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DEPARTMENT OF
WATER RESOURCES

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

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

Docket No. P-DR-2017-001

**SYLTE'S PETITION FOR
DECLARATORY RULING**

Gordon Sylte, Susan Goodrich, John Sylte, and Sylte Ranch Limited Liability Company (collectively, "Sylte"), by and through their counsel of record, Givens Pursley LLP, and pursuant to Idaho Code Section 67-5232 and Rule 400 of the Rules of Procedure, IDAPA 37.01.01.400, of the Idaho Department of Water Resources ("IDWR" or "Department"), hereby file this *Petition for Declaratory Ruling* ("*Petition*") requesting an order from the Department: (1) setting aside and reversing the letter dated September 20, 2016 (the "*Instructions*")¹ from IDWR's Northern Regional Manager, Morgan Case, to the Water District 95C ("WD 95C") Watermaster on grounds that such *Instructions* are contrary to the existing decree and are not in accordance with the prior appropriation doctrine as required by Idaho Code Section 42-602; and (2) determining that the prior appropriation doctrine and the existing decree in WD 95C require delivery of water

¹ A copy of the *Instructions* obtained from IDWR's website for WD 95C is attached hereto as Exhibit A, and incorporated herein by reference.

to Sylte's water right no. 95-0734 on a continuous year-round basis irrespective of the amount of natural tributary inflow into Twin Lakes or the application of the futile call doctrine.

BACKGROUND

Following a court trial, on February 22, 1989, First Judicial District Court Judge Richard Magnuson issued his *Memorandum Decision, In the Matter of the General Distribution of the Rights to the Use of the Surface Waters of Twin Lakes, Including Tributaries and Outlets*, Case No. 32572 (1st Jud. Dist. Ct. Feb. 27, 1989) ("*Memorandum Decision*").²

Among other things, the *Memorandum Decision* made findings and conclusions with respect to parties' objections to the Department's January 4, 1985 *Proposed Finding of Water Rights in the Twin Lakes – Rathdrum Creek Drainage Basin* ("*Proposed Finding*"). Judge Magnuson determined 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 (emphasis added). Accordingly, he instructed the Department to "prepare drafts of such proposed amendments." *Id.*

On April 19, 1989, Judge Magnuson issued his *Final Decree* ("*Decree*"),³ in which he stated that "the *Memorandum Decision* is adopted as findings of fact and conclusions of law . . . , and is incorporated herein by reference." *Decree* at 2-3. Judge Magnuson also stated that "[t]he *Memorandum Decision* directed IDWR to amend the general findings and conclusions in the *Proposed Finding* in accordance with the *Memorandum Decision*." *Decree* at 3. He attached a

² A copy of the *Memorandum Decision* obtained from IDWR's website for WD 95C is attached hereto as Exhibit B, and incorporated herein by reference.

³ A copy of the *Decree* obtained from IDWR's website for WD 95C is attached hereto as Exhibit C, and incorporated herein by reference.

copy of the amended *Proposed Finding* to the *Decree*, with insertions underlined and deletions struck through.

Sylte holds a number of valid water rights recognized in the *Decree* and *Memorandum Decision*, including 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.⁴ The *Decree* recognizes a number of junior priority water rights held by others with sources of Twin Lakes and Rathdrum Creek, two of which are storage water rights associated with Twin Lakes: nos. 95-0973 and 95-0974, which are 1906 priority rights currently held by Twin Lakes-Rathdrum Creek Flood Control District No. 17 and Twin Lakes Improvement Association, respectively.⁵

The Twin Lakes and Rathdrum Creek water system has a unique history and hydrology, as found by Judge Magnuson in his *Memorandum Decision*, which is 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,

⁴ Water right no. 95-0734 was decreed to John and Evelyn Sylte. Their son, Gordon Sylte, is the manager of Sylte Ranch Limited Liability Company, the current claimant of water right no. 95-0734 in the Coeur d'Alene-Spokane River Basin Adjudication ("CSRBA").

⁵ At places in the *Decree* and *Memorandum Decision*, Judge Magnuson mistakenly referred to these storage rights as nos. 95-0974 and 95-0975. In actuality, the *Decree* recognized storage water right no. 95-0973 in the name of the U.S. Bureau of Reclamation; the Bureau subsequently conveyed its interest in the water right to Twin Lakes-Rathdrum Creek Flood Control District No. 17. The *Decree* also recognized storage water right no. 95-0974 in the name of Twin Lakes Improvement Association. The *Decree* determined water right no. 95-0975 to be disallowed.

