IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

GORDON SYLTE, AN INDIVIDUAL, SUSAN GOODRICH, AN INDIVIDUAL, JOHN SYLTE, AN INDIVIDUAL, AND SYLTE RANCH LIMITED LIABILITY COMPANY, AN IDAHO LIMITED LIABILITY COMPANY;

Petitioners,

vs.

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

Respondents.

and

TWIN LAKES IMPROVEMENT ASSOCIATION, MARY A. ALICE, MARY F. ANDERSON, MARY F. ANDERSON ET AL., DEBRA ANDREWS, JOHN ANDREWS, MATTHEW A. BAFUS, CHARLES AND RUTH BENAGE, ARTHUR CHETLAIN JR., CLARENCE & KURT GEIGER FAMILIES, MARY K. COLLINS/BOSCH PROPERTIES, SANDRA COZZETTO, WES CROSBY, JAMES CURB, MAUREEN DEVITIS, DON ELLIS, SUSAN ELLIS, SCOTT ERICKSON, JOAN FREIJE, AMBER HATROCK, BARBARA HERR, WENDY AND JAMES HILLIARD, PAT & DENISE HOGAN, STEVEN & ELIZABETH HOLMES, LEIF HOUKAM, DONALD JAYNE, DOUGLAS I & BERTHA MARY JAYNE, TERRY KIEFER, MICHAEL KNOWLES, ADAM KREMIN, ROBERT KUHN, RENE LACROIX, JOAN LAKE-OMMEN, LARRY D & JANICE A FARIS LIVING TRUST, TERRY LALIBERTE, PATRICK E. MILLER, WILLIAM H. MINATRE, ANGELA MURRAY, DAVID R. NIPP, JOHN NOONEY, STEVE & PAM RODGERS, KIMBERLI ROTH, DAVID & LORI SCHAFER, DARWIN R. SCHULTZ, MOLLY SEABURG, HAL SUNDAY, TCRV LLC, TWIN LAKES, LLC, RICK & CORRINNE VAN ZANDT, GERALD J. WELLER, BRUCE & JAMIE WILSON,

Case No. CV-2017-7491

District Court - SRBA
Fifth Judicial District
In Re: Administrative Appeals
County of Twin Falls - State of Idaho

DEC 22 2017
LODGED

By _____ Clerk

_____ Deputy Clerk

DAVE ZIUCHKOVSKI, PAUL FINMAN, AND TWIN LAKES FLOOD CONTROL DISTRICT NO. 17,

Intervenors.

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

PETITIONER SYLTE'S OPENING BRIEF

Appeal of final agency action by the Idaho Department of Water Resources

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STATEMENT OF THE CASE

This is the opening brief of Petitioners Gordon Sylte, Susan Goodrich, John Sylte, and Sylte Ranch Limited Liability Company (collectively, "Sylte"). Sylte requests that this Court set aside and reverse the decision of the Idaho Department of Water Resources ("IDWR" or "Department") that improperly limits the exercise of decreed water right no. 95-0734 to the natural tributary inflow to Twin Lakes, which is contrary to a decree issued in 1989 and Idaho's prior appropriation doctrine. The Department's decision improperly allows the distribution of water to junior water rights before Sylte's water right no. 95-0734, which is the most senior water right on the system.

I. NATURE OF THE CASE

This is a judicial review of the Department's September 6, 2017 *Order on Motions for Summary Judgment; Order Amending Instructions; Order Vacating Hearing Dates and Schedule* in IDWR Docket No. P-2017-001 ("*Order*") (R. at 1390-1407).

Sylte initiated the proceeding before the Department with their February 16, 2017 *Petition for Declaratory Ruling* ("*Petition*") (R. at 213-74). In that proceeding, Sylte sought to set aside and reverse guidance the Department provided to the Watermaster of Water District 95C ("WD 95C") in the form of a September 20, 2016 letter from the Department's Northern Regional Manager (the "*Instructions*"). (R. at 210-12.)

Sylte argued in the proceedings below, as they do here, that water right no. 95-0734's senior priority date protects it from interference and injury caused by junior appropriators. The *Instructions* disregard this fundamental prior appropriation principle, as well as a prior court's

express findings and conclusions about the appropriation and exercise of water right no. 95-0734.

Water right no. 95-0734 is diverted from Rathdrum Creek, downstream from Twin Lakes. Twin Lakes was a natural lake formation when the water right was established in 1875. In 1906, a dam and outlet structure was constructed at Twin Lakes' natural outlet where water from the lakes historically emptied into Rathdrum Creek on a continuous year-round basis in amounts sufficient to always satisfy water right no. 95-0734. Sylte contends that they are entitled to have the natural, pre-dam outflow of water from Twin Lakes to Rathdrum Creek to satisfy water right no. 95-0734—an amount which would exceed Twin Lakes tributary inflow as inflow declined during the summer months. The Department's *Instructions* and *Order* reject Sylte's position, and instead limit the exercise of water right no. 95-0734 to Twin Lakes' natural tributary inflow. As discussed below, the Department's position is not supported by Idaho law or the express findings and conclusions in a general stream adjudication decree entered in 1989.

Sylte moved for summary judgment on the issues raised in the *Petition*, and Twin Lakes Improvement Association ("TLIA") filed a cross-motion asking that the *Petition* be denied. The Department denied Sylte's motion for summary judgment and granted TLIA's. In addition, the Department *sua sponte* amended the *Instructions* by adding language limiting the volume of water that may be "delivered" to water right no. 95-0734. The petition for judicial review presently before this Court challenges these actions.

II. STATEMENT OF FACTS AND COURSE OF PROCEEDINGS

A. The 1989 Decree

The water rights in WD 95C (the Twin Lakes and Rathdrum Creek water system) were determined in a general stream adjudication that concluded in 1989.[1] That adjudication produced three documents that together describe the water rights in the Twin Lakes – Rathdrum Creek water system. These documents—the *Memorandum Decision*, the *Final Decree*, and the *Proposed Finding* (as amended by the *Memorandum Decision*)—are described below.

On February 22, 1989, following a court trial in the Twin Lakes – Rathdrum Creek adjudication, First Judicial District Court Judge Richard Magnuson issued his *Memorandum Decision* ("*Memorandum Decision*"). (R. at 173-95). In it, among other things, Judge Magnuson made findings and conclusions with respect to parties' objections to the Department's January 14, 1985 *Proposed Findings of Water Rights in the Twin Lakes – Rathdrum Creek Drainage Basin* (January 14, 1985) ("*Proposed Finding*") (R. at 1-172). Judge Magnuson determined 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 Decision* at 21 (R. at 193). Accordingly, he instructed the Department to "prepare drafts of such proposed amendments." *Id.*

On April 19, 1989, Judge Magnuson issued his *Final Decree* (R. at 196-209) (the "*Final Decree*") in which he "adopted [the *Memorandum Decision*] as findings of fact and conclusions

[1] The "Twin Lakes – Rathdrum Creek adjudication" was captioned: *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.).

of law" and incorporated it by reference. *Final Decree* at 2-3 (R. at 197-98). The *Final Decree* also adopted and incorporated the Department's *Proposed Finding* as amended by the *Memorandum Decision*. *1989 Decree* at 2-3 (R. at 197-98). He attached to the *Final Decree* a copy of the Department's amended portions of the *Proposed Finding* (the "*Amended Proposed Finding*"), with insertions underlined and deletions struck through.[2]

Following the entry of the *1989 Decree*, on August 7, 1989, the Department issued an *Order Creating Water District* establishing WD 95C. *See Order on Exceptions Re: Amended Preliminary Order Removing a Watermaster* ("*Watermaster Removal Order*") at 6 (April 24, 2017) (R. at 1166).

Sylte holds a number of valid water rights recognized in the *1989 Decree*, including year-round, natural flow stockwater water right no. 95-0734 diverted from Rathdrum Creek (tributary to sinks), whose 1875 priority date makes it the most senior priority of all water rights in WD 95C.[3] The *1989 Decree* recognizes a number of junior priority water rights held by Sylte and others, two of which are storage water rights associated with Twin Lakes: nos. 95-0973 and 95-0974 (together, the "1906 Storage Rights"), which are 1906 priority rights currently held by Intervenors Twin Lakes Flood Control District No. 17 ("FCD") and TLIA, respectively.[4]

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[2] In this brief, the term "*1989 Decree*" means the combination of the *Final Decree* (including its attached *Amended Proposed Finding*), together with the *Memorandum Decision* and *Proposed Finding* (as amended by the *Memorandum Decision*) which, as described in the main text, were incorporated into the *Final Decree*.

[3] Water right no. 95-0734 was decreed to John and Evelyn Sylte. *Proposed Finding* at 3 (R. at 26). 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.

[4] At places in the *Final Decree* and *Memorandum Decision*, Judge Magnuson mistakenly referred to these storage rights as nos. 95-0974 and 95-0975. In actuality, the *1989 Decree* recognized storage water right no. 95-0973 in the name of the U.S. Bureau of Reclamation. *Proposed Finding* at 21 (R. at 45). The Bureau subsequently conveyed its interest in the water right to Twin Lakes-Rathdrum Creek Flood Control District No. 17 (which is named in this proceeding's caption as "Twin Lakes Flood Control District No. 17"). The *1989 Decree* also

The *Memorandum Decision* included many findings and conclusions concerning the Twin Lakes – Rathdrum Creek history and hydrology, and specifically concerning water right no. 95-0734. These are important to this proceeding and are quoted at length here:

> 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 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

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recognized storage water right no. 95-0974 in the name of Twin Lakes Improvement Association. *Proposed Finding* at 21 (R. at 45). The *1989 Decree* determined water right no. 95-0975 to be disallowed.

