for which Mr. Scarcello was negligent. His lack of performance and observation of his responsibilities in these findings specifically include not initiating a futile call when it was no longer possible to service 95-0734 by releasing up to the quantity of tributary inflows extant at the time.

Moreover, by not initiating a futile call, water was released frivolously and storage rights 95-0975 and 95-0974 were further reduced and negatively impacted. Additionally, the stated and intended use of the lake ("recreation") was diminished as lake levels continued to drop and the channel between Upper and Lower Twin lakes was no longer navigable, due shallow depth, plant

life, and other debris.

Response to Sylte Finding of Fact No. 54:

This fact should not be stricken as it is key to understanding the the water right administration and stewardship duties for which Mr. Scarcello was negligent, specifically his willful disregard for explicit instructions provided by IDWR, which Mr. Scarcello requested. Moreover, the request to strike the content of this section because its substance might possibly be impacted by future rulings has no basis in fact or law, but in hope and desire.

Response to Sylte Finding of Fact No. 55:

This fact should not be stricken as it is key to understanding the the water right administration and stewardship duties for which Mr. Scarcello was negligent. His lack of performance and observation of his responsibilities in these findings specifically include not initiating a futile call when it was no longer possible to service 95-0734 by releasing up to the quantity of tributary inflows extant at the time.

Moreover, by not initiating a futile call, water was released frivolously and storage rights 95-0975 and 95-0974 were further reduced and negatively impacted. Additionally, the stated and intended use of the lake (“recreation”) was diminished as lake levels continued to drop and the channel between Upper and Lower Twin lakes was no longer navigable, due shallow depth, plant life, and other debris.

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Response to Sylte Finding of Fact No. 56:

This fact should not be stricken as it is key to understanding the water right administration and stewardship duties for which Mr. Scarcello was negligent. His lack of performance and observation of his responsibilities in these findings specifically include not initiating a futile call when it was no longer possible to service 95-0734 by releasing up to the quantity of tributary inflows extant at the time.

Moreover, by not initiating a futile call, water was released frivolously and storage rights 95-0975 and 95-0974 were further reduced and negatively impacted. Additionally, the stated and intended use of the lake (“recreation”) was diminished as lake levels continued to drop and the channel between Upper and Lower Twin lakes was no longer navigable, due shallow depth, plant life, and other debris.

B. RESPONSE TO EXCEPTIONS TO AMENDED ORDER “ANALYSIS” SECTION

Response to Sylte Exception of “Analysis: Watermaster’s Duty”:

This analysis should not be stricken as it is key to understanding the the water right administration and stewardship duties for which Mr. Scarcello was negligent. If not for the responsibilities set forth by Idaho Statute, the Decree, the Watermaster Handbook, official instruction provided to Mr. Scarcello, and his own testimony, under what grounds could Mr.

Scarcello's performance (or lack thereof) be judged?

Moreover, the request to strike the content of this section because the Syltes disagree with its substance or the belief that it might possibly be impacted by future rulings has no basis in fact or law, but in hope and desire. These are not valid reasons to remove any content, but disregard the basis for key findings in the ruling.

Response to Sylte **Exception of "Analysis: Scarcello's Defense":**

This analysis should not be stricken as it is key to understanding the the water right administration and stewardship duties for which Mr. Scarcello was negligent. If not for the responsibilities set forth by Idaho Statute, the Decree, the Watermaster Handbook, official instruction provided to Mr. Scarcello, and his own testimony, under what grounds could Mr. Scarcello's performance (or lack thereof) be judged?

Further, they are key to understanding the water right administration and stewardship duties for which Mr. Scarcello was negligent. His lack of performance and observation of his responsibilities in these findings specifically include not initiating a futile call when it was no longer possible to service 95-0734 by releasing up to the quantity of tributary inflows extant at the time. By not initiating a futile call, water was released frivolously and storage rights 95-0975 and 95-0974 were further reduced and negatively impacted. Additionally, the stated and intended use of the lake ("recreation") was diminished as lake levels continued to drop and the channel between Upper and Lower Twin lakes was no longer navigable, due shallow depth, plant life,

and other debris.

Moreover, the request to strike the content of this section because the Syltes disagree with its substance or the belief that it might possibly be impacted by future rulings has no basis in fact or law, but in hope and desire. These are not valid reasons to remove any content, but disregard the basis for key findings in the ruling.

C. RESPONSE TO EXCEPTIONS TO AMENDED ORDER “CONCLUSIONS OF LAW” SECTION

Response to Sylte Exception of “Conclusion of Law” #s 5, 6, and 8:

These conclusions should not be stricken as they are key to understanding the the water right administration and stewardship duties for which Mr. Scarcello was negligent. If not for the responsibilities set forth by Idaho Statute, the Decree, the Watermaster Handbook, official instruction provided to Mr. Scarcello, and his own testimony, under what grounds could Mr. Scarcellos’s performance (or lack thereof) be judged?

