

APR 11 2018

By

Clerk

Deputy Clerk

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

Case No. CV-2017-7491

MEMORANDUM DECISION

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 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 SYLTES' PETITION)
 FOR DECLARATORY RULING)
 REGARDING DISTRIBUTION OF WATER)
 TO WATER RIGHT NO. 95-0734)

I.

BACKGROUND

This matter concerns the distribution of water to water right 95-734. In 1975, a general adjudication was commenced to adjudicate rights to the use of surface waters in the Twin Lakes-Rathdrum Creek Drainage Basin. R., 196. The *Final Decree*, which will be referred to herein as the *Decree*, was entered in 1989.¹ *Id.* It includes a list of all existing rights to the surface waters of Twin Lakes, its tributaries, and its outlets as of May 23, 1977. Water right 95-734 was decreed to John and Evelyn Sylte in the *Decree*. *Id.* at 26. In 2006, the Idaho Department of Water Resources ("Department") issued written instructions to the local watermaster regarding the administration of water rights under the *Decree*. *Id.* at 210. The Petitioners disagree with the instructions' distribution of water to water right 95-734, asserting it is contrary to the *Decree* and the doctrine of prior appropriation. *Id.* at 213. Therefore, in 2017 they filed a *Petition for*

¹ The *Final Decree* was entered in Kootenai County Case Civil Case No. 32572 on April 20, 1989. By its terms, it incorporates by reference (1) a *Memorandum Decision* entered by the Court in that matter on February 27, 1989, and (2) the *Proposed Finding of Water Rights in the Twin Lakes-Rathdrum Creek Drainage Basin* filed on January 14, 1985, as subsequently amended as set forth in the *Final Decree*. R., 197-918.

Declaratory Ruling with the Department asking it to set aside and reverse the instructions. *Id.* The Intervenor's opposed the *Petition*. *Id.* at 1255.

Following hearing on cross-motions for summary judgment, the Department issued its *Final Order*.² *Id.* at 1390. In the *Final Order*, the Department granted the Intervenor's motion for summary judgment and denied the Petitioner's request to reverse and set aside the instructions. *Id.* at 1402. In so holding, the Department found the instructions to be consistent with the *Decree*. *Id.* at 1400. The Petitioner subsequently filed a *Petition* seeking judicial review of the *Final Order*. They assert the *Final Order* is contrary to law and request that the Court set it aside. A hearing on the *Petition* was held before the Court on March 20, 2018.

II.

STANDARD OF REVIEW

Judicial review of a final decision of the director of IDWR is governed by the Idaho Administrative Procedure Act ("IDAPA"). Under IDAPA, the court reviews an appeal from an agency decision based upon the record created before the agency. I.C. § 67-5277. The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. I.C. § 67-5279(1). The court shall affirm the agency decision unless it finds that the agency's findings, inferences, conclusions, or decisions 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. I.C. § 67-5279(3). Further, the petitioner must show that one of its substantial rights has been prejudiced. I.C. § 67-5279(4). Even if the evidence in the record is conflicting, the Court shall not overturn an agency's decision that is based on substantial competent evidence in the record. *Barron v. IDWR*, 135 Idaho 414, 417, 18 P.3d 219, 222 (2001). The petitioner bears the burden of documenting and proving that there was not substantial evidence in the record to support the agency's decision. *Payette River Property Owners Assn. v. Board of Comm'rs.*, 132 Idaho 552, 976 P.2d 477 (1999).

² The term *Final Order* refers to the Department's *Order on Motions for Summary Judgment; Order Amending Instructions; Order Vacating Hearing Dates and Schedule* dated September 6, 2017.