Rathdrum Creek traveled a distance of approximately 4½ miles downstream from Lower Twin Lake to a place just south of the town of Rathdrum, where the waters disappeared into a sink area. This company constructed a ditch which captured the waters of Rathdrum Creek at the sink and carried them approximately four additional miles for the irrigation of lands in Rathdrum Prairie.

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

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

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

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

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

This Court finds at the time the John Sylte and Evelyn Sylte Water Right #95-0734 was created in 1875 there was sufficient direct flow water in Rathdrum Creek, in its then natural condition, furnished from the water of Twin (Fish) Lakes, to provide .07 cubic foot per second to the appropriator on a continuous year-round basis. . . .

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

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

Since 1906, evaporation and seepage from the impounded water of Twin Lakes sometimes exceed natural tributary inflow to Twin Lakes. At such times, Twin Lakes is not a significant source of water to Rathdrum Creek, except for Water Right #95-0734. Therefore, when evaporation and seepage from the impounded waters of Twin Lakes exceed natural tributary inflow to Twin Lakes, the Rathdrum Creek appropriators, except for John and Evelyn Sylte, No. 95-0734, are not entitled to the release of water from Twin Lakes, and the direct flow appropriators upstream from the outlet at the lower end of Lower Twin Lakes are entitled to divert the natural tributary inflow to Twin Lakes in accordance with their priorities.

Memorandum Decision at 9-13.

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

On September 20, 2016, the Manager of IDWR's Northern Regional Office sent a letter—the *Instructions*—to the WD 95C Watermaster⁶ “[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. 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.

The *Instructions* were issued in response to a letter to IDWR from Mr. Colby Clark complaining about the Watermaster. *Instructions* at 1. Based on Mr. Clark's letter, the

⁶ At the time the *Instructions* were issued, the WD 95C Watermaster was Laurin Scarcello. Mr. Scarcello was removed as WD 95C Watermaster after a hearing held in November 2016. See *Order on Reconsideration; Amended Preliminary Order Removing a Watermaster, In the Matter of Clark's Request for Removal of the Water District No. 95C Watermaster, Laurin Scarcello*, Docket No. C-RWM-2016-001 (served Feb. 2, 2017) (“*Watermaster Removal Order*”). Susan Goodrich and John Sylte participated in the watermaster removal proceeding, and have appealed the *Watermaster Removal Order* on grounds that it included findings, conclusions, analyses, and interpretations that are contrary to the existing *Decree* and *Memorandum Decision* and Idaho's prior appropriation doctrine that could be interpreted as final determinations as to the proper administration of water rights in WD 95C—specifically Sylte's water right no. 95-0734.

Department initiated a proceeding to remove the Watermaster, which resulted in the *Watermaster Removal Order*. *Watermaster Removal Order* at 1.

According to the Department's findings in the *Watermaster Removal Order*, water users in WD 95D requested Department guidance on how to administer water rights in WD 95C as far back as 1994. *Watermaster Removal Order* at 6 (Finding of Fact No. 14). However, "there is no record prior to 2016 of the Department offering written guidance to the Watermaster of WD 95C regarding how to deliver water in accordance with the Decree." *Watermaster Removal Order* at 5 (Finding of Fact No. 16).⁷

POINTS AND AUTHORITIES

Pursuant to IDAPA 37.01.01.400.01(c) and 37.01.01.400.02, Sylte sets forth the following legal and factual contentions in support of this *Petition*.

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

For the reasons set forth herein, Sylte respectfully requests that the Department issue an order reversing and setting aside the *Instructions*, and determining that the *Decree* and

⁷ Prior to 2016, the only guidance provided by the Department was a 2002 letter concerning "construction work involving the channels of natural watercourses," not water rights administration. *Amended Order* at 6 (Finding of Fact No. 15).

Memorandum Decision and Idaho's prior appropriation doctrine require delivery of water to Sylte's water right no. 95-0734 on a continuous year-round basis irrespective of the amount of natural tributary inflow into Twin Lakes or the application of futile call doctrine.

I. IDAHO LAW REQUIRES THAT WATER RIGHTS BE DISTRIBUTED IN WD 95C IN ACCORDANCE WITH THE DECREE AND MEMORANDUM DECISION.

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

Except for certain exceptions inapplicable here, "[t]he decree entered in a general adjudication shall be conclusive as to the nature and extent of all water rights in the adjudicated water system." *Idaho Ground Water Assoc. v. Idaho Dep't of Water Res.* ("*Rangen II*"), 160 Idaho 119, 369 P.3d 897, 905 (2016) (quoting I.C. § 42-1420(1)).

