

**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,

Respondent.

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;

Case No. CV-2017-7491

KIMBERLI ROTH; DAVID & LORI
SCHAFFER; DARWIN R. SCHULTZ; MOLLY
SEABURG; HAL SUNDAY; TCRV LLC;
TWIN ECHO RESORT; UPPER TWIN
LAKES, LLC; RICK & CORRINNE VAN
ZANDT; GERALD J. WELLER; BRUCE &
JAMIE WILSON; DAVE ZIUCHKOVSKI;
PAUL FINMAN, and TWIN LAKES FLOOD
CONTROL DISTRICT NO. 17,

Intervenors.

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

INTERVENORS' RESPONSE BRIEF

On appeal of final agency action by the Idaho Department of Water Resources

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COME NOW, the above-named Intervenor (except Twin Lakes Flood Control District No. 17), by and through their counsel of record, Norman M. Semanko of Parsons Behle & Latimer, and hereby respond to Petitioner Sylte's Opening Brief dated December 21, 2017 (hereinafter "Opening Brief") in this matter on judicial review from the Idaho Department of Water Resources (hereinafter "Department" or "IDWR") as follows:

I. STATEMENT OF THE CASE

In its statement of the case, Sylte incorrectly asserts that IDWR's order in this matter "is contrary to a decree issued in 1989 and Idaho's appropriation doctrine." Sylte also wrongly claims that IDWR's decision "improperly allows the distribution of water to junior water rights before Sylte's water right." Opening Brief at 6. As discussed in the argument section below, IDWR's decision properly interprets and applies the 1989 decree and appropriately sets forth the details for administration of the natural flow and storage water rights in Water District 95C.

A. Additional Statement of the Facts

1. Memorandum Decision, Proposed Finding of Water Rights, and 1989 Decree.

Sylte's Statement of Facts and Course of Proceedings (Opening Brief at 8–16) quotes at length from portions of the 1989 Memorandum Decision issued by Judge Magnuson, as well as portions of IDWR's Proposed Finding of Water Rights, and the 1989 Decree. However, Sylte's statement omits some key facts contained in these documents, which are set forth below.

"After the Director of the Department of Water Resources filed its report with the court, various individuals or groups filed their objections to such report, which were responded to by the Director of said department. These objections were four in number: 1. By John Sylte and Evelyn Sylte, husband and wife; Gordon Sylte and Judith Sylte, husband and wife; and Sylte Ranch, hereinafter referred to as the Syltes." Memorandum Decision at 2–3 (R. at 175).

Immediately following the “Objectors Listing of Rights,” including Sylte’s claim no. 95-0734, the court noted: “None of these claims included storage as a purpose of the water rights. Memorandum Decision at 5–6 (R. at 177–78).

“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).

“The Twin Lakes Improvement Association filed a notice of claim to a water right that included storage in Twin Lakes, which was recommended in the Proposed Findings at p. 21 as Water Right No. 95-0974.” Memorandum Decision at 7 (R. at 179).

“The U.S. Dept. of Interior, Bureau of Reclamation filed a notice of claim to a water right that included storage in Twin Lakes, which was recommended in the Proposed Finding at p. 21 as Water Right No. 95-0975.” Memorandum Decision at 7 (R. at 179). It is uncontested that the correct water right number for this Twin Lakes storage right is 95-0973 and that the right is now held by Intervenor Twin Lakes Flood Control District No. 17.

“The Objectors have maintained there is no independent right to water storage, or to water stored for some future use, contending that water rights in Idaho are created by appropriations, and that appropriation requires diversion (except in certain instances).

“Storage of spring flows of water for later use is recognized in Idaho. Idaho Code Sec. 42-202. Storage water rights differ from direct flow rights in that water is impounded for later use, while waters, subject to direct flow rights, are diverted for immediate use.” Memorandum Decision at 14 (R. at 186).

“The Court concludes there are only two storage rights recognized as a result of this adjudication proceeding, to-wit: 1. Twin Lakes Improvement Association storage right between 0.0 to 6.4 feet on the staff gauge (95-0974); 2. Bureau of Reclamation’s right between 6.4 to 10.4

feet on the staff gauge (95-0975) [again, this storage right is actually 95-0973 and now belongs to the Flood Control District].” Memorandum Decision at 15 (R. at 187).