III. ANALYSIS

A. Decree interpretation.

When a final decree is entered in an adjudication Idaho law requires water rights to be administered in accordance with that decree. I.C. § 42-1413(2). Therefore, to address issues pertaining to the administration of water right 95-734 the Court begins with the interpretation of the *Decree*. The rules of interpretation applicable to contracts also apply to the interpretation of a water right decree. *A & B Irr. Dist. v. Spackman*, 153 Idaho 500, 523, 284 P.3d 225, 248 (2012). If a decree's terms are clear and unambiguous, the decree's meaning and legal effect are questions of law to be determined from the plain meaning of its own words. *Cf., Sky Cannon Properties, LLC v. The Golf Club at Black Rock, LLC*, 155 Idaho 604, 606, 315 P.3d 792, 794 (2013). Whether a decree is ambiguous is a question of law over which this Court exercises free review. *Id.* A decree is ambiguous if it is reasonably subject to conflicting interpretations. *Lamprecht v. Jordan, LLC*, 139 Idaho 182, 185, 75 P.3d 743, 746 (2003).

The elements of water right 95-734 are plainly set forth in the *Decree*. The water right authorizes the year-round diversion of .07 cfs from Rathdrum Creek for stockwater purposes pursuant to a May 1, 1875, priority date, limited to a total annual diversion volume of 4.10 acre-feet. R., at 26. These elements are undisputed. However, the *Decree* includes additional language, which is the subject of dispute, specific to how water right 95-734 is to be administered. It is that language which will be addressed below.

i. History.

To provide context for the administrative language contained in the *Decree*, Judge Magnuson summarized the history of the Twin Lakes-Rathdrum Creek Drainage Basin. The Court includes his summary herein in pertinent part:

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 Lower 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.

...

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.

R., 181-182.

ii. Changes in condition to Rathdrum Creek.

Water right 95-734 was appropriated in 1875 out of Rathdrum Creek, which is the only outlet from Twin Lakes. Judge Magnuson found that the 1906 alterations to the Twin Lakes water system, specifically the dam and outlet structure, had an effect on the natural conditions of Rathdrum Creek.³ He noted 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.” R., 184. At the time the right was created he found “there was sufficient direct flow water in Rathdrum Creek, in its then natural condition, furnished from the water of Twin Lakes, to provide 0.07 cfs to the appropriator on a continuous year-round basis.” *Id.* at 203. However, he held that “such condition has not existed on a year-round basis at all times since the dam and outlet structure were constructed in 1906.” *Id.* at 184. He attributed the change in condition in Rathdrum Creek to increases in evaporation and seepage out of Twin Lakes as a result of the dam and outlet structure. *Id.* at 184, 203. He found that since 1906 evaporation and seepage from the impounded waters of Twin Lakes sometimes exceed natural tributary inflow to Twin

³ Judge Magnuson also found changes in the system since 1875 due to factors other than the 1906 system alterations. Specifically, he stated “[t]here have been changes in the area which affect the inflow into Twin Lakes area and the natural storage of 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.” R., 184.

Lakes, and that when that happens “Twin Lakes is not a significant source of water to Rathdrum Creek.” *Id.* at 203.

iii. Under the plain language of the *Decree*, diversion by water right 95-734 is limited to the amount of natural tributary inflow to Twin Lakes.

Given the finding that the increased seepage and evaporation had an effect on the natural conditions of Rathdrum Creek, Judge Magnuson considered how best to memorialize the administration of water right 95-734 in the *Decree*. He determined to protect the right by giving it a unique administrative status relative to other natural flow rights on the system located downstream from Twin Lakes. The pertinent administrative language is contained in conclusion of law 14, which provides as follows:

14. When seepage and evaporation losses from Twin Lakes exceed the total natural tributary inflow to Twin Lakes, no water will be released from the lakes to satisfy downstream water rights, with the exception of Water Right No. 95-0734. When this occurs, Water Right No. 95-0734 and water rights that divert from Twin Lakes and from the tributaries to Twin Lakes may divert the natural flow, but not the stored waters, on the basis of water right priority.