[T]he Director's duty to administer water according to technical expertise is governed by water right decrees. The decrees give the Director a quantity he must provide to each water user in priority. In other words, the decree is a property right to a certain amount of water: a number that the Director must fill in priority to that user.

A&B IV, 157 Idaho at 394, 336 P.3d at 801.

In WD 95C, the more detailed findings and conclusions in the *Memorandum Decision* are necessary to properly implement the *Decree*. The *Decree* adopted and incorporated by reference the *Memorandum Decision* as the Court's specific findings of fact and conclusions of law. *Decree* at 2-3. The amended *Proposed Finding* attached to the *Decree* (which Judge Magnuson called the "general findings and conclusions") reflects the Department's revisions ordered by Judge Magnuson "to reflect and effectuate this Court's determinations regarding No. 95-0734"

set forth in the *Memorandum Decision*. *Memorandum Decision* at 21. In other words, it would violate the *Decree* to administer water, or interpret the amended *Proposed Finding*, inconsistently with the *Memorandum Decision*.

II. THE MEMORANDUM DECISION AND DECREE REQUIRE DELIVERY OF WATER TO WATER RIGHT NO. 95-0734 ON A CONTINUOUS YEAR-ROUND BASIS.

A. Water right no. 95-0734 was always satisfied on a continuous year-round basis when it was created.

The *Memorandum Decision* and *Decree* require the delivery of water to water right no. 95-0734 on a continuous year-round basis, which always occurred at the time the right was appropriated. The *Decree* states that “[a]t the time Water Right No. 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 Lakes, to provide 0.07 cfs to the appropriator on a continuous year-round basis.” *Decree* at xvii (Finding of Fact No. 20) (underline in original depicting addition to *Proposed Finding*). This language was added to the *Proposed Finding* clearly to “reflect and effectuate” the nearly identical language on page 11 of the *Memorandum Decision*. *Memorandum Decision* at 21.

The basis for this finding is further explained in the *Memorandum Decision*. After noting a disagreement among the parties about the nature of pre-dam flow in Rathdrum Creek, Judge Magnuson stated:

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*. . . .

Memorandum Decision at 11 (underlining in original; italics added).

Judge Magnuson further found that “[a]n appropriator is entitled to maintenance of the stream conditions substantially as they were at the time the appropriator made his or her appropriation, if a change in stream conditions would interfere with the proper exercise of the water right.” *Decree* at xix (Conclusion of Law No. 11). This language was added to the *Proposed Finding* clearly to “reflect and effectuate” the nearly identical language on page 13 of the *Memorandum Decision*.⁸ *Memorandum Decision* at 21.

Immediately following this statement in the *Memorandum Decision*, Judge Magnuson further concluded that:

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.

Memorandum Decision at 13 (emphasis added).

Idaho’s prior appropriation doctrine requires that the Department give effect to these express findings and conclusions in its distribution of water to water right no. 95-0734. *A&B IV*, 157 Idaho at 393, 336 P.3d at 800 (holding that “the Director cannot distribute water however he pleases at any time in any way; he must follow the law”); *id.*, 157 Idaho at 394, 336 P.3d at 801 (“[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

⁸ On page 13 of the *Memorandum Decision*, Judge Magnuson cited *Bennett v. Nourse*, 22 Idaho 249, 125 P. 1038 (1912), for this rule. Although *Bennett*’s rule was stated in the context of protecting juniors against harmful changes by seniors, the Idaho Supreme Court has recognized the same rule protects seniors. *Arkoosh v. Big Wood Canal Co.*, 48 Idaho 383, 238 P. 522, 526-27 (1929).

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.”); *Rangen II*, 160 Idaho 119, 369 P.3d at 905 (quoting I.C. § 42-1420(1): “[t]he decree entered in a general adjudication shall be conclusive as to the nature and extent of all water rights in the adjudicated water system”).

In a case involving similar circumstances—i.e. 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, 238 P. at 526-27 (1929) (Baker, J., on rehearing). The same result is required here, particularly in light of Judge Magnuson’s express findings and conclusions in the *Memorandum Decision*.

The *Instructions* violate the *Decree* and *Memorandum Decision* and Idaho’s prior appropriation doctrine by ignoring by Judge Magnuson’s express findings that the pre-dam natural conditions always allowed sufficient direct flow water in Rathdrum Creek, furnished from the water of Twin Lakes, to provide the full amount of water appropriated under water right no. 95-0734 on a continuous year-round basis.