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.

An appropriator is entitled to maintenance of stream conditions substantially as they were at the time the appropriators made their appropriation, if a change in stream conditions would result in interference with the proper exercise of the right. Bennett v. Nourse, 22 Ida. 249, 125 P. 1038 (1912). At the time the appropriation (No. 95-0734) was made in 1875, there was *always* water in Rathdrum Creek to serve said water right.

> The holders of water right #95-0734 are therefore entitled to waters from the source of their appropriation on a basis of priority over those storage rights Nos. 95-0974 and 95-0975. The waters of this basin are to be administered in such manner as to give effect to such priority.
>
> This Court concludes the rights of all the other Objectors are limited to the natural tributary inflows to Twin Lakes, less evaporation and seepage from Twin Lakes.

Memorandum Decision at 9-13 (R. at 181-85) (underlining in original).

B. The 2016 Instructions

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 (R. at 210). The letter 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 (R. at 212). The *Instructions* were the Department's first ever written guidance concerning the distribution of water in WD 95C.[5] *See Watermaster Removal Order* at 17 (April 24, 2017) (R. at 1177).

Among other things, the *Instructions* limit the amount of water flow in Rathdrum Creek, and thus capable of delivery to water right no. 95-0734, to the total natural tributary inflow into Twin Lakes. Specifically, the *Instructions* state:

> 4) From April 1 to October 31 of each year, the watermaster will measure the total natural tributary inflow to Twin Lakes (weekly) and allow diversion of up to that amount by the direct flow water rights on the basis of water right priority. *See Decree* at Conclusion of Law 12.

[5] The *Instructions* were issued in response to a letter to IDWR from Mr. Colby Clark complaining about the Watermaster. *Instructions* at 1 (R. at 210). Also because of Mr. Clark's letter, the Department initiated a proceeding to remove the Watermaster, which resulted in an order removing the Watermaster, none of which is relevant to this proceeding.

> 5) From April 1 to October 31 each year, when seepage and evaporation losses from Twin Lakes exceed the total natural tributary inflow to Twin Lakes (as determined by decreasing lake level), no water will be released from the lakes to satisfy Rathdrum Creek water rights, except for water right no. 95-734. *Decree* at Conclusions of Law 12, 14; *Memorandum Decision* at 12-13. When this occurs, all or a portion of the total natural tributary inflow to Twin Lakes, as measured by the watermaster, can be released to satisfy delivery of water right no. 95-734 with 0.07 cfs at the legal point of diversion. If all of the natural inflow must be released to satisfy water right no. 95-734, the watermaster shall curtail all junior direct flow water rights. If only a portion of the inflow is released to satisfy water right no. 95-734, the watermaster shall satisfy water rights that divert from Twin Lakes and its tributaries using the remainder of the natural flow, on the basis of water right priority.
>
> 6) From April 1 to October 31 of each year, when seepage and evaporation losses from Twin Lakes do not exceed the total natural tributary inflow (as determined by steady or increasing lake level), the watermaster shall distribute the total natural tributary inflow to water rights that divert from Twin Lakes and its tributaries and Rathdrum Creek on the basis of water right priority. *See Decree* at Conclusions of Law 12, 14.

Instructions at 2 (R. at 211).

In addition, the *Instructions* require a futile call determination if the release of all natural tributary inflow into Rathdrum Creek does not satisfy water right no. 95-0734:

> 7) If release of all of the natural tributary inflow does not satisfy delivery of water right no. 95-734 within a 48-hr period, the watermaster shall consult with the Department's Northern Regional Manager or designated Department representative, regarding determination of a futile call with respect to delivery of water right no. 95-734. The Department's Northern Regional Manager will issue written notice to the watermaster regarding the futile call determination. A futile call determination will result in non-delivery of water right no. 95-734.

Instructions at 2 (R. at 211).

C. Sylte's Petition and the Department's Order

On February 16, 2017, Sylte initiated the proceeding below by filing their *Petition*.

Numerous individuals and entities—including FCD and TLIA—filed petitions to intervene.[6] Sylte's *Petition* sought to have the *Instructions* overturned because they were contrary to the *1989 Decree* and Idaho's prior appropriation doctrine.

Because the case involved only the meaning of the *1989 Decree* and related legal concepts, Sylte moved for summary judgment. *See Sylte's Motion for Summary Judgment* (Jun. 23, 2017) ("*Sylte's MSJ*") (R. at 900-06); *Sylte's Memorandum in Support of Motion for Summary Judgment* (June 23, 2017) ("*Sylte MSJ Brief*") (R. at 907-35). TLIA agreed that the meaning of the *1989 Decree* under Idaho law was the sole issue and was purely legal in nature. *Twin Lakes Improvement Association's Memorandum in Support of Cross-Motion Summary Judgment and in Opposition to Sylte's Motion for Summary Judgment* ("*TLIA's MSJ Memo*") at 2 (Jul. 7, 2017) (R. at 1260).

On summary judgment, Sylte argued that the *1989 Decree* is clear on its face and unambiguously requires that Sylte's senior water right no. 95-0734 be fulfilled on a continuous year-round basis from Twin Lakes' natural pre-dam outflow, and not limited by the amount of Twin Lakes' natural tributary inflow. *Sylte's MJS* at 1 (R. at 900); *Sylte's MSJ Brief* at 12-21 (R. at 918-27). Sylte argued that, by limiting the exercise of Sylte's right to the amount of natural tributary inflow, the *Instructions* ran contrary to the *1989 Decree's* express findings and conclusions and Idaho's prior appropriation doctrine.

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[6] A large number of individuals and entities (over 70) filed petitions to intervene in this matter. *See generally* R. at 333-660. Some were granted intervention and others were denied intervention or defaulted. *See, e.g., Order Regarding Intervention; Order Requiring Submittal of Information* (May 26, 2017) (R. at 643-50); *Default Order Denying Petitions to Intervene* (June 14, 2017) (R. at 811-17). Most parties designated TLIA and its attorney as their spokesperson in the proceeding below. *See e.g., Summary of Forms Required by May 26, 2017 Order, Order Spreadsheet* (June 20, 2017) (R. at 862-64).

Intervenors Colby Clark[7] and TLIA opposed *Sylte's MSJ*, with TLIA filing its own cross-motion for summary judgment asking that Sylte's *Petition* be denied. *Clark's Response to Sylte's Motion for Summary Judgment* (R. at 1205-41); ("*Clark's Response*"); *Twin Lakes Improvement Association's Cross-Motion for Summary Judgment* ("*TLIA's Cross-Motion*") (R. at 1255-58).[8] Both argued that only two storage rights exist with respect to the waters in Twin Lakes—i.e. the 1906 Storage Rights held by FCD and TLIA—and that Sylte's right no. 95-0734, despite its senior priority, is not entitled to water from Twin Lakes and therefore its exercise must be limited to the amount of Twin Lakes' natural tributary inflow. *Clark's Response* at 21-26 (R. at 1225-30); *TLIA's MSJ Memo* at 11-14 (R. at 1269-72).

Sylte replied and responded to Clark and TLIA, emphasizing that they did not claim an entitlement to the artificially stored waters of Twin Lakes, but rather they claimed an entitlement to the natural pre-dam outflows from Twin Lakes that Judge Magnuson determined were always sufficient to supply Sylte's right no. 95-0734 on a continuous year-round basis. *See, e.g., Sylte's Reply Memorandum in Support of Motions of Summary Judgment* ("*Sylte's Reply*") at 2-3 (R. at 1284-85) (citing *Memorandum Decision* at 11, 13). Therefore, and because Sylte's right is entitled to be administered as it was at the time of appropriation, it must be fulfilled on a continuous year-round basis from Twin Lakes pre-dam natural outflow regardless of what effect

[7] Mr. Clark was dismissed from the proceeding below after he sold his property and water right in WD 95C. Order Dismissing Colby and Kathy Clark as Parties and Denying Request to Strike Documents, at 2-3 (Sept. 6, 2017) (R. at 1386-87).

[8] *TLIA's Cross-Motion* was amended by *Twin Lakes Improvement Association's Amended Cross-Motion for Summary Judgment* (Jul. 10, 2017) (R. at 1277-80). In this brief, the term "*TLIA's Cross-Motion*" refers to *TLIA's Cross-Motion* as amended.

the construction of the dam and appropriations by junior water rights may have had on the system.

On September 6, 2017, the Department issued its *Order*. (R. at 1390-1407.) On September 7, 2017, the Department issued a letter ("*Letter*") identifying the *Order* as a "final action of the agency" instead of a preliminary order (as it was originally identified). (R at 1408-11.) Citing and quoting documents not in the record, the *Order* denied *Sylte's MSJ*, granted *TLIA's Cross-Motion*, and *sua sponte* amended the *Instructions* to include language authorizing the delivery of water to water right no. 95-0734 "unless or until the maximum annual diversion volume of 4.1 acre-feet has been delivered." *Order* at 13 (R. at 1402). No party had requested such an amendment, and nor had any been given the opportunity to present evidence or argument on that issue.