“Regarding the Rathdrum Creek Drainage Association [‘a generic term encompassing all the individual Objectors’ (R. at 180)] claim that they have a vested right in storage rights in Rathdrum Creek, it is noted such claimants were required to submit a notice of claim for each water right claimed on a claim form prepared by the Idaho Department of Water Resources, setting forth each element of the water right claimed. Such claims must be filed in a timely manner. The evidence herein does not disclose any claim to a water right for storage purposes was submitted by the Objectors. The time for filing such claims in this adjudication is past.” Memorandum Decision at 16-17 (R. at 188-89).

“Regarding the Objectors’ objection to finding of fact no. 18 on the basis that the listing of water rights did not include all the water which had been diverted and applied to beneficial use on a historical basis by Syltes, this Court finds that all said claimed diversions were described in the listing of water rights.” Memorandum Decision at 20 (R. at 192).

“This Court concludes there is a difference between storage rights and natural flow water rights and the Objectors have not established any rights in the artificially stored waters in Twin Lakes. They have not diverted or appropriated such water.” Memorandum Decision at 20–21 (R. at 192–93).

“Storage water rights utilize the storage capacity of the lake. Direct flow water rights utilize the flows passing through the lake and are established on a priority basis.” Proposed Finding of Water Rights at xvi (Finding of Fact No. 12) (R. at 17).

“No water right exists for the natural storage below the level of 0.0 feet on the Staff Gauge located at the outlet of Lower Twin Lake.” Proposed Finding of Water Rights at xix (Conclusions of Law No. 8) (R. at 20).

“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.” 1989 Decree at xix (amended/final Conclusions of Law No. 14) (underlining omitted) (R. at 205).

Sylte’s water right no. 95-0734 is a “natural flow appropriation” from Rathdrum Creek “for 300 head of stock,” with a “max amount” of 4.1 acre-feet and a “max rate” of .07 cfs. Proposed Finding of Water Rights at 3 (Listing of Rights) (R. at 26).

2. Order on Exceptions.

The Department issued its Order on Exceptions Re: Amended Preliminary Order Removing a Watermaster on April 24, 2017. (R. at 1161–80). This is a final order for which the period to seek judicial review has expired. (R. at 1181–82). Despite including a copy of this order as an exhibit to the affidavit in support of its petition to amend IDWR’s Instructions, Sylte now claims that this order is not relevant to this proceeding. Opening Brief at 12 n.5. To the contrary, particular findings and conclusions made in that matter are relevant in this matter. They are therefore listed below.

The Syltes were parties to the action which resulted in the removal of the Watermaster. Order on Exceptions at 4 (R. at 1164).

In the proceeding, the Director found that: “The [1989] Decree determined the elements of the water rights from Twin Lakes and its tributaries.” Order on Exceptions at 5 (Finding of Fact

No. 4) (R. at 1165). He also found that, for the water from the bottom of the lakes to 0.0 feet on the staff gauge: “No water right exists for this water.” (Finding of Fact No. 6) (R. at 1165).

Twin Lakes Improvement Association’s storage water right no. 95-0974 “authorizes the year-round storage of 5,360 acre feet (‘AF’) of water in Twin Lakes for Recreation Storage purposes.” (Finding of Fact No. 7) (R. at 1165). Twin Lakes Flood Control District No. 17’s storage water right no. 95-0973 “authorizes the year round storage of 3,730 AF of water in Twin Lakes for Recreation Storage and Wildlife Storage purposes.” (Finding of Fact No. 8) (R. at 1165). “From November 1 of each year until March 31 of the next year” these storage water rights “enable Twin Lakes to be filled to the level of 10.4 feet on the Staff Gauge [citing the 1989 Decree at Conclusion of Law No. 12]. 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 [again citing the 1989 Decree at Conclusion of Law No. 12].” (Finding of Fact No. 9) (R. at 1165–66).

The Director further found: “There is no minimum stream flow water right for Rathdrum Creek for wildlife habitat or for any other purpose.” (Finding of Fact No. 33) (R. at 1168). Water flowing out of Twin Lakes into Rathdrum Creek seeps into the ground before it gets to the Syltes’ property. As much as two-thirds of Rathdrum Creek is estimated to be lost. This has impacted the availability of Sylte’s water right no. 95-0734, rendering it unavailable during low flow periods. (Finding of Fact Nos. 37–39, 46, 49) (R. at 1169, 1171). “In September and October of 2016, Department staff testified that futile call conditions in Rathdrum Creek prevented the delivery of water to Syltes to satisfy stockwater right no. 95-0734.” (Finding of Fact No. 53) (R. at 1173).