B. The water appropriated under the 1906 storage rights was natural lake storage prior to dam construction.

Judge Magnuson found that construction of the dam and outlet did not actually impound any more water than Twin Lakes had naturally stored. “The water level of Twin Lakes and the vegetation lines around the lakes were relatively the same, both before and after the construction of the dam. The primary result the dam had on the water level was to hold the water at a higher point longer through the summer months. . . .” *Memorandum Decision* at 10. Consistent with

this finding, the *Decree* states that all of the water in Twin Lakes is, or was at one time, “the natural lake storage.” *Decree* at xv-xvi (Finding of Fact No. 10).⁹

Consistent with his finding that the dam did not impound more water than naturally had been held in Twin Lakes, language was deleted from the *Proposed Finding’s* Finding of Fact No. 10 which had stated that the dam and outlet structure “provided the capability to raise the level of the lakes.” *Decree* at xv.¹⁰

Coupled with his finding 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,” the obvious conclusion is that, prior to dam construction, Twin Lakes was a natural storage facility regulating the flow of water into Rathdrum Creek. In other words, in 1875, Twin Lakes was just a natural upstream tributary water source to Rathdrum Creek. By the terms of the *Decree* and *Memorandum Decision*, water right no. 95-0734 is not dependent on manmade storage or natural inflow to Twin Lakes—it is entitled to continuous year-round outflow from Twin Lakes so it always can be satisfied in the same manner it was satisfied prior to the appropriation of the 1906 storage water rights.

The Instructions fail to recognize or implement these express findings and conclusions in the *Decree* and *Memorandum Decision*, and therefore must be reversed and set aside.

⁹ Finding of Fact No. 10 in the *Decree* describes three “blocks” of water in Twin Lakes. The first “block” of water, which has no associated water right, is “the natural lake storage located between the bottom of the lake and Staff Gauge height 0.0 feet . . .” *Decree* at xv (Finding of Fact No. 10.a). The second and third “blocks” of water, which are associated with storage right nos. 95-0974 and 95-0973, also were “at one time part of the natural lake storage, but [were] made available for appropriation by excavation of the outlet from Lower Twin Lakes,” and are located between Staff Gauge heights 0.0 and 6.4 feet, and between heights 6.4 and 10.4 feet, respectively. *Decree* at xv-xvi (Finding of Fact No. 10.b and 10.c).

¹⁰ The portion of Finding of Fact No. 10 showing the deleted language is: “Near the turn of the century Upper Twin Lake was hydraulically connected to Lower Twin Lake by a man-made channel, and a dam and outlet structure was constructed at the outlet to Lower Twin Lake, ~~that provided the capability to raise the level of the lakes.~~” *Decree* at xv (underlining and strikethrough in original depicting revisions to *Proposed Finding*).

C. Junior water rights and changes to the natural stream conditions cannot adversely affect the distribution of water to water right no. 95-0734.

Water right no. 95-0734's senior priority makes it "first in time [and] first in right." I.C. § 42-106. To give effect to this senior priority, it must at all times be satisfied ahead of the 1906 storage water rights. This means that, when the 1906 water 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 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 holding that a water right holder is entitled to maintenance of the stream conditions substantially as they were when the right was created.

Put another way, while the *Decree* and *Memorandum Decision* allow the 1906 storage water right holders to keep water in Twin Lakes longer than it naturally was held prior to dam construction, they do not give the right holders prior rights to the water in Twin Lakes as against the holder of right no. 95-0734. As found by Judge Magnuson, the water stored under the 1906 storage water right is the same water that was naturally held in Twin Lakes prior to the storage rights' creation, and that water at all times naturally discharged over and through the lakes' natural outlet and always provided water in Rathdrum Creek to serve water right no. 95-0734 on a continuous year-round basis. The contrary view effectively would give 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 14.¹¹

It bears emphasis that the 1906 storage water rights in Twin Lakes are not like storage water rights appropriated when an on-stream dam is constructed on a natural stream. In those cases, the new dam impounds all of the natural flow that previously continued downstream to senior water right holders. Such on-stream reservoirs must 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.

That simply is not the situation here, where the natural conditions of Twin Lakes and Rathdrum Creek included the impoundment and constant 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. The 1906 storage water rights were appropriated under these conditions, including the delivery of water to water right no. 95-0734. Those junior rights are not entitled to store water to the injury of water right no. 95-0734 under the terms of the *Decree* and *Memorandum Decision*, or under Idaho’s prior appropriation doctrine.