Further, they are key to understanding the water right administration and stewardship duties for which Mr. Scarcello was negligent. His lack of performance and observation of his responsibilities in these findings specifically include not initiating a futile call when it was no longer possible to service 95-0734 by releasing up to the quantity of tributary inflows extant at the time. By not initiating a futile call, water was released frivolously and storage rights 95-0975 and 95-0974 were further reduced and negatively impacted. Additionally, the stated and intended use of the lake (“recreation”) was diminished as lake levels continued to drop and the channel

between Upper and Lower Twin lakes was no longer navigable, due shallow depth, plant life, and other debris.

Moreover, the request to strike the content of this section because the Syltes disagree with its substance or the belief that it might possibly be impacted by future rulings has no basis in fact or law, but in hope and desire. These are not valid reasons to remove any content, but disregard the basis for key findings in the ruling.

RESPONSE TO “ADDITIONAL GROUNDS SUPPORTING EXCEPTIONS AND APPEAL” SECTION

A. All Laws Should be Followed

In order to address the foundational argument which provided crucial support to remove the watermaster, a determination and understanding of the decree and water inflows and outflows is necessary. Such determinations are the legal and factual reasons why the watermaster had to be removed in the first place. The Appeal basically asks that we simply ignore and remove all facts and law which support the decision. The decision was based upon sound findings of fact and law and must stand supported by such. The Order was not reached in a factual or legal vacuum and cannot stand unsupported stripped of its basis as the Appeal requests.

While the Appeal asks us to ignore relevant facts and law, it also conveniently picks out a few points of facts that it attempts to re-argue and re-negotiate. It appears to basically say, “don’t look at this”, but “look at that”. In some instances, the appeal calls on the Decree, Memorandum Decision, statutes, and other documents and their respective interpretations for

support, and in other cases it states that the reference and interpretation of such is inappropriate and beyond the jurisdiction of the hearing officer and respective ruling. Interestingly the appeal claims that it is inappropriate for the IDWR to interpret the same documents and statutes in the enforcement of water rights and evaluation of watermaster performance and makes claim that the Director of the IDWR is administering water “as he pleases” irrespective of the law.

Ironically, this attitude of picking the laws and facts that seem most convenient is exactly the kind of behavior and thinking that caused this proceeding in the first place. One cannot choose which laws to follow and which to ignore. Both the Decree and Mr. Scarcello’s performance (or lack thereof) is relevant and cannot be ignored in this proceeding.

Similarly, the Appeal dismisses the 2002 guidance to the watermaster prohibiting the role from performing construction work, because there is no written record of that guidance being provided. But, during the hearing testimony was provided by Morgan Case (IDWR), Colby Clark, Terry Kiefer, Donald Ellis, Suzie Ellis, and others (including Mr. Scarcello himself) that Scarcello was aware that he was not authorized to perform construction work, but did so anyway because he was a “roll up his sleeves and get it done” type of guy. Once again, the Appeal is picking and choosing what facts to accept and what to disregard.

B. Mr. Scarcello Refused to Follow the Decree and IDWR Instructions in Administration of Water Rights.

Moreover, notwithstanding the guidance provided to Mr. Scarcello in September, 2016, Mr. Scarcello continued to disobey the same. He stated many times during the hearing that he did not recognize the legitimacy of the decree and associated laws and guidance and it was up to him to

interpret the law as he pleased and to do what was best for the community.

Further, Mr. Scarcello made clear several times during the hearing that he had no intentions of abiding by the decree as it was a bad ruling. Considering Scarcello's stated intent to ignore the decree and continue to do as he pleased according to his own interpretation, there was no other reasonable course of action than to remove him. As such, his disregard for the 2016 guidance and his outright admission and testimony that he would continue to disregard the decree are in scope as they reveal state of mind and intent.

C. Determination of Inflows and Outflows and the Futile Call Are Crucial to the Determination of Removing the Watermaster

The Appeal erroneously claims that the quantities of inflow vs. outflow are irrelevant to the proceedings for removal of the watermaster. This is incorrect because the inflows and outflows pertain to the legal delivery of water per water rights and the terms of the decree, which is the primary function of the watermaster. Moreover, this particular point is the primary source of contention in that Mr. Scarcello had been delivering water to the Syltes above and beyond their right and in contravention of the clear and unambiguous language of the decree.

Based on Terry Kiefer's inflow measurements from all stream tributaries, comparisons with IDWR flow meter measurements at Fish Creek (which were similar in volume), as well as the Twin Lakes dam outflow and lake level measurements (all of which combined constitute best evidence) it is clear that Mr. Scarcello continually and knowingly released significantly more water from the Twin Lakes Reservoir than the tributary inflow provided starting in late May, 2016 and continuing into August, 2016. This led to the unauthorized depletion of storage waters

dumped to downstream users (the Syltes) and was responsible for low water levels in the lake.

Moreover, even after the futile call was established and the Syltes rescinded their water call, Mr. Scarcello continued to dump water downstream, which made it to the edge of the Finman property where it disappeared into the ground. The continued release of this water providing no beneficial use constitutes a frivolous waste of water resources.

All of these facts are relevant and important to support the Order and should remain in the current Order.