The Water District 95C Advisory Board adopted a resolution in 2016, expressing concerns about the Watermaster “violating the decree by releasing storage water to satisfy Rathdrum Creek natural flow water rights.” (Finding of Fact No. 50) (R. at 1171–72). The September 20, 2016 Instructions to the Watermaster “describe the Department’s understanding of how the two Twin Lakes storage water rights and the natural flow water rights from Rathdrum Creek, Twin Lakes, and Twin Lakes’ tributaries are to be administered.” (Finding of Fact No. 52) (R. at 1172).

The Director went on to conclude: “The Department properly exercised its statutory authority when it issued its Instructions to [the Watermaster] regarding application of the prior appropriation doctrine to water distribution in WD95C.” (Conclusion of Law No. 3) (R. at 1178). He also concluded that proper administration by the Watermaster included seeking a futile call determination and refraining from turning storage water rights into Rathdrum Creek. (Conclusion of Law No. 5) (R. at 1178).

II. ADDITIONAL ISSUES PRESENTED ON APPEAL

A. Attorney Fees on Appeal.

Intervenors Twin Lakes Improvement Association et al. seek an award of attorney fees in this judicial review action, pursuant to Idaho Code Sec. 12-117, authorizing an award of attorney fees to the prevailing party when the nonprevailing party acts without a reasonable basis in fact or law. Sylte has been attempting for decades to manipulate and control the storage in Twin Lakes for their own purposes. Judge Magnuson rejected these attempts in the Twin Lakes Adjudication in 1989. The Syltes offer nothing new here and have no basis in fact or law for their claims.

III. ARGUMENT

A. IDWR's Order Is Consistent with the Memorandum Decision, the 1989 Decree and Idaho Law.

Sylte claims that IDWR's Order and its Instructions to the Watermaster "impermissibly limit the amount of water available to water right no. 95-0734" and "also impermissibly require that water right no. 95-0734 be subject to a futile call determination." Instead of being subject to such administration, Sylte claims that its water right "must be satisfied on a continuous, year-round basis." Opening Brief at 21. Sylte's assertions stand in direct contrast to the 1989 Decree and Idaho law.

Sylte claims that IDWR "ignored" Judge Magnuson's Memorandum Decision in its order. IDWR did no such thing. To the contrary, IDWR exhaustively reviewed the Memorandum Decision, 1989 Decree and associated documents, citing from them at length in the summary judgment order, including the portions that Sylte relies upon. In doing so, the agency considered all of the relevant provisions of the documents, not just the selectively quoted – and creatively interpreted – provisions that Sylte favors. Far from reading anything out of these documents, IDWR carefully examined and analyzed the entirety of the documents, providing a straightforward, plain-meaning interpretation of Judge Magnuson's decision. That same interpretation is reflected in the Instructions.

Idaho Code Section 42-602 "gives the Director a 'clear legal duty' to distribute water" and broad powers to direct and control distribution of water from all natural water sources within water districts." *In re SRBA (Basin Wide Issue 17)*, 157 Idaho 385, 393 (2014). "The Director cannot distribute water however he pleases at any time in any way; he must follow the law. . . [T]he details of the performance of the duty," however, "are left to the director's discretion. . . . Details are left to the Director." *Id.*

The Instructions to the Watermaster are “details” properly left to the Director and IDWR. While the Syltes obviously do not like IDWR’s Instructions to the Watermaster, this does not give them the right to substitute their judgment for that of the Director in how to administer decreed water rights within a water district. As the Idaho Supreme Court has stated, “we ordinarily must vest the findings of the [Director] with the presumption of correctness.” *In re SRBA (Basin Wide Issue 17)*, 157 Idaho at 394. “The Legislature intended to place upon the shoulders of the [Director] the primary responsibility for a proper distribution of the waters of the state” and “recognized the need for the Director’s expertise.” *Id.*

The Idaho Supreme Court has historically “recognized the Director’s discretion to direct and control the administration of water in accordance with the prior appropriation doctrine,” and “more recently” the Court “further articulated the Director’s discretion: ‘Somewhere between the absolute right to use a decreed water right and an obligation not to waste it and to protect the public’s interest in this valuable commodity, lies an area for the exercise of discretion by the Director.’” *Id.* “Thus, the Director’s clear duty to act means that the Director uses his information and discretion to provide each user the water it is decreed. And implicit in providing each user its decreed water would be determining when the decree is filled or satisfied.” *Id.* at 393–94.