Idaho’s prior appropriation doctrine requires that the Department give effect to Judge Magnuson’s express findings and conclusion in its distribution of water to water right no. 95-0734. The *Instructions* fail to do so by limiting releases of water from Twin Lakes into

¹¹ The Department’s “interpretation of the facts” in this quote presumably is a reference to the original findings of fact and conclusions of law in the *Proposed Finding*. In his *Memorandum Decision*, Judge Magnuson clearly intended to amend those findings and conclusions so that junior water rights and changed stream conditions would not prevent the satisfaction of water right no. 95-0734 on a continuous year-round basis.

Rathdrum Creek to the natural tributary inflow which, as explained in the next subsection, is a consequence of changed stream conditions that the *Decree* applies to other water rights but not to water right no. 95-0734.

III. DELIVERY OF WATER TO WATER RIGHT NO. 95-0734 IS NOT DEPENDENT ON THE AMOUNT OF TRIBUTARY INFLOW TO TWIN LAKES.

Judge Magnuson found that “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.” *Memorandum Decision* at 12. “Since 1906, evaporation and seepage from the impounded waters of Twin Lakes sometimes exceed natural tributary inflow to Twin Lakes.” *Memorandum Decision* at 12.

Unlike other water rights recognized in the *Decree*, however, the exercise of water right no. 95-0734 is not affected by the evaporation and seepage in Twin Lakes. “[W]hen 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” *Memorandum Decision* at 12-13 (emphasis added); *see also Decree* at xix (Conclusion of Law No. 14).¹² This conclusion is consistent with Judge Magnuson’s finding that, when evaporation and seepage exceed natural tributary inflow, “Twin Lakes is not a significant source of water to Rathdrum Creek, except for Water Right #95-0734.” *Memorandum Decision* at 12 (emphasis added).

¹² The *Decree*’s 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.

Decree at xix (underlining in original depicting addition to *Proposed Finding*).

Thus, Judge Magnuson recognized that water right no. 95-0734 is different than all of the other water rights on the system. Indeed, immediately following his conclusions that the holders of water right no. 95-0734 are “entitled to waters from the source of their appropriation on a basis of priority over those storage rights Nos. 95-0974 and 95-0975” and that “[t]he waters of this basin are to be administered in such manner as to give effect to such priority,” Judge Magnuson concluded 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.” *Memorandum Decision* at 13 (emphasis added).¹³

The *Decree* and *Memorandum Decision* also exempt water right no. 95-0734 from any limitation based on the inflow to Twin Lakes. Judge Magnuson found and concluded that natural stored water flowed out of Twin Lakes “through the natural pre-dam obstruction at all times, forming the source waters of Rathdrum Creek,” that “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, and that “there was always water in Rathdrum Creek to serve said water right” when it was created. *Memorandum Decision* at 11. Nowhere did Judge Magnuson qualify these plain, unambiguous statements with any language suggesting that the natural pre-dam outflow from Twin Lakes, or the exercise of water right no. 95-0734, was limited to the natural tributary inflow.

By comparison, Judge Magnuson expressly qualified the exercise of other water rights on the amount of natural tributary inflow. The *Decree* states that, aside from the 1906 storage water rights, “[a]ll 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

¹³ The “other Objectors” all claimed priority dates junior to the 1906 storage water rights. See *Memorandum Decision* at 5.

to the inflow to the lakes.” *Decree* at xix (Conclusion of Law No. 12) (emphasis added).¹⁴ By its express terms, this limitation does not apply to water right no. 95-0734 because its source is Rathdrum Creek tributary to sinks, and not Twin Lakes tributary to Rathdrum Creek.

Conclusion of Law No. 14 attached to the *Decree* does not change this. This Conclusion’s first sentence clearly exempts water right no. 95-0734 from its application:

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.

Decree at xix (Finding of Fact No. 14) (underlining in original depicting changes to the original *Proposed Finding*).

The Conclusion’s second sentence also cannot be interpreted as limiting water right no. 95-0734 if it is to be read consistently with the *Memorandum Decision*. It states:

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.

Decree at xix (Finding of Fact No. 14) (underlining in original depicting changes to the original *Proposed Finding*). As already described, the natural flow to which water right no. 95-0734 is entitled includes all of the natural lake storage in Twin Lakes. To be consistent with the rest of the *Decree* and the *Memorandum Decision*, which mandate outflows sufficient to satisfy water right no. 95-0734 on a continuous year-round basis, the words “stored waters” must be read to mean water stored under the 1906 storage water rights, not the natural lake storage to which

¹⁴ This Conclusion of Law No. 12 is consistent with the *Decree*’s Finding of Fact No. 12, which states:

Water rights identified herein with the source of Twin Lakes tributary to Rathdrum Creek are categorized as either storage water rights or direct flow water rights. Only Water Right No. 95-0973 in the name of the BOR, and No. 95-0974 in the name of Twin Lakes Improvement Association are storage water rights. All other water rights that divert from Twin Lakes are direct flow water rights. Storage water rights utilize the storage capacity of the lake. Direct flow water rights utilize the flows passing through the lake and are established on a priority basis.