Id. at 205 (underline in original). The language of this provision is plain and unambiguous. It protects water right 95-734, which was appropriated before the 1906 alterations, from the increased seepage and evaporation created by those alterations. It ensures the increased seepage and evaporation is not counted against the natural tributary inflow the right is entitled to divert. In this sense, water right 95-734 received a unique administrative status on the system. None of the other Objectors in the adjudication received such protection. To the contrary, the *Decree* expressly provides that “the rights of all the other Objectors are limited to the natural tributary inflows to Twin Lakes, *less evaporation and seepage from Twin Lakes.*” *Id.* at 185 (emphasis added).

In denying the Petitioners’ *Petition for Declaratory Ruling*, the Department found the 2006 instructions to be consistent with the *Decree*. This Court agrees. The instructions provide in pertinent part as follows:

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.

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. 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.

Id. at 211 (internal citations omitted). A review of these provisions establishes they accurately reflect the plain language of the *Decree*. Since the instructions are consistent with the *Decree*, the Department's *Final Order* does not offend any provision of Idaho Code § 67-5279(3) and must be affirmed.

iv. The Petitioners' argument is contrary to the plain language of the *Decree*.

Notwithstanding conclusion of law 14, the Petitioners contend they are entitled to a continuous, guaranteed, and uninterrupted supply of 0.07 cfs from the waters of Twin Lakes under water right 95-734 regardless of the amount of natural tributary inflow into Twin Lakes. This argument assumes and requires the release of the lakes' stored waters to satisfy the right when the amount of natural tributary inflow is insufficient.⁴ However, in addition to being contrary to the plain language of conclusion of law 14, the Petitioners' argument is untenable since the release of storage water to satisfy water right 95-734 is expressly prohibited under the *Decree*.

Judge Magnuson differentiated between storage water rights and direct flow water rights in the *Decree*. It provides that "[s]torage rights differ from direct flow rights in that water is impounded and stored for later use, while waters, subject to direct flow rights, are diverted for

⁴ If the natural tributary inflow is insufficient to satisfy water right 95-734, there is no other source of water that could be released into Rathdrum Creek to satisfy the right except for the lakes' stored water.

immediate use.” R., 186. Further, that storage rights “utilize the storage capacity of the lake,” while direct flow rights “utilize the flows passing through the lake . . .” *Id.* at 202. The *Decree* instructs that “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.” *Id.* at 205. All other decreed water rights, including 95-734, are categorized as direct flow rights that have no legal entitlement to the lakes’ stored waters. *Id.* Thus, the *Decree* did not award the Petitioners any right to divert the lakes’ stored waters. To the contrary, it makes clear that water right 95-734 is a direct flow water right that may only be satisfied by flows passing through the lake.

Even in addressing the increased seepage and evaporation losses cause by the 1906 alterations, the *Decree* makes clear that under no circumstance may water right 95-734 divert the lakes’ stored waters. It expressly provides that when seepage and evaporation losses exceed the total inflow, water right 95-734 “may divert the natural flow, *but not the stored waters*, on the basis of water right priority.” *Id.* at 205 (emphasis added). Therefore, the Petitioners’ argument, which necessarily relies upon the release of the lakes’ stored water to satisfy their right, is contrary to the plain language of the *Decree* and must be rejected.

Last, the Petitioners argue that conclusion of law 12 opens the door or creates an ambiguity as to whether water right 95-734 may divert storage water. It provides:

12. Only two water rights identified herein, Nos. 95-0973 and 95-0974, are entitled to store water and to make beneficial use of stored waters in Twin Lakes. *All other water rights with source of Twin Lakes Tributary to Rathdrum Creek* are direct flow water rights and are entitled to divert, on the basis of priority, a combined rate of flow equal to the inflow to the lakes. Stated in another manner, direct flow water rights can be utilized to divert from Twin Lakes only if the diversions do not injure the storage water rights in Twin Lakes.