That is precisely what IDWR has done with the Instruction to the Watermaster, as upheld by the agency’s order on summary judgment. Consistent with the plain language of the 1989 Decree and the Memorandum Decision, IDWR has determined that Sylte’s water right is filled or satisfied by natural flow, without penalty for evaporation or seepage. IDWR has also determined that the right is not filled or satisfied by the delivery of storage water. To decide otherwise would be directly contrary to the Decree and the Memorandum Decision.

B. Sylte's Water Right Is Limited to Natural Flow, and Sylte Has No Right to the Natural or Artificial Storage of Twin Lakes.

The Syltes objected to the Director's Report for water rights in the Twin Lakes Adjudication and argued that they were entitled to storage. Judge Magnuson clearly disagreed. Memorandum Decision at 16-17 (R. at 188-89). The court also found that storage rights are different from natural flow water rights. Memorandum Decision at 20-21 (R. at 191-92); *see also*, *American Falls Reservoir Dist. No. 2*, 143 Idaho 862, 880 (2007) (noting that there is a "fundamental difference" between water rights for direct diversion and use and water rights for storage). While under direct diversion water rights, the water must be put to immediate use, "the very purpose of storage is to retain and hold for subsequent use. . . hence retention is not of itself illegal and does not deprive the user of the right to continue to hold." *Rayl v. Salmon River Canal Co.*, 66 Idaho 199, 208 (1945). As a result, Judge Magnuson specifically concluded that Sylte's water right could be satisfied by natural flow, but not with storage. 1989 Decree at xix (amended/final Conclusions of Law No. 14) (R. at 205).

The Syltes – despite being precluded by res judicata and collateral estoppel – are again arguing that they are entitled to storage water. They characterize it as being part of the natural storage of the lake – something they call "natural, pre-dam outflow," a term which does not appear in the 1989 Decree or the Memorandum Decision – and therefore not really "storage." This bizarre argument turns the Decree, Memorandum Decision and Idaho law all on their heads.

The Decree and Memorandum Decision specifically found that there is no water right to the natural storage in Twin Lakes. Proposed Finding of Water Rights at xix (Conclusions of Law No. 8) (R. at 20). The Director made the same finding in the Order on Exceptions: "No water right exists for this water." (Finding of Fact No. 6) (R. at 1165). There is simply no basis for Sylte to lay claim to this water.

Regarding the distinction between natural flow water rights (like Sylte's) and storage water rights (like TLIA's and the Flood Control District's), Judge Magnuson noted: "Storage water rights differ from direct flow rights in the water is impounded and stored for later use, while waters, subject to direct flow rights, are diverted for immediate use. Memorandum Decision at 14 (R. at 186). "Direct flow water rights utilize the flows passing through the lake." Proposed Finding of Water Rights at xvi (Finding of Fact No. 12) (R. at 17). "No water right exists for the natural storage below the level of 0.0 on the Staff Gauge located at the outlet of Lower Twin Lake." Proposed Finding of Water Rights at xix (Conclusions of Law No. 8) (R. at 20). Of course, this serves to entirely defeat Sylte's claim to this water as "natural, pre-dam outflow." It is "natural storage," to which Sylte has no right.

Sylte's assertion that the 1906 dam "did not impound any additional water" (Opening Brief at 21) is an absolute mischaracterization of the Memorandum Decision. The result of the dam "was to hold the water at a higher point longer through the summer months." Memorandum Decision at 10 (R. at 182). By definition, that is the impoundment of additional water to be held during the summer months. That additional water is the storage owned by TLIA and the Flood Control District. Sylte has no right to that storage water, as previously determined by Judge Magnuson.

Sylte argues that the 1906 storage water rights are not like other storage water rights and that somehow Sylte should not be limited to natural flow, like other dams "where no natural storage system previously existed." Opening Brief at 25. No authority is provided for this supposition. Moreover, this argument flies in the face of one of Idaho's most well-documented examples of natural flow water right holders not being allowed to utilize storage water rights.