Decree at xvi (emphasis added).

water right no. 95-0734 is entitled. In other words, water right no. 95-0734 never diverts “stored water” even when it diverts water once 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 many express findings and conclusions in the *Decree* and *Memorandum Decision* providing otherwise.

Accordingly, because the *Instructions* incorrectly apply natural tributary inflow limitations to the exercise of water right no. 95-0734, they must be reversed and set aside.

IV. THE FUTILE CALL PROCEDURE SET FORTH IN THE INSTRUCTIONS VIOLATES THE DECREE.

The *Instructions* require 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. This violates the *Decree* and *Memorandum Decision* because, as discussed, the delivery of water to water right no. 95-0734 is not dependent on the amount of inflow to Twin Lakes. Indeed, since the water in Twin Lakes is the same natural lake storage that formed the source water of Rathdrum Creek when water right no. 95-0734 was created, the right is subject to a futile call determination only if all the remaining water available to be discharged from Twin Lakes would not provide water right no. 95-0734 with a sufficient quantity to apply to beneficial use.

The Idaho Supreme Court 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 water right no. 95-0734 so long as the water flowing in its natural channels would reach the point of diversion. Sylte is entitled to have water flow in the natural channels as it did prior to the appropriation of the 1906 storage water rights—when water flowed “through the natural pre-dam construction at all times, forming the source waters of Rathdrum Creek, such that “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 [of water right no. 95-0734] on a continuous year-round basis.” *Memorandum Decision* at 11.

CONCLUSION

Sylte requests the Department issue an order: (1) setting aside and reversing the *Instructions*; and (2) determining that Idaho's prior appropriation doctrine and the *Decree* and *Memorandum Decision* require delivery of water to Sylte's water right no. 95-0734 on a continuous year-round basis irrespective of the amount of natural tributary inflow into Twin Lakes or the application of the futile call doctrine.

Respectfully submitted this 16th day of February, 2017.

GIVENS PURSLEY LLP



Michael P. Lawrence

Jack W. Relf

Attorneys for Gordon Sylte, Susan Goodrich, John Sylte, and Sylte Ranch Limited Liability Company

CERTIFICATE OF SERVICE

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

DOCUMENT FILED:

Gary Spackman, Director,
Idaho Department of Water Resources
322 East Front Street
P.O. Box 83720
Boise, ID 83720-0098

<input type="checkbox"/>	U. S. Mail
<input checked="" type="checkbox"/>	Hand Delivered
<input type="checkbox"/>	Overnight Mail
<input type="checkbox"/>	Facsimile
<input type="checkbox"/>	E-mail



Michael P. Lawrence

EXHIBIT A



State of Idaho

DEPARTMENT OF WATER RESOURCES

Northern Region • 7600 N. Mineral Drive, Suite 100 • Coeur d'Alene, Idaho 83815-7763
Phone: (208) 762-2800 • Fax: (208) 762-2819 • Website: www.idwr.idaho.gov

C.L. "BUTCH" OTTER
Governor

GARY SPACKMAN
Director

September 20, 2016

LAURIN SCARCELLO
22389 N KEVIN RD
RATHDRUM, ID 83814

COPY

Re: Watermaster Guidance

Dear Mr. Scarcello:

The Idaho Department of Water Resources ("Department") has received a written complaint from Mr. Colby Clark, a water right owner in Water District 95C (WD 95C), which includes a formal request for removal of the watermaster for WD 95C. Idaho Code § 42-605(9) states the following:

The director of the department of water resources may remove any watermaster whenever such watermaster fails to perform the watermaster's duty, upon complaint in that respect being made to the director in writing, by one (1) person owning or having the right to the use of a water right in such district, which right has been adjudicated or decreed by the court or is represented by valid permit or license issued by the department of water resources provided, that upon investigation the director, after a hearing with the other water users of said district, which shall be held in the district or at some location convenient to the water users of the district, finds such charge to be true, and the director may appoint a successor for the unexpired term.