On October 3, 2017, Sylte timely filed its petition for judicial review of the *Order*.[9]

ISSUES PRESENTED ON JUDICIAL REVIEW

In this judicial review, Sylte contends that the Department erred by denying *Sylte's MSJ*, granting *TLIA's Cross-Motion*, upholding the *Instructions*, ordering *sua sponte* that language be added to the *Instructions*, and relying on documents not in the agency record. Sylte contends that the *Order* and the findings, inferences, conclusions or decisions therein, are: (1) in violation

[9] On September 20, 2017, because of confusion created by the issuance of the *Letter* and in an effort to ensure exhaustion of administrative remedies, Sylte filed with the Director of IDWR *Sylte's Appeal, Exceptions, Request for Reconsideration and Clarification, and Request for Hearing* ("*Sylte's Exceptions*") (R. at 1412-36). Sylte now understands that the Department does not intend to issue an order deciding any matters raised in *Sylte's Exceptions*, including issues concerning whether the *Letter* properly designated the *Order* as a final agency action. Sylte further understands that the Department believes the *Order* was a final agency action which was properly and timely appealed to this Court, and that this Court (not the Department) has jurisdiction to decide the merits of this case. Sylte desires that this Court decide the merits of this judicial review, but reserves all arguments concerning the *Letter*, including without limitation those set forth in *Sylte's Exceptions* at 3-9 (R. at 1414-20) (incorporated herein by reference).

of constitutional or statutory provisions, or administrative rules of the Department; (2) in excess of the Department's statutory authority or its authority under the administrative rules of the Department; (3) made upon unlawful procedure; (4) not supported by substantial evidence on the record as a whole; and (5) arbitrary, capricious, and/or an abuse of the Department's discretion. I.C. § 67-5279(3). In summary, by upholding and amending the *Instructions*, the *Order* improperly limits the exercise of decreed water right no. 95-0734, and prejudices Sylte's rights under Idaho law. I.C. § 67-5279(4).

Specific questions related to these issues described above are as follows (with Sylte's proposed answers in brackets):

1. Do the *1989 Decree* or Idaho's prior appropriation doctrine limit the exercise of water right no. 95-0734 to Twin Lakes' natural tributary inflow? [No.]
2. Is Sylte entitled to the natural, pre-dam outflow from Twin Lakes with respect to the delivery of water to water right no. 95-0734? [Yes.]
3. Is the application of the futile call doctrine with respect to water right no. 95-0734 dependent on the amount of Twin Lakes' natural tributary inflow? [No.]
4. Must the *Instructions* be set aside and reversed because they are contrary to the *1989 Decree* and Idaho's prior appropriation doctrine? [Yes.]
5. Was the Department's consideration of documents not in the agency record improper? [Yes.]
6. Was the Department's *sua sponte* amendment to the *Instructions* improper? [Yes.]

7. Even if it was appropriate for the Department to amend the *Instructions* in the *Order*, was the language of the amendment consistent with the *1989 Decree* and Idaho's prior appropriation doctrine? [No.]

STANDARD OF REVIEW

A district court acting in its appellate capacity in a judicial review proceeding under the Idaho Administrative Procedure Act must overturn the agency's findings, inferences, conclusions, or decisions when it finds that they are: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) not supported by substantial evidence on the record as a whole; or (e) arbitrary, capricious, or an abuse of discretion. Idaho Code § 67–5279(3); *Rangen, Inc. v. Idaho Dep't of Water Res.*, 159 Idaho 798, 367 P.3d 193, 199 (2016) (citing *Clear Springs Foods, v. Spackman*, 150 Idaho 790, 796, 252 P.3d 71, 77 (2011) (Eismann, C.J.)). The reviewing court must also find that, as a result of the error, "substantial rights of the appellant have been prejudiced." I.C. § 67-5279(4).

A court's review of an agency's findings of fact is confined to the agency record. *See, e.g., Chisholm v. Idaho Dep't of Water Res.*, 142 Idaho 159, 162, 125 P.3d 515, 518 (2005). The Court exercises free review over questions of law. *Neighbors for a Healthy Gold Fork v. Valley Cnty.*, 145 Idaho 121, 127, 176 P.3d 126, 132 (2007). "If the agency's action is not affirmed, it shall be set aside, in whole or in part, and remanded for further proceedings as necessary." I.C. § 67-5279(3).

Sylte's *Petition* and this judicial review challenge the Department's "interpretation" of

the *1989 Decree* (which the parties below and the Department agreed was unambiguous[10]) and Idaho's prior appropriation doctrine—questions of law that this Court may freely review. *City of Blackfoot v. Spackman*, 162 Idaho 302, 396 P.3d 1184, 1188 (2017) (holding that judicial interpretation of unambiguous water decrees involves the same rules of interpretation applicable to contracts, and if a contract's terms are clear and unambiguous, the contract's meaning and legal effect are questions of law to be determined from the plain meaning of its own words).

ARGUMENT

The main question in this judicial review is: What does the *1989 Decree* mean? The answer to this question must be based on the *1989 Decree's* plain language in a way that gives force and effect to all of it.

In Idaho, water decrees are interpreted "using the same interpretation rules that apply to contracts." *Rangen*, 159 Idaho at ___, 367 P.3d at 202. Consequently, the intent of a decree is to be ascertained from the language of the decree itself. *Hap Taylor & Sons, Inc. v. Summerwind Partners, LLC*, 157 Idaho 600, 610, 338 P.3d 1204, 1214 (2014). "In the absence of ambiguity, a document must be construed by the meaning derived from the plain wording of the instrument." *Brown v. Greenheart*, 157 Idaho 156, 166, 335 P.3d 1, 11 (2014); *see also Chavez v. Barrus*, 146 Idaho 212, 219, 192 P.3d 1036, 1043 (2008) ("In the absence of ambiguity, the document must be construed in its plain, ordinary and proper sense, according to the meaning derived from the plain wording of the instrument." (internal quotation marks omitted)). "In

[10] *TLIA's MSJ Memo* at 2, (R. at 1260) ("TLIA agrees this matter can be decided on summary judgment . . ."); *Clark's Response* at 3 (R. at 1207) ("However, these matters have been thoroughly litigated and conclusively resolved in the Decree of 1989."); *Order* at 3 (R. at 1397) ("In this case, none of the parties identified any genuine issues of material fact that would prevent the hearing officer from issuing a decision on Sylte's Motion and TLIA's Cross-Motion.").

deciding whether a document is ambiguous, this Court must seek to determine whether it is 'reasonably subject to conflicting interpretation.'" *Id.* (quoting *Bondy v. Levy*, 121 Idaho 993, 997, 829 P.2d 1342, 1346 (1992)). "Ambiguity results when reasonable minds might differ or be uncertain as to its meaning, however ambiguity is not established merely because different possible interpretations are presented to a court." *McKay v. Boise Project Bd. of Control*, 141 Idaho 463, 469–70, 111 P.3d 148, 154–55 (2005). An ambiguity exists only "[i]f there are two different reasonable interpretations of the [decree's] language . . . ." *Hap Taylor & Sons, Inc.*, 157 Idaho at 610, 338 P.3d at 1214.

When the intent behind a decree is clear from the language of that decree, interpretation of the decree is to be resolved as a purely legal matter. *Farnsworth v. Dairymen's Creamery Ass'n*, 125 Idaho 866, 870, 876 P.2d 148, 152 (Ct. App. 1994) ("Thus, where the parties' intention is clear from the language of their contract, its interpretation and legal effect are to be resolved by the court as a matter of law."). In such cases, summary judgment is appropriate. *Id.*; *Hap Taylor & Sons, Inc.*, 157 Idaho at 610, 338 P.3d at 1214. It is only where a legal document cannot be understood from its own language that an issue of fact is created and extrinsic evidence may be examined. *Farnsworth*, 125 Idaho at 870, 876 P.2d at 152.

A written instrument must be read "as a whole and [to] give meaning to all of its terms to the extent possible." *Twin Lakes Vill. Prop. Ass'n, Inc. v. Crowley* ("*Twin Lakes*"), 124 Idaho 132, 138, 857 P.2d 611, 617 (1993) (citing *Magic Valley Radiology Assocs., P.A. v. Prof'l Bus. Servs., Inc.*, 119 Idaho 558, 565, 808 P.2d 1303, 1310 (1991)). "[V]arious provisions in a contract must be construed, if possible, so to give force and effect to every part thereof." *Twin Lakes*, 124 Idaho at 137, 857 P.2d at 616.

I. LIMITING THE EXERCISE OF WATER RIGHT NO. 95-0734 TO TWIN LAKES' TRIBUTARY INFLOW IS CONTRARY TO THE *1989 DECREE* AND IDAHO'S PRIOR APPROPRIATION DOCTRINE.

By limiting the outflow of water into Rathdrum Creek to the amount of Twin Lakes' tributary inflow, the *Instructions* and the *Order* impermissibly limit the amount of water available to water right no. 95-0734 contrary to the express and unambiguous findings and conclusions contained in the *1989 Decree*. They also impermissibly require that water right no. 95-0734 be subject to a futile call determination based on Twin Lakes' natural tributary inflow.

As discussed below, the only reading of the *1989 Decree* which gives full force and effect to all of its language requires that water right no. 95-0734 must be satisfied on a continuous, year-round basis from the natural, pre-dam outflow from Twin Lakes, unlimited by the amount of tributary inflow into the Lakes.

A. Water right no. 95-0734 is entitled to the natural, pre-dam outflow from Twin Lakes to Rathdrum Creek.

As set forth in Section II.A above, Judge Magnuson's *Memorandum Decision* included detailed findings and conclusions about the nature of the Twin Lakes – Rathdrum Creek water system and water right no. 95-0734. Those findings and conclusions entitle Sylte to Twin Lakes' natural, pre-dam outflow to Rathdrum Creek—an amount that Judge Magnuson found was always sufficient to satisfy water right no. 95-0734 on a continuous year-round basis—and historically was greater than inflow to Twin Lakes during the summer months.