A century ago, senior natural flow water right holders in eastern Idaho challenged the notion that a storage right with a junior priority date to their natural flow rights, could be delivered past their headgates. “Although the earliest rights on the Snake were held by water users in the Idaho Falls area, they were ordered to close their headgates late in the season even though there was water in the river. Due to releases from Jackson Dam, the water in the river was considered storage water for those who had subscribed for the water in the Minidoka Project and not natural flow water which could otherwise be diverted by the earlier priority natural flow rights.” *The Development of Water Rights and Water Institutions in the Upper Snake River Valley*, Jerry R. Rigby, *The Advocate*, Vol. 53, No. 11/12 (Nov/Dec 2010); *see also*, *Institutional History of the Snake River 1850-2000*, R.A. Slaughter, University of Washington (2004) (“Jackson Lake storage produced the irony of natural flow right holders having their water shut off while there was substantial flow in the river, the flow belonging to storage right holders”). This was the result dictated by Idaho’s prior appropriation doctrine. And, contrary to Sylte’s assertion, the result was not different because Jackson Lake was in existence prior to Jackson Dam. The natural flow right holders were entitled to natural flow only, not storage. Twin Lakes is no different.

In other water districts in Idaho which include both natural flow and storage water rights, natural flow water right delivery is limited to the amount of natural flow available in the reach containing the diversion. *Concepts, Practices, and Procedures Used to Distribute Water within Water District #1*, Upper Snake River Basin, Tony Olenichak, at 28 (March 2, 2015). The natural flow holders do not receive storage. The result can be no different in Water District 95C.

To accomplish a continuous, guaranteed, and uninterrupted supply of water, Sylte would need to tap into the storage of the Twin Lakes, including the water rights held by TLIA and the Flood Control District, as a supplemental supply to Sylte’s natural flow water right. That is

precisely what they attempted to do in the Twin Lakes Adjudication. It is what they are attempting again in this proceeding. To allow such use by Sylte would be in direct violation of the 1989 Decree and Idaho law. IDWR's order and the Instructions to the Watermaster appropriately recognize this.

C. The Express Quantity Elements of Sylte's Water Right Preclude a Continuous Year-Round Supply.

Sylte relies heavily on a generalized finding by Judge Magnuson, concluding that "there was always water in Rathdrum Creek to serve said water right" and "to provide .07 cubic foot per second to the appropriator on a continuous year-round basis." Sylte contends that this is a "clear inference" that Judge Magnuson "intended" for the Syltes to be protected. Opening Brief at 29.

Of course, there can be no guarantee that a natural flow water right will "always" flow. Sooner or later, natural flows deplete during the summer months, precisely as they did in Water District 95C during the drought conditions in 2015 and 2016. Order on Exceptions at 17 (R. at 1177). Judge Magnuson's finding that water flowed to Rathdrum Creek before the construction of the dam in 1906 is useful in understanding the basis for excluding water right no. 95-0734 (as a pre-dam right) from the evaporation and seepage losses that were applied to other natural flow water rights (post-dam rights), but it does not equate to a guarantee of a permanent, uninterrupted supply. There is certainly nothing in the 1989 Decree that concludes that.

Even more problematic for Sylte is the fact that water right no. 95-0734 has a decreed maximum volume of 4.1 acre-feet. Proposed Finding of Water Rights at 3 (Listing of Rights) (R. at 26). This is true whether this limitation is expressly included in the Instruction to the Watermaster or not. It is in the Decree, it is plain language, and it must be adhered to by the Watermaster. Idaho Code Sec. 42-607. There is no inference or intent that can provide otherwise.

Sylte insists that the right “must be satisfied on a continuous, year-round basis.” Opening Brief at 21. At the decreed diversion rate of .07 cfs, a continuous supply would equate to a total of 50.7 acre-feet per year. *See, Water Conversion Factors* (available at idwr.idaho.gov) (1 cfs equals 1.9835 acre-feet per day) (.07 cfs x 1.9835 = .138845 acre-feet; .138845 acre-feet x 365 days = 50.7 acre-feet). This is 46.6 acre-feet more than the 4.1 acre-foot quantity authorized to be diverted under the water right, as decreed by Judge Magnuson.

Obviously, Sylte’s right cannot be authorized “on a continuous year-round basis” at the rate of .07 cfs, or it would exceed the “max amount” in the decree by a factor or more than 12 times the quantity that is authorized. Proposed Finding of Water Rights at 3 (Listing of Rights) (R. at 26). Therefore, there can be no factual or legal basis for the “always” and “continuous year-round” arguments made by Sylte.