The complaint alleges that you have been releasing storage water from Twin Lakes contrary to the *Final Decree, In the Matter of the General Determination of the Rights to the Use of the Surface Waters of Twin Lakes, Including Tributaries and Outlets*, Case No. 32572 (1st Jud. Dist. Ct. April 20, 1989) ("Decree"). To clarify your duties as watermaster and resolve any potential discrepancies between your regulation and the legal requirements of the Decree, the Department requests that you adhere to the following instructions:

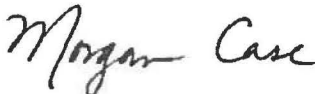
- 1) The watermaster shall follow the guidelines set out in the Watermaster Handbook available online at:
https://www.idwr.idaho.gov/files/districts/20130701_Watermaster_Handbook.pdf
- 2) The watermaster shall administer all diversions from surface water sources tributary to Twin Lakes and Rathdrum Creek, except springs and diversions for non-irrigation domestic purposes. *See Order Creating Water District, In the Matter of Creating Water District 95-C, Twin Lakes and Surface Tributaries* (August 7, 1989).

- 3) Only two water rights (no. 95-974 – Twin Lakes Improvement Association (0 to 6.4 ft) and no. 95-973 – Flood Control District (6.4-10.4 ft.)) are authorized to store waters in Twin Lakes. Filling of these storage water rights can occur only November 1 through March 31 each year. *Proposed Findings of Water Rights in the Twin Lakes-Rathdrum Creek Drainage Basin*, In the Matter of the General Determination of the Rights to the Use of the Surface Waters of Twin Lakes, Including Tributaries and Outlets, Civil Case No. 32572 (1st Jud. Dist. Ct. Feb. 14, 1985) at 21. The storage water rights do not authorize release of water for instream purposes. *See Decree* at Findings of Fact 10b-c, 11, 12; Conclusions of Law 8, 9, 12; *Memorandum Decision*, In the Matter of the General Determination of the Rights to the Use of the Surface Waters of Twin Lakes, Including Tributaries and Outlets, Civil Case No. 32572 (1st Jud. Dist. Ct. Feb. 27, 1989) (“*Memorandum Decision*”) at 18-19.
- 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) 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.
- 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.
- 8) With respect to those rights to the use of water from Rathdrum Creek with a priority prior to April 5, 1906, the unnamed stream that is currently tributary immediately above the outlet at the lower end of Lower Twin Lake will be administered as if the stream were tributary to Rathdrum Creek immediately below the outlet. *Decree* at Conclusion of Law 17. The watermaster shall release up to the inflow of the unnamed stream to satisfy those rights.

Water rights that divert 0.2 cfs or more must have Department-approved measurement devices. *Decree at Conclusion of Law 7*. The Department will issue an order to those water right holders at the end of the irrigation season to allow time for installation of the devices before the 2017 irrigation season.

You must administer water rights according to these instructions, which are subject to further review and updates by the Department. In addition, pursuant to Idaho Code § 42-605(9), unless the complaint is withdrawn, the Department will hold a hearing with other water users of WD 95C to determine whether you should be removed as watermaster of WD 95C.

Please let me know if you have any questions.

A handwritten signature in cursive script that reads "Morgan Case".

Morgan Case
Northern Regional Manager

C: Colby Clark
WD 95C Advisory Committee

EXHIBIT B

STATE
COUNTY
FILED

0 } ss
11:15

FEB 27 3 23 PM '89

[Handwritten signature]

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

IN THE MATTER OF THE GENERAL)
DETERMINATION OF THE RIGHTS TO)
THE USE OF THE SURFACE WATERS)
OF TWIN LAKES, INCLUDING)
TRIBUTARIES AND OUTLETS.)

CIVIL NO. 32572

MEMORANDUM DECISION

THE STATE OF IDAHO,)
Department of Water Resources,)
Plaintiff,)

v.)

ABBOTT, Knox and Spouse;)
et al.,)
Defendants.)

This proceeding was brought pursuant to Section 42-1406 Idaho Code for the purpose of adjudicating the rights of the various users of the surface waters of Twin Lakes, including its tributaries and outlets, within Kootenai County, Idaho. The Director of the Idaho Department of Water Resources filed his petition seeking such adjudication, after he received petitions signed by one hundred and twenty-two users of waters from Twin Lakes.

MEMORANDUM DECISION

-1-

Several orders of joinder were later entered by this Court and a total of approximately 1,154 landowners and potential water right claimants were made parties to this adjudication proceedings. A total of 414 notices of claims to water rights were filed before the deadline before filing claims. An additional seven claims were filed after the deadline and were treated herein as having been timely filed.