Judge Magnuson found that the dam and outlet structure constructed at Twin Lakes' outlet around 1906 did not impound any additional water in the lakes, but merely served to keep water from flowing out of the lakes. Specifically, he found that "[t]he 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 [in 1906]. 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 (R. at 182); *see also Amended Proposed Finding* at xv-xvi (R. at 201-02) (Finding of Fact No. 10 amended to strike language stating that the dam and outlet structure "provided the capability to raise the level of the lakes").[11]

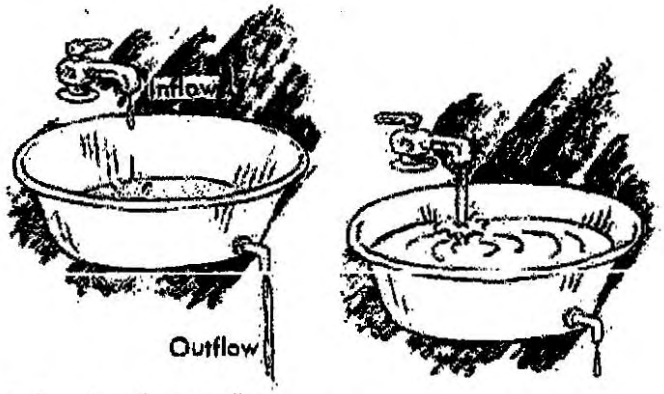
In other words, the dam and outlet structure constructed in 1906 did not artificially store more water in Twin Lakes than was naturally stored prior to 1906. Also, in other words, prior to 1906 the natural lake level lowered faster during the summer than after 1906. This important finding—which Sylte raised and argued in the proceeding below (*see, e.g., Sylte's Reply* at 4-5 (R. at 1286-87))—was not even mentioned by the Department in the *Order*.

This finding proves that the amount of water flowing from Twin Lakes to Rathdrum Creek prior to 1906 was not limited to Twin Lakes' tributary inflow. If Twin Lakes reached the same maximum level before 1906 as after, but the level dropped faster before 1906 than after, where did the pre-1906 water go? The only logical conclusion is that the water naturally stored in Twin Lakes prior to 1906 flowed into Rathdrum Creek. *See Memorandum Decision* at 9 (R. at 181) ("Rathdrum Creek is the only outlet from the lakes . . . .") Water levels in Twin Lakes dropped faster before 1906 because, prior to the dam "hold[ing] the water at a higher point longer through the summer months," *Memorandum Decision* at 10 (R. at 182), the water "flowed

[11] Finding of Fact No. 10 in the *Amended Proposed Finding* 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 . . . ." *Amended Proposed Finding* at xv (R. at 201-02) (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. *Amended Proposed Finding* at xv-xvi (R. at 201-02) (Finding of Fact No. 10.b and 10.c).

. . . through the natural pre-dam obstruction at all times, forming the source waters of Rathdrum Creek." *Memorandum Decision* at 11 (R. at 183).[12]

The fact that Twin Lakes' water levels dropped faster before the dam was built, and that such water must have flowed into Rathdrum Creek, means that Twin Lakes' outflow was greater than its inflow during such times. Basic hydrology dictates that storage decreases if inflow is less than outflow. Likewise, storage increases if inflow is greater than outflow. In short, "the rate of change of storage is the difference between the rate of inflow and the rate of outflow." R. at 1286 (from an excerpt of Luna B. Leopold & Walter B. Langbein, A PRIMER ON WATER ("*A Primer on Water*"), US DEP'T OF INTERIOR GEOLOGICAL SURVEY, at 22 (1960)).[13] The following illustration from *A Primer on Water* depicts this fundamental principle:



A Primer on Water at 22 (R. at 1306).

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[12] There is no evidence or reason to believe that evaporation was greater prior to 1906 than after, nor that there was greater seepage other than the water that "seeped" through "the natural pre-dam obstruction at all times, forming the source waters of Rathdrum Creek." *Memorandum Decision* at 11 (R. at 183).

[13] *A Primer on Water* is available online at https://pubs.usgs.gov/gip/7000045/report.pdf. An excerpt of its section on "River Channels and Floods" is in the record attached as Addendum A to *Sylte's Reply*. (R. at 1300-07.)

Thus, Judge Magnuson's finding that Twin Lakes' water level dropped (*i.e.*, natural storage decreased) faster during the summer months before the dam was constructed in 1906 means that the natural outflow from Twin Lakes during those periods was greater than the natural inflow. In other words, the water that naturally filled Twin Lakes prior to 1906 gradually drained out to Rathdrum Creek during the summer months in excess of the lakes' tributary inflow, lowering the lake levels. *See A Primer on Water* at 22 (R. at 1306) ("[T]he outflow does not stop at the same moment that the inflow ceases. . . . After the tributary inflow stops, that water which is in transit . . . gradually drains out.").

Consistent with this conclusion, Judge Magnuson also found that "before the dam was built [at the outlet of Twin Lakes in 1906] the outflow water flowed in Rathdrum Creek for about four miles downstream to the John Sylte (#95-0734) place of diversion." *Memorandum Decision* at 11 (R. at 183). Indeed, he found that "at the time the John Sylte and Evelyn Sylte Water Right #95-0734 was created in 1875 there was sufficient direct flow water in Rathdrum Creek, in its then natural condition, furnished from the water of Twin (Fish) Lakes, to provide .07 cubic foot per second to the appropriator on a continuous year-round basis. . . ." *Memorandum Decision* at 11 (R. at 183) (emphasis added). He further stated:

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

> This Court concludes the rights of *all the other Objectors* are limited to the natural tributary inflows to Twin Lakes, less evaporation and seepage from Twin Lakes.

Memorandum Decision at 13 (R. at 185) (italics added). The Department's *Order* acknowledges these findings and conclusions, but ultimately ignores them. *Order* at 6-8 (R. at 1395-97).

But these findings and conclusions by Judge Magnuson could hardly be clearer. In sum, he determined that (a) there was "always" sufficient water in Rathdrum Creek to serve water right no. 95-0734 on a "continuous year-round basis" when it was appropriated in 1875, (b) such water was "furnished from" Twin Lakes, (c) appropriators (such as Sylte) are "entitled to maintenance of stream conditions as they were at the time" of their appropriation, (d) the holders of water right no. 95-0734 are entitled to water "on a basis of priority" over the 1906 Storage Rights (not to mention all other junior water rights), (e) water rights administration must give effect to 95-0734's priority over the 1906 Storage Rights, and (f) the rights of all "other" objectors (which are junior to the 1906 Storage Rights) "are limited to the natural tributary inflows to Twin Lakes, less evaporation and seepage."

It bears emphasis that the 1906 Storage Rights are not like storage water rights appropriated when an on-stream dam is constructed on a stream where no natural storage system previously existed. In those cases, a new dam impounds all of the natural flow that previously continued downstream to senior water right holders. Idaho water law requires that such on-stream reservoirs bypass water to satisfy downstream senior water rights, but only up to the amount of natural flow coming into the reservoir since that is all of the water that would have flowed to the senior had the dam not been constructed. Thus, when those kinds of on-stream

reservoir storage water rights are in priority, releases to downstream senior water rights are properly limited to the amount of natural tributary inflow into the reservoir.

The situation here is different. The natural conditions of Twin Lakes and Rathdrum Creek included the impoundment of water in Twin Lakes and constant gradual outflow of water to Rathdrum Creek in amounts sufficient to satisfy water right no. 95-0734 on a continuous year-round basis. *Memorandum Decision* at 11 (R. at 183). That fact was conclusively found by Judge Magnuson, and it cannot be disputed now. *See Rangen*, 159 Idaho at ___, 367 P.3d at 200 ("By statute, 'decree[s] entered in a general adjudication shall be conclusive as to the nature and extent of all water rights in the adjudicated water system.'" (quoting I.C. § 42-1420(1)). Sylte's water right no. 95-0734 was appropriated under such conditions, when it was "always" served by water in Rathdrum Creek "furnished from" Twin Lakes "on a continuous year-round basis." *Memorandum Decision* at 11-13 (R. at 183-85). The 1906 Storage Rights were appropriated under these circumstances, and therefore they are not entitled to store or retain water to the injury of water right no. 95-0734.

B. Water right no. 95-0734's senior priority is protected under Idaho law.

Idaho law could not be clearer or more consistent on this point: "Priority of appropriation shall give the better right as between those using the water." Idaho Const. art. 15 § 3; *see also* I.C. § 42-106 ("As between appropriators, the first in time is first in right.").

Idaho courts have repeatedly enforced this fundamental principle. "The rule in this state, both before and since the adoption of our constitution, is . . . that he who is first in time is first in

right." *Joyce Livestock Co. v. United States*, 144 Idaho 1, 8, 156 P.3d 502, 509 (2007) (quoting *Brossard v. Morgan*, 7 Idaho 215, 219–20, 61 P. 1031, 1033 (1900)).

"Each junior appropriator is entitled to divert water only at such times as all prior appropriators are being supplied under their appropriations under conditions as they existed at the time the appropriation was made." *Beecher v. Cassia Creek Irr. Co., Inc.*, 66 Idaho 1, 12, 154 P.2d 507, 510 (1944).