D. IDWR’s Futile Call Analysis Is Sound.

The futile call doctrine is a bedrock principle of water rights administration and the prior appropriation doctrine in Idaho. Among other things, it guards against the waste of water when water flowing in its natural channel would not reach the point of diversion downstream. *Gilbert v. Smith*, 97 Idaho 735, 739 (1976). Sylte fails to identify any authority to the contrary. There is no exemption from the futile call doctrine for Sylte in either the 1989 Decree or Idaho law.

Water flowing out of Twin Lakes into Rathdrum Creek seeps into the ground before it gets to the Syltes’ property. As much as two-thirds of Rathdrum Creek is estimated to be lost. This has impacted the availability of Sylte’s water right no. 95-0734, rendering it unavailable during low flow periods. (Finding of Fact Nos. 37–39, 46, 49) (R. at 1169, 1171). “In September and October of 2016, Department staff testified that futile call conditions in Rathdrum Creek prevented the delivery of water to Syltes to satisfy stockwater right no. 95-0734.” (Finding of Fact No. 53) (R. at 1173).

IDWR was correct to require a futile call determination in the Instructions to the Watermaster, so as not to waste water. Such a requirement is certainly consistent with Idaho law.

E. The Sylte Volume Limit Is Appropriate to Include in the Instructions.

In its petition for declaratory ruling, Sylte asked IDWR to revise the Instructions to the Watermaster. Sylte has acknowledged that the Instructions “are subject to further review and updates by the Department.” Opening Brief at 12 (quoting Instructions at 3 (R. at 212)). It should come as no surprise that IDWR revised the Instructions, albeit not in the way that Sylte requested.

IDWR added to the Instructions a reference to the decreed diversion volume for Sylte’s water right. This “max quantity” of 4.1 acre-feet per year is taken directly from the elements of the decreed water right. Proposed Finding of Water Rights at 3 (Listing of Rights) (R. at 26). It is beyond reason how Sylte can complain about such an addition. There is no due process issue: The Syltes were parties to the Twin Lakes Adjudication, where the water right was decreed with the diversion volume. Res judicata and collateral estoppel preclude Sylte from challenging it.

The quantity element – both the diversion rate and annual diversion volume – is a key component of an adjudicated water right. Idaho Code Secs. 42-1411(2)(c) and 42-1412(6). Without it, the Watermaster is unable to accurately and effectively ensure the delivery of water rights during times of shortage, as required by statute. Idaho Code Sec. 42-607.

Both the diversion rate and the annual diversion volume are defined in Sylte’s water right, as decreed by Judge Magnuson. (R. at 26). Sylte cites no authority for the proposition that water rights should be administered only for their diversion rate, not their diversion volume. To do so would negate the purpose of adjudicating the water rights in the first place.

IDWR’s decision is sound, will assist the Watermaster in administering water rights in the future, and should be upheld.

F. The Additional Documents Cited by IDWR Are Related to the 1989 Decree, and Any Error from Reviewing Them Is Harmless.

Sylte claims that the IDWR order's citation to the objection filed by the Syltes in the Twin Lakes Adjudication, and the additional citation to IDWR's Notice filed after the Final Decree was entered, were improper.

Both of these documents are part of the Twin Lakes Adjudication. The Syltes' objection is specifically referenced by Judge Magnuson in the Memorandum Decision. (R. at 175). And the Notice of Entry of Final Decree is certainly related to the adjudication. As part of the court proceedings, it is difficult to understand why it would be improper for IDWR to review them. In any event, it is evident that IDWR's decision in this matter is not based upon those two documents. The Memorandum Decision and the 1989 Decree are clear and unambiguous. It is those documents that IDWR relied upon in its summary judgment order. Accordingly, even if it was improper for IDWR to cite and review the two documents in question, the error is harmless.

IV. CONCLUSION

For the above-stated reasons, the Intervenor respectfully request that IDWR's Order and the Instructions to the Watermaster, as modified by IDWR, be upheld, and that attorney fees and costs be awarded to the Intervenor as prevailing parties.

DATED February 9, 2018.

PARSONS BEHLE & LATIMER

By 
Norman M. Semanko

*Attorneys for All Intervenor Other Than Twin
Lakes Flood Control District No. 17*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of February, 2018, I served a true and correct copy of the foregoing document on the parties listed below by their designated method of service as indicated.

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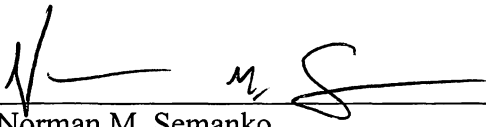
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