D. The Syltes Water Right Is Limited to Tributary Inflow and Does not Allow the Watermaster to Drop the Dam below 10'4" as the Sylte's Water Right Cannot Impinge Upon the Two Storage Water Rights or on the Stated Purpose of Twin Lakes for recreation.

The Appeal asserts an objection stating that outflow to satisfy water right 95-0734 is not limited to tributary inflow. Specifically, the objection states that such a limitation is in contravention to the Decree's supposed "clear and unambiguous language [requiring] the delivery of water to satisfy water right no. 95-0734."

This is clearly a misunderstanding or misrepresentation of the decree, which states in clear and unambiguous language on Page xix of the decree:

"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."

Emphasis was added to the phrase "but not stored waters" to call attention to the fact that

stored waters (between 0' and 10'4") are not to be distributed to 95-0734.

Page xvi of the Decree further states:

"Water rights identified herein with the source of Twin Lakes tributary to Rathdrum Creek are categorized as either storage water rights or direct flow water rights. Only Water Right No. 95-0975 in the name of the BOR, and No. 95-0974 in the name of Twin Lakes Improvement Association are storage water rights. All other water rights that divert from Twin Lakes are direct flow water rights. Storage water rights utilize the storage capacity of the lake. Direct flow water rights utilize the flows passing through the lake and are established on a priority basis."

This clearly identifies that only two water rights are allowed to access storage water rights below 10'4" and 95-0734 is not one of them.

Additionally, this section defines that there are 2 types of water rights:

- 1) storage rights and
- 2) direct flow rights.

The Sylte's water right 95-0734 is a direct flow right and therefore can only be allocated up to the amount of water provided by tributary inflows to satisfy it.

Page xix of the Decree clarifies this further by stating:

"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.**"

Another item worth mentioning is that from the time the dam was put in place until the time of the ruling and much of the time afterwards, Rathdrum Creek property owners have enjoyed more water than they were entitled to according to any of the water rights in existence. The reason for this was that purpose of the lake up until the time the storage water rights were transferred from the East Green Acres Irrigation District to the Bureau of Reclamation was that

of “irrigation,” not “recreation.” Rathdrum Creek property owners previously enjoyed a continuous, heavy flow of water continuously that was released for the purposes of servicing Green Acres irrigation needs.

Once the stated purpose of the Twin Lakes reservoir change from irrigation to recreation, it became prudent to store more water throughout the summer than to release it. Interestingly, this was the state of affairs at the time the Sylte water right was established in 1875, when there was no means to manually release water below the level of 10’ 4”, its natural state at that time.

The Syltes claim that their freeflow rights supercede the storage rights and are entitled to receive water from any source to service 95-0734, regardless of inflow or water level, but the capability to release storage waters did not exist in 1875, nor do they have rights to waters stored below 10’ 4”. Waters stored in Twin Lakes were inaccessible to them and only freeflow water reached their property.

Moreover, the Decree and Discussion Memorandum make clear that 95-0734 has no right to storage waters as it did not establish nor were entitled to the impounded waters. Per the Memorandum Discussion:

“The Court concludes water stored by the holders of Water Rights Nos. 95-0974 and 95-0975 is not unappropriated water subject to appropriation by others. Further, this Court concludes the Objectors have not acquired a portion of the water right recommended to the United States Bureau of Reclamation by adverse possession.”

While it may be true that weather and forest conditions have changed since 1875 resulting in faster snow melt earlier in the year and subsequently less or no snow melt later in the year and drier conditions, it still does not permit 95-0734 to be serviced using water belonging to other rights holders, specifically 95-0975 and 95-0974. Moreover, it does not justify the

disregard for of the stated “recreational” purpose of the Twin Lakes reservoir and depleting it by 3-4 feet over the summer in order to service 95-0734 clearly above and beyond its allotment. Per the terms, conditions, and definition of a free-flow water right, regardless of date established, unless there is sufficient water flowing to service the request, the water right cannot be satisfied. It is unlawful to deplete storage waters for such purposes. Moreover, having a water right of any date is not a guarantee against drought conditions or an assurance of water delivery in adverse conditions.

Accordingly, the Complainant is requesting that the Proposed Order be finalized as it stands, with the exception of the stipulated addition to Finding of Fact #6 adding, “It is water naturally occurring in Twin Lakes” to bullet points #2 and #3.

Respectfully Submitted,

Dated: March 2, 2017

A handwritten signature in black ink, appearing to read 'Colby Clark', with a long horizontal flourish extending to the right.

Colby Clark, Complainant

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REMOVAL OF THE WATER DISTRICT NO 95C)
WATERMASTER, LAURIN SCARCELLO)
_____)

Docket No. C-RWM-2016-001

PROOF OF SERVICE

I HEREBY CERTIFY that on this 2nd day of March 2017, I served the original of the **Complainant's Response to Sylte's Appeal and Exceptions** on the following office by hand delivery to the office.

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Copies these same documents were serve via U.S. Postal service on the same day to the following addresses:

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Dated: March 2, 2017


Kathy Clark