"This court has uniformly adhered to the principle, announced both in the Constitution and by the statute, that the first appropriator has the first right; and it would take more than a theory, and in fact clear and convincing evidence, in any given case, showing that the prior appropriator would not be injured or affected by the diversion of a subsequent appropriator, before we would depart from a rule so just and equitable in its application, and so generally and uniformly applied by the courts." *Silkey v. Tiegs*, 54 Idaho 126, 28 P.2d 1037, 1038 (1934) (quoting *Moe v. Harger*, 10 Idaho 302, 77 P. 645, 647 (1904)); *see also Moe v. Harger*, 10 Idaho 302, 77 P. 645, 647 (1904) ("So soon as the prior appropriation and right of use is established, it is clear, as a proposition of law, that the claimant is entitled to have sufficient of the unappropriated waters flow down to his point of diversion to supply his right, and an injunction against interference therewith is proper protective relief to be granted.").

To give effect to water right no. 95-0734's senior priority, it must be satisfied ahead of junior water rights, including the 1906 Storage Rights. This means that, when the 1906 Storage Rights are "filling" during their authorized period of November 1 to March 31, they must continue to bypass water sufficient to satisfy water right no. 95-0734. Likewise, during the rest of the year, sufficient water (up to the amount of pre-dam natural outflow) must continue to

outflow into Rathdrum Creek to satisfy water right no. 95-0734, so as to give effect to its priority and Judge Magnuson's express findings and conclusions.

Put another way, the 1906 Storage Right holders are allowed to keep water in Twin Lakes longer than it naturally was held prior to dam construction, but they are not entitled to retain water to the extent that, absent reservoir operations and diversions, it would have naturally flowed down Rathdrum Creek to satisfy right no. 95-0734. The contrary view, which is reflected in the Department's *Instructions* and *Order*, effectively gives upstream junior water rights priority over water right no. 95-0734. As Judge Magnuson put it, "[t]o accept the [D]epartment's interpretation of the facts as they pertain to the 1875 Sylte water right (#95-0734), would be to deprive the holders of such right of the use of the water to which they are entitled and to which use they have a prior right to those possessing the storage rights." *Memorandum Decision* at 14 (R. at 186).

C. Junior water rights are not entitled to injure seniors by changing stream conditions or otherwise.

Judge Magnuson expressly recognized:

> An appropriator is entitled to maintenance of stream conditions substantially as they were at the time the appropriators made their appropriation, if a change in stream conditions would result in interference with the proper exercise of the right. Bennett v. Nourse, 22 Ida. 249, 125 P. 1038 (1912). At the time the appropriation (No. 95-0734) was made in 1875, there was always water in Rathdrum Creek to serve said water right.

Memorandum Decision at 13 (R. at 185) (underlining in original).

Because a senior water right is normally protected from injury by juniors simply by virtue of priority, the principle stated in *Bennett v. Nourse* typically is advanced to protect juniors from injury by seniors (*e.g.*, in the case of a water right transfer). Indeed, that appears to have been

the circumstance in that case. *Bennett v. Nourse*, 22 Idaho 249, 125 P. 1038, 1039 (1912) ("A subsequent appropriator has a vested right, as against his senior, to insist upon a continuance of the conditions that existed at the time he made his appropriation, provided a change would injure the subsequent appropriator.") Nevertheless, the principle has been cited to protect senior rights also. *See, e.g., Arkoosh v. Big Wood Canal Co.*, 48 Idaho 383, 283 P. 522, 526 (1929).

In any case, Judge Magnuson included the *Bennett v. Nourse* principle immediately before pronouncing that there was "always water in Rathdrum Creek" to serve water right no. 95-0734 when it was appropriated in 1875, and that the water right is entitled to water "on a basis of priority" over the 1906 Storage Rights. *Memorandum Decision* at 13 (R. at 185). The clear inference from his coupling of these sentences in a single paragraph is that Judge Magnuson intended for water right no. 95-0734 to be protected from interference by changes in stream conditions caused by junior water rights such as the 1906 Storage Rights.

This conclusion is consistent with nearly a century of Idaho Supreme Court precedent. For example, in *Carey Lake Reservoir Co. v. Strunk*—a case cited by Judge Magnuson in the *Memorandum Decision* at 14-15 (R. at 186-87)—the Idaho Supreme Court agreed with the downstream senior's argument that "by virtue of being prior appropriators, they had the right to have at least the quantity of water to which they were entitled flow down to them uninterrupted, and that, if this flow were interfered with by respondent's dam, they had a right to themselves cut the dam, to such an extent as to allow them to obtain their water . . . ." *Carey Lake Reservoir Co. v. Strunk*, 39 Idaho 332, 227 P. 591, 593 (1924).

In *Arkoosh*—a case involving a claim by senior natural flow water right holders against upstream junior storage right holders—the Idaho Supreme Court held that the junior upstream

storage rights "may be exercised so long as [downstream senior right holders] have at their headgates, during the irrigation season, the amount of water to which they are entitled under their appropriations as the same would have naturally flowed in the natural stream prior to the construction [of the junior's system]." *Arkoosh*, 48 Idaho 383, 283 P. at 526-27 (1929) (Baker, J., on rehearing).

In *Weeks v. McKay*, 85 Idaho 617, 622, 382 P.2d 788, 791 (1963), the Court held that "[o]ne who undertakes to change the natural channel of a stream or by means of dams or otherwise increases or diminishes the flow of a stream must exercise care in so doing and take such precautions as to prevent injury to others." Similar to this case, the junior priority defendant in *Weeks* constructed a dam upstream of the senior priority plaintiff. The *Weeks* Court ordered that the junior defendant's dam was required "to permit the same amount of water to escape from the lake and proceed down [the creek] to [plaintiff's] diversion point as would occur if its channel had remained unchanged." *Weeks*, 85 Idaho at 623-24, 382 P.2d at 791-92.

Citing *Weeks*, the Court in *Ward v. Kidd*, 87 Idaho 216, 392 P.2d 183 (1964), held that an upstream junior dam owner could not "obstruct the flow" when "the water, if unobstructed, would reach [the downstream senior's] land . . . ." *Ward*, 87 Idaho at 226, 392 P.2d at 189-90. The *Ward* Court held that the downstream senior "was entitled to have it flow uninterrupted." *Id.* at 226, 392 P.2d at 189. The *Ward* Court also remarked that the senior's rights to use the water "were valuable rights. The law cannot countenance the invasion of a right merely because it is small. The holder of such a right is entitled to its protection to the same extent as if it were of greater magnitude." *Id.* at 227, 392 P.2d at 190.

In short, Idaho law simply does not give an upstream junior water user the right to take a downstream senior's natural flow. As between Sylte's water right no. 95-0734 and other water rights on the Twin Lakes – Rathdrum Creek system (all of which are junior), Sylte's senior priority date guarantees that their right will be the first and last right to receive water.

II. THE DEPARTMENT'S *ORDER* AND *INSTRUCTIONS* DISREGARD THE *1989 DECREE* AND WATER RIGHT NO. 95-0734'S SENIOR PRIORITY.

Instead of grappling with the matters discussed above (which Sylte raised in its briefing below), the *Order* jumps to its—and the *Instructions*'—conclusion that "Water Right no. 95-0734 entitles Syltes to the natural tributary inflow into Twin Lakes, up to the decreed amount, regardless of evaporation and seepage losses, when the natural flow of Rathdrum Creek downstream from the Twin Lakes control structure is not sufficient to satisfy the right." *Order* at 8 (R. at 1397) (emphasis added).

After acknowledging that water right no. 95-0734 "has the most senior priority date in the Twin Lakes – Rathdrum Creek drainage," *Order* at 8 (R. at 1397), and that Idaho's prior appropriation doctrine requires that the Department distribute water on the basis of "first in time is the first in right, *id.* at 8-9 (R. at 1397-98), the *Order* returns to the same conclusion:

> Because Water Right no. 95-0734 is the most senior right in the Twin Lakes - Rathdrum Creek drainage, Sylte is entitled to the passage of Twin Lakes' natural tributary inflow through the outlet control structure to augment the flow of water in Rathdrum Creek for the satisfaction of Water Right no. 95-0734, regardless of evaporation and seepage losses from Twin Lakes.

Order at 9 (R. at 1398) (emphasis added).

But this is not reasoning; it is *ipse dixit*—"[s]omething asserted but not proved." BLACK'S LAW DICTIONARY 905 (9th ed. 2009). Nowhere does the Department address Judge

Magnuson's findings and conclusions discussed in Section I of the Argument above, or how such findings and conclusions lead to the Department's conclusion that water right no. 95-0734 is limited to Twin Lakes' tributary inflow rather than the lakes' pre-1906 natural outflow.

Instead, in support of the Department's conclusion, the *Order* cites this sentence from the *1989 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." *Order* at 9 (R. at 1398) (quoting *Amended Proposed Finding* at xix, Conclusion of Law 14) (underlining in original). But this sentence means only what it says: that other water rights are limited by seepage and evaporation losses from Twin Lakes that exceed total natural tributary inflow, while water right no. 95-0734 is not. It does not say that water right no. 95-0734 is limited by Twin Lakes' total natural tributary inflow.[14]

The *Order* also incorrectly reasons that Sylte is entitled to water only from "the source of their appropriation" which does not include "water stored in Twin Lakes." *Order* at 9-10 (R. at 1398-99). For this proposition, the *Order* cites this quote from the *Memorandum Decision*:

> The holders of water right #95-0734 are therefore entitled to waters from the source of their appropriation on a basis of priority over those storage rights Nos. 95-0974 and 95-0975. The waters of this basin are to be administered in such manner as to give effect to such priority.

Memorandum Decision at 13.