R., 205. (emphasis added). The Petitioners contend that since water right 95-734 has a source of Rathdrum Creek, and not a source of Twin Lakes, conclusion of law 12 does not apply to limit or define it as a direct flow water right. They assert it only applies to water rights with a source of Twin Lakes, leaving an open question as to the status of 95-734. The Court disagrees. The provision is plain. It unambiguously provides that there are only two storage rights in Twin Lakes – 95-0973 and 95-0974. It then explains all other water rights with a source of Twin Lakes are direct flow water rights. The provision does not address water rights with a source of Rathdrum Creek because to do so would be unnecessary and redundant. A right in Rathdrum Creek cannot by its very nature be a storage right as there is no storage capability or capacity in

Rathdrum Creek. The only storage in the system is in Twin Lakes. Therefore, all other water rights on the system with a source other than Twin Lakes, including 95-734, are direct flow rights by their very nature, and further explanation is not required.

B. Principles of res judicata preclude the Petitioners from asserting the *Decree's* plain language is contrary to the doctrine of prior appropriation.

The Petitioners argue that the Department's instructions and *Final Order* are contrary to Idaho's prior appropriation doctrine. Among other things, they cite many cases for the proposition that first in time is first in right, and for the proposition that an appropriator is entitled to continue to divert water under conditions that existed at the time the appropriation was made. They argue the Department's interpretation of the *Decree* offends the principles set forth in these cases to the injury of their water right. The Court disagrees and finds that principles of res judicata preclude the Petitioners from asserting the *Decree's* plain language is contrary to the doctrine of prior appropriation.

The doctrine of res judicata covers both claim preclusion and issue preclusion. *Hindmarsh v. Mock*, 138 Idaho 92, 94, 57 P.3d 803, 805 (2002). Claim preclusion bars a subsequent action between the same parties upon the same claim or upon claims "relating to the same cause of action . . . which might have been made." *Id.* Issue preclusion protects litigants from litigating an identical issue with the same party or its privy. *Rodriguez v. Dep't. of Corr.*, 136 Idaho 90, 92, 29 P.3d 401, 403 (2001).

In this case, the Petitioners were parties to the Twin Lakes-Rathdrum Creek Drainage Basin adjudication. R., 175, 177, & 180. They had a full and fair opportunity to timely assert their claims and arguments in that proceeding. *Id.* Indeed they did so and actively pursued and litigated an objection to the recommendation for water right 95-734. *Id.* The adjudication resulted in the issuance of the *Decree*, which was a final and appealable judgment on the merits. *Id.* at 196. If the Petitioners were dissatisfied with how water right 95-734 was memorialized in the *Decree*, they were required to timely file an appeal. They did not. Likewise, if they believed that the *Decree* was inconsistent with Idaho's doctrine of prior appropriation, or that it failed to adequately protect their rights, they were required to file an appeal. They did not.

Once the *Decree* in the adjudication was issued and final, Idaho law requires water rights to be administered in accordance with that decree. I.C. § 42-1413(2). Thus, the Court's review

in this proceeding is limited to whether the Department's administration of the water right 95-734 is consistent with the plain language of the *Decree*. As set herein, it finds that it is. The Court cannot consider issues of whether the plain language of the *Decree*, as it pertains to water right 95-734, is consistent with Idaho's doctrine of prior appropriation. Nor can it consider arguments that the plain language of the *Decree* does not adequately protect the Petitioners' rights. Such issues were raised, or should have been raised, in the prior adjudication and are precluded from being raised in this proceeding by principles of res judicata.⁵

C. The remaining issues raised by Petitioners do not entitle them to relief on judicial review as no prejudice to a substantial right has been shown.

The Petitioners complain that the instructions improperly contain a provision regarding the futile call doctrine. That provision provides that if the natural tributary inflow does not satisfy the delivery of water right 95-734 within a 48-hour period, the watermaster shall consult with the Department regarding the determination of futile call. R., 211. The futile call doctrine is an integral part of Idaho water law that guards against the waste of water. *Gilbert v. Smith*, 97 Idaho 735, 739, 552 P.2d 1220, 1224 (1976). No water right is immune from futile call if the elements of the doctrine are established and proven. Therefore, the Director did not abuse his discretion in including the subject futile call instruction, nor does its inclusion in the instructions prejudice a substantial right of the Petitioners.

Next, in the *Final Order* the Department amended provision 5 of the instructions to include a volume limitation of 4.1 acre-feet with respect to water right 95-734. R., 1402. The Petitioners complain it was improper for the Department to so amend the instructions since the issue of such an amendment was not raised before it. The *Decree* unambiguously limits water right 95-734 to a total annual diversion volume of 4.10 acre-feet. *Id.* at 26. Amending the instructions to include that volume limitation does not prejudice any substantial right of the Petitioners. Since the right was decreed with an annual volume limitation, the law requires that it be administered with that limitation. I.C. § 42-1413(2).

⁵ In addressing the Petitioners' objection in the prior adjudication, Judge Magnuson clearly acknowledged and considered the tenants of Idaho's prior appropriation doctrine now raised by the Petitioners. For instance, in the *Decree* he cites *Bennett v. Norse*, 22 Idaho 249, 125 P 1038 (1912), for the proposition that "[a]n appropriator is entitled to maintenance of stream conditions substantially as they were at the time the appropriators made their appropriation." *Id.* at 185.

Last, the Petitioners complain that the Department improperly considered documents not in the agency record in this matter. The Petitioners have failed to establish these actions resulted in harmful error to the prejudice of their substantial rights. As the analysis set forth above shows, the Department's instructions regarding the administration of water right 95-734 are consistent with the plain language of the *Decree*. The Petitioners are entitled to have their right administered consistent with the *Decree*, and such a result has been reached. The Court finds that the same result would have been reached by the Department in its *Final Order* regardless of its consideration of the documents over which the Petitioners' complain. Therefore, there is no prejudice to the Petitioners' substantial rights.

D. Attorney fees.

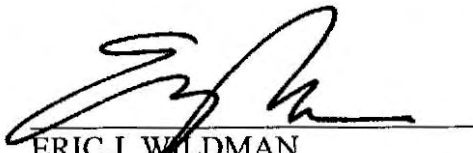
The Petitioners seek an award of attorney fees and costs under Idaho Code § 12-117. The Petitioners have not prevailed in this matter. As such, they are not entitled to an award under the statute. I.C. § 12-117(1). The Intervenors likewise seek an award of attorney fees under Idaho Code § 12-117. The decision to grant or deny a request for attorney fees under Idaho Code § 12-117 is left to the sound discretion of the court. *City of Osburn v. Randel*, 152 Idaho 906, 908, 277 P.3d 353, 355 (2012). The Idaho Supreme Court has instructed that attorney fees under Idaho Code § 12-117 will not be awarded against a party that presents a "legitimate question for this Court to address." *Kepler-Fleenor v. Fremont County*, 152 Idaho 207, 213, 268 P.3d 1159, 1165 (2012). The Court holds that the Petitioners have presented legitimate issues for this Court to address pertaining to interpretation of the prior decree and the actions of the Department. The Court does not find the Petitioners' arguments on these issues to be frivolous or unreasonable. Therefore, the Court in an exercise of its discretion denies the Intervenors' request for attorney fees.

IV.

ORDER

Therefore, based on the foregoing, IT IS ORDERED that the *Final Order* is hereby affirmed.

Dated Apr. 11, 2018


ERIC J. WILDMAN
District Judge

CERTIFICATE OF MAILING

I certify that a true and correct copy of the MEMORANDUM DECISION AND JUDGMENT was mailed on April 11, 2018, with sufficient first-class postage to the following:

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MEMORANDUM DECISION AND JUDGMENT

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CLARENCE/KURT GEIGER FAMILIES
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DAVE ZIUCHKOVSKI
DAVID & LORI SCHAFFER
DAVID R NIPP
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DONALD JAYNE
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JOHN NOONEY
KIMBERLI ROTH
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MARY F ANDERSON
MARY F ANDERSON ETAL
MARY K COLLINS/BOSCH PROP
MATTHEW A BAFUS
MAUREEN DE VITIS
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