[14] The *Order* cites statements from a document that is not in the record to "reinforce" its conclusion that water right no. 95-0734 is limited to Twin Lakes' natural tributary inflow. *Order* at 9 (R. at 1398). As explained in Section IV of the Argument below, however, the cited document is not properly relied on by the Department.

First, to be clear, Sylte does not claim an entitlement to the artificially stored water in Twin Lakes. Rather, consistent with the *1989 Decree*, Sylte claims it is entitled to the natural pre-dam outflow of water that was naturally impounded in Twin Lakes and that gradually drained out into Rathdrum Creek.

Second, the *Order* is wrong about "the source of [Sylte's] appropriation." Judge Magnuson conclusively determined that Twin Lakes was the source of water in Rathdrum Creek that supplied water right no. 95-0734 when it was first appropriated:

> 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.

Memorandum Decision at 11 (R. at 183) (emphasis added). He also conclusively determined that Twin Lakes still is the source of water in Rathdrum Creek that supplies water right no. 95-0734:

> 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.

Memorandum Decision at 12 (R. at 184) (emphasis added).

Third, the *Order's* conclusion that water in Twin Lakes is stored under the 1906 Storage Rights and is not available to senior water right no. 95-0734 simply does not square with the *1989 Decree* or Idaho's prior appropriation doctrine.

In the very same sentence containing the "source of their appropriation" language relied on by the Department, Judge Magnuson determined that water right no. 95-0734 is entitled to

water "on a basis of priority" over the 1906 Storage Rights, and in the very next sentence he expressly admonished that "[t]he waters of this basin are to be administered in such manner as to give effect to such priority." *Memorandum Decision* at 13 (R. at 185). Clearly, and consistent with fundamental Idaho water law, Judge Magnuson recognized that the 1906 Storage Rights cannot legally interfere with water right no. 95-0734 because of its senior 1875 priority date.

There is no justification for diminishing water right no. 95-0734's priority for the benefit of the 1906 Storage Rights (or any other junior water right). The Idaho Supreme Court has described a water right as a valuable property right entitled to protection under the law:

> "When one has legally acquired a water right, he has a property right therein that cannot be taken from him for public or private use except by due process of law and upon just compensation being paid therefor." *Bennett v. Twin Falls North Side Land & Water Co.*, 27 Idaho 643, 651, 150 P. 336, 339 (1915). "Priority in time is an essential part of western water law and to diminish one's priority works an undeniable injury to that water right holder." *Jenkins v. State, Dept. of Water Resources*, 103 Idaho 384, 388, 647 P.2d 1256, 1260 (1982). When there is insufficient water to satisfy both the senior appropriator's and the junior appropriator's water rights, giving the junior appropriator a preference to the use of the water constitutes a taking for which compensation must be paid. *Montpelier Milling Co. v. City of Montpelier*, 19 Idaho 212, 219, 113 P. 741, 743 (1911); Idaho Const. Art. XV, § 3.

Clear Springs Foods, Inc. v. Spackman, 150 Idaho 790, 797–98, 252 P.3d 71, 78–79 (2011).

Finally, the *Order* cites Conclusion of Law No. 14 in the *Amended Proposed Finding* to support its conclusion that water right no. 95-0734 is limited to Twin Lakes' tributary inflow and not the "stored waters" in Twin Lakes. *Order* at 10 (R. at 1399). Conclusion of Law No. 14 states:

> When seepage and evaporation losses from Twin Lakes exceed the total natural tributary inflow to Twin Lakes, no water will be released from the 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.

Amended Proposed Finding at xix (R. at 205) (underlining in original). The Department's amendment of Conclusion of Law No. 14 (shown in underlining) could have been more artfully drafted.[15] In any case, it does not support the Department's conclusion. The first sentence simply says that the exercise of water right no. 95-0734 is not limited when Twin Lakes' seepage and evaporation losses exceed natural tributary inflow. The second sentence says that, when that circumstance occurs, water right no. 95-0734 (and some other rights) may divert "natural flow, but not the stored waters, on the basis of priority." As already discussed, Sylte does not claim an entitlement to the artificially stored waters in Twin Lakes, but rather the natural pre-dam outflow from Twin Lakes that water right no. 95-0734's is entitled to by virtue of its senior priority. In other words, this language supports Sylte's position, not the Department's.

In order to give force and effect to every part of the *1989 Decree*, Conclusion of Law No. 14 must be read in light of Judge Magnuson's other findings and conclusions that all of the water in Twin Lakes is the pre-dam "natural lake storage" that supplied the "natural flow"[16] to which water right no. 95-0734 is entitled to in priority under Conclusion of Law No. 14. *See supra* pp. 20-21 (discussing Judge Magnuson's findings and conclusions that the 1906 dam did not actually

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[15] Inartful drafting does not necessarily create ambiguity. In *Chavez*, the Idaho Supreme Court found a divorce settlement agreement was not reasonably subject to conflicting interpretation (*i.e.*, they found the agreement unambiguous) despite acknowledging that it could have been "more artfully drafted." *Chavez*, 146 Idaho at 219, 192 P.3d at 1043.

[16] The Department has defined "natural flow" as "water that would be flowing in the river system absent reservoir operations and diversions.'" *Amended Final Order* at 7 n.7, *In the Matter of Accounting for Distribution of Water to the Federal On-Stream Reservoirs in Water District 63* (Oct. 20, 2015). To the extent necessary, this Court may take judicial notice of the *Amended Final Order* pursuant to Idaho Rule of Evidence 201 and Idaho Rule of Civil Procedure 44, as it is in this Court's record in another case: *Ballentyne Ditch Company, et al. v. IDWR*, CV-WA-2015-21376 (Consolidated Ada County Case No. CV-WA-2015-21391), record pages 1230-1311.

impound more water, it just held it longer). That is, the words "stored waters" in Conclusion of Law No. 14 must be read to mean water stored under the 1906 Storage Rights, not the pre-dam natural outflow "furnished" from Twin Lakes to which water right no. 95-0734 is entitled. In other words, water right no. 95-0734 never diverts "stored water" when it diverts water once naturally held in Twin Lakes—it diverts natural lake storage that supplied Rathdrum Creek's natural flow when the right was created. The contrary conclusion—*i.e.* that water right no. 95-0734 is not entitled to water that once was natural lake storage, and is instead limited to natural tributary inflow to Twin Lakes—would undermine the other express findings and conclusions in the *1989 Decree* discussed above.

In short, water right no. 95-0734 is entitled to the pre-dam, "natural flow" of water that was naturally stored in Twin Lakes. By virtue of water right no. 95-0734's senior priority, Sylte does not need and is not asking for the waters artificially stored under the 1906 Storage Rights.

The *Order* also incorrectly concludes that Conclusion of Law No. 14 means that, although water right no. 95-0734 is limited to natural tributary inflow, it is "unique" because it is excused from evaporation and seepage. *Order* at 11 (R. at 1400). This makes no sense when read together with Judge Magnuson's findings and conclusions in the *Memorandum Decision*:

> At the time the appropriation (No. 95-0734) was made in 1875, there was always water in Rathdrum Creek to serve said water right.
>
> The holders of water right #95-0734 are therefore entitled to waters from the source of their appropriation on a basis of priority over those storage rights Nos. 95-0974 and 95-0975. The waters of this basin are to be administered in such manner as to give effect to such priority.
>
> This Court concludes the rights of all the other Objectors are limited to the natural tributary inflows to Twin Lakes, less evaporation and seepage from Twin Lakes.

Memorandum Decision at 13 (emphasis added).

Here, Judge Magnuson expressly limited the rights of "all the other Objectors" to natural tributary inflow, but expressly singled out and excluded water right no. 95-0734 from any such limitation. The "rights of all the other Objectors"—which are junior to the 1906 Storage Rights[17]—are limited to natural tributary inflows less evaporation and seepage because, otherwise, they would be diverting stored water for which they hold no rights. *See Memorandum Decision* at 12-13 (R. at 184-85).[18] On the other hand, however, as already discussed, water right no. 95-0734 is not subject to either the natural tributary inflow or the evaporation and seepage limitations because it was appropriated prior to the 1906 Storage Rights and construction of the manmade dam and outlet structure.[19]

In summary, Sylte is not arguing that they are entitled to the artificial storage waters of right nos. 95-0974 and 95-0975. Rather, Sylte is entitled to the same delivery of water to water right no. 95-0734 now as when it was appropriated in 1875. Judge Magnuson found that there

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[17] In addition to water right no. 95-0734, the "rights of all the other Objectors" are listed on pages 5 and 6 of the *Memorandum Decision*. The "other" objectors' water rights (some of which are Sylte's) claimed "priority dates of May 1, 1945 or later," and "the points of diversion of all Objectors are located on Rathdrum Creek, which is downstream from the outlet of Lower Twin Lake." *Memorandum Decision* at 7 (R. at 179).

[18] "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 12-13 (R. at 184-85) (emphasis added).

[19] To the extent there is any inconsistency between Judge Magnuson's detailed and specific findings and conclusions in the *Memorandum Decision* and any provision in the *Amended Proposed Findings* (which as discussed in the main text, there is not), the *Memorandum Decision's* specific findings and conclusions control over what Judge Magnuson called the Department's "general findings and conclusions in the Proposed Finding." *Final Decree* at 3 (R. at 198) (emphasis added). *See Twin Lakes*, 124 Idaho 132, 138, 857 P.2d 611, 617 (1993) ("It is well established that specific provisions in a contract control over general provisions where both relate to the same thing.").

was "always" sufficient water in Rathdrum Creek to serve water right no. 95-0734 on a "continuous year-round basis" when it was appropriated in 1875, that such water was "furnished from" Twin Lakes, that appropriators (such as Sylte) are "entitled to maintenance of stream conditions as they were at the time" of their appropriation, and that the holders of water right no. 95-0734 are entitled to water "on a basis of priority" over the 1906 Storage Rights. Nowhere did Judge Magnuson conclude that water right no. 95-0734 is limited to Twin Lakes' natural tributary inflow.

III. THE FUTILE CALL DOCTRINE'S APPLICATION TO WATER RIGHT NO. 95-0734 IS NOT DEPENDENT ON TWIN LAKES' TRIBUTARY INFLOW.

The *Order* improperly upholds the *Instructions'* futile call procedure, which requires a futile call determination "[i]f release of all the natural tributary inflow does not satisfy delivery of water right no. 95-734 within a 48-hr period." *Instructions* at 2 ¶ 7 (R. at 211). This violates the *1989 Decree* because, as already discussed, the delivery of water to water right no. 95-0734 is not limited by the amount of natural tributary inflow to Twin Lakes.

The Idaho Supreme Court has described the futile call doctrine this way:

> As a rule, the law of water rights in this state embodies a policy against the waste of irrigation water. Such policy is not to be construed, however, so as to permit an upstream junior appropriator to interfere with the water right of a downstream senior appropriator so long as the water flowing in its natural channels would reach the point of downstream diversion. We agree that if due to seepage, evaporation, channel absorption or other conditions beyond the control of the appropriators the water in the stream will not reach the point of the prior appropriator in sufficient quantity for him to apply it to beneficial use, then a junior appropriator whose diversion point is higher on the stream may divert the water.

Gilbert v. Smith, 97 Idaho 735, 739, 552 P.2d 1220, 1224 (1976) (internal citations omitted).

Applying the *Gilbert* Court's analysis here, the state's policy against waste must not be construed to permit upstream junior water rights to interfere with the delivery of water to water right no. 95-0734 so long as the natural flow of water—which, as discussed, is Twin Lakes' pre-dam natural outflow—in its natural channels would reach the right's point of diversion. Sylte is entitled to have the pre-dam amount of natural flow—*i.e.*, the water that would be flowing in Rathdrum Creek absent reservoir operations and diversions[20]—continue in Rathdrum Creek's natural channel as it did in 1875, and to be subject to the futile call doctrine under *Gilbert* only if, due to seepage, evaporation, channel absorption or other conditions beyond the control of the appropriators, such water will not reach water right no. 95-0734's point of diversion in sufficient quantity to apply to beneficial use.

The *Order* at 12-13 (R. at 1401-02) improperly relies on the Director's "discretion" in administering water rights to justify the *Instructions*' futile call procedure. It cites the Idaho Supreme Court's decision in SRBA Basin Wide Issue 17, *In re SRBA*, 157 Idaho 385, 336 P.3d 792 (2014) (hereinafter "*BW 17*"), but ignores critical language in that decision that strictly limits the Director's discretion:

> [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. However, it is within the Director's discretion to determine when that number has been met for each individual decree. In short, the Director simply counts how much water a person has used and makes sure a prior appropriator gets that water before a junior user. Which accounting method to employ is within the Director's discretion and the Idaho Administrative Procedure Act provides the procedures for challenging the chosen accounting method.

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[20] *See supra* n. 16 (quoting the definition of "natural flow" in *Amended Final Order* at 7 n.7, *In the Matter of Accounting for Distribution of Water to the Federal On-Stream Reservoirs in Water District 63* (Oct. 20, 2015)).

BW 17, 157 Idaho at 393-94, 336 P.3d at 800-01 (quotation marks and citation omitted). This passage makes clear that the Director's discretion to choose accounting methodologies is constrained by water right decrees and Idaho's priority system. He does not have discretion to pick a junior water right over a senior water right. As the *BW 17* Court said, "the Director cannot distribute water however he pleases at any time in any way; he must follow the law." *BW 17*, 157 Idaho at 393, 336 P.3d at 800. "[A]s long as the Director distributes water in accordance with prior appropriation, he meets his clear legal duty." *Id.*

Without any citation to authority, the *Order* states that the Director "is responsible for balancing the right to divert water against the obligation not to waste it." *Order* at 13. Whatever these asserted responsibilities and obligations might involve, they cannot mean that a senior can be deprived of water by a junior when there is sufficient water upstream to reach the senior's headgate. The *Gilbert* Court made this clear in the passage quoted above (and reiterated here):

> As a rule, the law of water rights in this state embodies a policy against the waste of irrigation water. Such policy is not to be construed, however, so as to permit an upstream junior appropriator to interfere with the water right of a downstream senior appropriator so long as the water flowing in its natural channels would reach the point of downstream diversion.

Gilbert, 97 Idaho at 739, 552 P.2d at 1224.

In any case, even if the Director's discretion extended as far as the *Order* suggests, a conclusion that delivering water to water right no. 95-0734 is wasteful cannot be reconciled with the Department's prior determination that "it is not in the interest of the local public to dry up the channel of Rathdrum Creek downstream of the [Twin Lakes dam] control structure." *Proposed Memorandum Decision and Order* ("*Proposed Order*") at 5, *In the Matter of Application for*

Transfer No. 2745 of Water Right No. 95-0973 and 95-2059 filed by the United States of America, acting through the Regional Director, Bureau of Reclamation (Jun. 26, 1984) (R. at 1189).[21]

Accordingly, the futile call procedures set forth in the *Instructions* and upheld by the *Order* must be rejected.

IV. THE DEPARTMENT IMPROPERLY RELIED ON DOCUMENTS NOT IN THE RECORD.

In the *Order*, the Department improperly cited and quoted documents not in the agency record. Doing so violated Sylte's due process right to notice and a meaningful opportunity to respond, as well as the Department's Rules of Procedure.

First, the Department quoted Sylte's predecessor's *Objection to Proposed Findings of Water Rights* ("*Sylte's Objection*"), filed March 20, 1985, in the proceedings before Judge Magnuson. *Order* at 6 (R. at 1395).[22] Second, the Department cited and quoted the Department's *Notice of Entry of Final Decree* ("*IDWR's Notice*") filed after Judge Magnuson's *Final Decree* was entered. *Order* at 9 (R. at 1398). The Department had no legal basis to cite, quote, or rely upon either of these documents which were not in the record below (and are not in the record on judicial review).

The Department did not find any ambiguity in the *1989 Decree* that would justify looking outside its four corners. "In the absence of ambiguity, a document must be construed by the meaning derived from the plain wording of the instrument." *Brown v. Greenheart*, 157 Idaho

[21] The *Proposed Order* was adopted as a final decision by the Director of IDWR. *Order Adopting Proposed Memorandum Decision and Order* (Aug. 1, 1984) (R. at 1184). The Department's decision was not appealed. *1989 Final Decree* at xvi (Finding of Fact No. 11) (R. at 202)..

[22] Sylte's predecessor-in-interest that filed the objection included John and Evelyn Sylte, Gordon and Judith Sylte, and Sylte Ranch, Inc.

156, 166, 335 P.3d 1, 11 (2014). Indeed, the *Order's* only comment as to whether the *1989 Decree* might be ambiguous is with respect to Conclusion of Law No. 14, which the *Order* determines is "unambiguous." *Order* at 10 (R. at 1399).

No party put these documents in this proceeding's record, the Department did not take official notice of either under Rule of Procedure 602 (IDAPA 37.01.01.602), and no party received notice of them before the issuance of the *Order* or was given an opportunity to contest or rebut them as required by that rule. Accordingly, it was error for the Department to review and quote from such documents in the *Order's* findings and conclusions. IDAPA 37.01.01.650 ("The agency shall maintain an official record for each contested case and (unless statute provides otherwise) base its decision in a contested case on the official record for the case."); IDAPA 37.01.01.712.01 ("Findings of fact must be based exclusively on the evidence in the record of the contested case and on matters officially noticed in that proceeding."). The Department's review and quotation of (and apparent reliance on) these documents violated Idaho law, the Department's Rules of Procedure, and Sylte's due process right to notice and a meaningful opportunity to respond.

In any case, even if *Sylte's Objection* and *IDWR's Notice* were properly in the record, they do not support the conclusions reached by the IDWR. Of course, because Sylte contends the *1989 Decree* is unambiguous, there is no reason to look outside their four corners at these other documents. Nevertheless, since the *Order* quotes from them and to reduce any sense of mystery that might attach to them, Sylte addresses them briefly here.[23]

[23] In offering argument concerning *Sylte's Objection* and *IDWR's Notice*, Sylte in no way admits that additional documents are needed to interpret the *1989 Decree*. As already argued, the *1989 Decree* unambiguously supports Sylte's arguments. Sylte in no way waives any argument or issue, now or on appeal, that the Department's

Concerning *Sylte's Objection*, the Department mischaracterized its substance by selectively quoting from it, and implying (if not asserting outright) that Judge Magnuson rejected the same arguments Sylte is making in this proceeding. *Order* at 6-8 (R. at 1395-97).

The full context of the language the Department quoted from *Sylte's Objection* is as follows:

> 2) As to paragraph 11 [of the Proposed Finding's Conclusions of Law],[24] Syltes specifically object that any rights of storage to the water rights known as 95-0973 and 95-0974 as storage water, are senior to the water rights of Syltes, number 95-0734. Syltes are entitled to their water rights based upon priority on a combined rate of flow to the lake plus stored water down to the 0.0 staff gauge level. The direct flow right of the Syltes has priority over the storage rights of 95-0973 and 95-0974.
>
> As to paragraph 11, paragraph 2, Syltes do not understand what Conclusion of Law is being proposed as it affects the rights of Syltes and therefore object to the same.

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citation and quotation of such documents violated Idaho law, IDWR's Rules of Procedure, or Sylte's due process rights. Nor does Sylte waive its right to meaningfully respond to such documents with further argument or other documents, if necessary.

[24] Paragraph 11 of the *Proposed Finding's* Conclusions of Law (which was later amended to be paragraph 12) stated:

> 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.

Proposed Finding at xix (R. at 20).

> 3) As to Paragraph 13 [of the Proposed Finding's Conclusions of Law],[25] Sylte's water rights are senior to any storage rights above the 0.0 level of Twin Lakes. When the level of water is 0.0 on the Staff Gauge, then at that time the downstream use may be restricted only after all junior water right holders, including homeowners on the lakes have been restricted as to their use.

Sylte Objection at 4.

The thrust *Sylte's Objection* is clear. The Department's original *Proposed Finding* took the position that "direct flow water rights . . . are entitled to divert, on the basis of priority, a combined rate of flow equal to the inflow to the lakes" and that "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." *Proposed Finding* at xix (R. at 20). Sylte objected to those contentions because their 1875 "direct flow right . . . has priority over the storage rights of 95-0973 and 95-0974" and "Syltes water rights are senior to any storage rights above the 0.0 level of Twin Lakes." *Sylte Objection* at 4.

As already discussed, Judge Magnuson agreed with Sylte. Indeed, he expressly rejected the Department's contentions in favor of Sylte's. *Memorandum Decision* at 14 (R. at 186) ("[t]o accept the [D]epartment's interpretation of the facts as they pertain to the 1875 Sylte water right (#95-0734), would be to deprive the holders of such right of the use of the water to which they are entitled and to which use they have a prior right to those possessing the storage rights.").

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[25] Paragraph 13 of the *Proposed Finding's* Conclusions of Law (which was later amended to be paragraph 14) stated:

> 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. When this occurs, water rights that divert from Twin Lakes and from the tributaries to Twin Lakes may divert the natural flow, but not stored waters, on the basis of water right priority.

Proposed Finding at xix (R. at 20).

Concerning *IDWR's Notice*, it simply cannot be relied on to accurately reflect the meaning of the *1989 Decree*. *IDWR's Notice* was filed by the Department after the entry of the *Memorandum Decision* and *Final Decree*. It is not a statement by Judge Magnuson, and therefore it has no bearing on the meaning of the *1989 Decree*. At most it is the Department's self-serving, *post hoc* re-statement of its arguments that were rejected by Judge Magnuson.

Indeed, there simply was no reason for *IDWR's Notice* to include the statements cited by the *Order* other than to place a stake in the ground should the Department want to later re-assert the positions rejected by Judge Magnuson. Judge Magnuson made a number of findings and conclusions about a number of matters, making it odd (to say the least) that IDWR would single out and offer its further explanation concerning only water right no. 95-0734.[26]

In short, the Department's *Order* should not have cited, quoted, or relied on any documents not in the record, and certainly should not have cherry-picked self-serving statements outside the four corners of the *1989 Decree*. Doing so was prejudicial to Sylte and must be reversed.

V. THE DEPARTMENT ERRED BY *SUA SPONTE* ADDING AN INCORRECT VOLUME LIMITATION PROVISION TO THE *INSTRUCTIONS*.

Without any party asking, and without it being an issue presented in this proceeding, the Department improperly added to the *Instructions*' a volume limitation provision concerning water right no. 95-0734. *Order* at 11, 13 (R. at 1400, 1402). This must be reversed because it

[26] For example, Judge Magnuson made findings and conclusions about the nature of the natural lake storage prior to the dam and outlet construction, and also the nature of an unnamed stream that was tributary to Rathdrum Creek immediately below Twin Lakes' outlet prior to the dam and outlet construction. But *IDWR's Notice* makes no mention of such other findings.

was outside the issues raised in this proceeding and because it misapplies whatever volume limitation must be imposed on water right 95-0734.

No party raised the issue of water right no. 95-0734's volume limitation at any point in this proceeding. As already discussed, this proceeding was brought by Sylte to challenge the *Instructions'* provisions limiting the exercise of water right no. 95-0734 to Twin Lakes' natural tributary inflow. Sylte had no notice of the volume limitation issue or any opportunity to address it.

Moreover, even if this was an appropriate issue to address in this proceeding, the Department incorrectly determined how a volume limit should be administered. According to the *1989 Decree*, Sylte's water right no. 95-0734 is entitled to divert 4.10 acre-feet per year in priority. (R .at 26). The *Order*, on the other hand, limits the exercise of water right no. 95-0734 to "unless or until the maximum annual diversion volume of 4.1 acre feet has been delivered." *Order* at 13 (R. at 1402) (emphasis added). Sylte's water right no. 95-0734 is entitled to divert 4.10 acre-feet per year in priority (*i.e.*, not counting excess water diverted under so-called "free river" conditions), not merely to have that amount delivered to their point of diversion. Sylte is entitled to have water delivered to water right no. 95-0734's point of diversion on a continuous year-round basis, only to be curtailed when the right has diverted the volume limit in priority.

"Procedural due process is the aspect of due process relating to the minimal requirements of notice and a hearing if the deprivation of a significant life, liberty, or property interest may occur." *Bradbury v. Idaho Judicial Council*, 136 Idaho 63, 72, 28 P.3d 1006, 1015 (2001). With neither notice nor opportunity to be heard regarding the Department's *sua sponte* addition of a

volume limit to the *Instructions*, the Department's *Order* deprived Sylte of a significant property right in violation of Sylte's due process rights.

ATTORNEY FEES AND COSTS ON APPEAL

Sylte seeks an award of its attorney fees and costs, in full or in part, on this judicial review pursuant to Idaho Code §§ 12-117(1) and 12-117(2).

Idaho Code § 12-117(1) authorizes awards of attorney fees to the "prevailing party" in a proceeding involving as adverse parties a state agency and a person, when "the nonprevailing party acted without a reasonable basis in fact or law." Both determinations are committed to the discretion of the trial court and are reviewed under an abuse of discretion standard. *City of Osburn v. Randel*, 152 Idaho 906, 908, 277 P.3d 353, 355 (2012) (J. Jones, J.).

However, if those tests are met, the award is mandatory. *Fuchs v. Idaho State Police, Alcohol Beverage Control*, 153 Idaho 114, 117, 279 P.3d 100, 103 (2012) (Burdick, C.J.). Idaho Code § 12-117(2) authorizes awards of attorney fees to the prevailing party "on a portion of the case" if the nonprevailing party acted without a reasonable basis in fact or law with respect to that portion of the case.

Sylte is entitled to an award of attorney fees and costs to the extent they prevail on any issues because, as demonstrated above, the *Order* and *Instructions* are contrary to the *1989 Decree* and Idaho's prior appropriation doctrine and they deprive Sylte's senior water right of the benefit of its priority. At all stages of these proceedings Sylte has maintained that the plain language of the *1989 Decree* does not limit the exercise of water right no. 95-0734 to Twin Lakes' tributary inflow. Sylte also has consistently argued that water right no. 95-0734's senior priority protects it from interference or injury by junior water rights—a simple and fundamental

principle of Idaho water law. Nevertheless, despite Judge Magnuson's admonition that "[t]o accept the department's interpretation of the facts as they pertain to the 1875 Sylte water right (#95-0734), would be to deprive the holders of such water right of the use of the water to which they are entitled and to which use they have a prior right to those possessing the storage rights." *Memorandum Decision* at 14 (R. at 186), the Department's *Order* and *Instructions* include provisions which would do exactly that.

Accordingly, the Department has ignored Sylte's arguments and the findings and conclusions of Judge Magnuson, and has thus acted without a basis in fact or law. Sylte respectfully requests an award of attorney fees and costs.

CONCLUSION

The unambiguous language of the *1989 Decree* provides that senior water right no. 95-0734 is entitled to be fulfilled on a continuous year-round basis from the natural, pre-dam outflow from Twin Lakes. This conclusion is required by the *1989 Decree* and Idaho's prior appropriation doctrine. The Department's *Order* and *Instructions*, on the other hand, violate the *1989 Decree* and Idaho's prior appropriation doctrine by limiting water right no. 95-0734 to Twin Lakes' tributary inflow.

The Department's *Order* also should be reversed because it references and relies upon documents outside the record in violation of Sylte's right to due process.

Also, the Department's *Order* should be reversed because it *sua sponte* amended the *Instructions* with language incorrectly applying a volume limitation to water right no. 95-0734.

For the reasons discussed above, the Department's *Order* is in violation of constitutional and statutory provisions, is in excess of the statutory authority of the agency, is made upon

unlawful procedure, is not supported by substantial evidence on the record as a whole, and is arbitrary, capricious, or an abuse of discretion. Sylte respectfully requests that the *Order* be reversed and the *Instructions* should be set aside and reversed.

DATED this 21st day of December, 2017.

Respectfully submitted,

GIVENS PURSLEY LLP

By _____
Michael P. Lawrence

By _____
Jack W. Relf
Attorneys for Petitioners Gordon Sylte, Susan Goodrich, John Sylte, and Sylte Ranch Limited Liability Company

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of December, 2017, I caused a true and correct copy of the foregoing to be filed and copies delivered by the method indicated below, and addressed to the following:

DOCUMENT FILED:

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