This Court ordered the Department of Water Resources to conduct a survey and make an examination of the waters of Twin Lakes, including the tributaries and outlets and to prepare a map showing the course of the waters, the location of the diversion of the water therefrom and the legal subdivisions of the land which had been irrigated, along with the other uses being made of the diverted water. The department was further directed to prepare a list and/or show on said map of present users and/or prior claimants to the water being used, and the location of their uses.

The Department of Water Resources did prepare such report of water rights, entitled Proposed Finding of Water Rights in the Twin Lakes-Rathdrum Creek Drainage Basin which has been filed with this Court and later amended in two instances. The first of these amendments added page 100A, entitled Claims Not Submitted to the Report. The second amendment deleted one water right (95-2002) from the report (on pages 95 and 149) which was not properly included in the adjudication.

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.
2. By Betty Rose Hogan.
3. By Chester A. Park, Diane J. Park, Daniel M. Park, Chester R. Park, Naomi J. Park, Elizabeth Stevens, Clara Primmer and Dean A. Primmer.
4. By the Rathdrum Creek Drainage Association.

Michael J. Newell appeared before this Court as the legal representative of all the aforesaid Objectors.

A. Lynne Krogh-Hampe, Deputy Attorney General, represented the Department of Water Resources.

The United States by and through its attorney, for the District of Idaho, had earlier contacted this court on behalf of its affected agency, as a claimant in this general water right adjudication. However, the United States did not petition to intervene, nor has it been joined as a party by the objectors, and it did not file any objections to the Director's Report. In a memorandum to this Court, the Assistant United States Attorney, Warren S. Derbidge, stated:

"United States fully supports the petition of the State of Idaho in this litigation and perceives that the interest of judicial economy are best served by the United States refraining from participating in the trial."

* * * * *

Before the subsequent trial of this matter, this Court did enter an Order Authorizing Interim Administration of Water Rights in the Twin Lakes Water System on February 2, 1988, pursuant to Chapter 6, Title 42 of the Idaho Code.

Pursuant to Section 42-1412 I.C., the Director's Report, the objections, the responses to objections, notice of claims and any negotiated agreements between the State of Idaho and any federal reserved water right claimant constituted the pleadings herein. The portions of the Director's Report for which no objection was filed were admitted and accepted by this Court as true facts. (Sec. 42-1412(9)). This Court conducted a trial without a jury on said objections and issues this memorandum decision setting forth its determinations.

The Objectors in this case submitted fourteen notices of claims to water rights of which twelve were recommended in the Director's proposed findings, as extracted for the purpose of setting out the following list. These twelve water rights are in the total amount of 6.56 cubic feet per second:

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES
LISTING OF RIGHTS
OBJECTORS' LISTING OF RIGHTS

RIGHT NUMBER	NAME AND ADDRESS	PRIORITY DATE	USE FROM TO	MAX AMOUNT MAX RATE	DIVERSION POINT	PLACE OF USE AND ACREAGE	BASIS FOR RIGHT
SOURCE: RATHERUM CREEK		TRIBUTARY TO: SLIMS					
95-0754	SYLVE, RICH SYLVE, EVELYN ROUTE 1 BOX 891 RATHERUM ID 83858 REMARKS: FOR 300 HEAD OF STOCK, NATURAL FLOW APPROPRIATION.	05-01-1975	STOCKWATER 01-01 12-31	4.10 AFA .07 CFS	LT08 S30 T52N R04W	LT04 S30 T52N R04W	BENEFICIAL USE
95-0943	PARK, CHESTER R. RT. 4 BOX 730 RATHERUM ID 83858 REMARKS: FOR 100 HEAD OF STOCK, NATURAL FLOW APPROPRIATION.	05-01-1945	STOCKWATER 01-01 12-31	1.40 AFA .03 CFS	INNW S20 T52N R04W	INNW S20 T52N R04W	BENEFICIAL USE
95-0731	WILLADSEN, MARVIN WILLADSEN, SHIRLEY J. RT. 4 BOX 812 RATHERUM ID 83858 REMARKS: IN-STREAM STOCKWATERING, NATURAL FLOW APPROPRIATION	10-01-1947	STOCKWATER 01-01 12-31	1.40 AFA .03 CFS	WESE SESE S19 T52N R04W INNE SEIN S30 T52N R04W	SWSE S19 T52N R04W SEIN S30 T52N R04W	BENEFICIAL USE
95-0733	SYLVE RANCH INC. RT. 1 BOX 690 RATHERUM ID 83858 REMARKS: FOR 1000 HEAD OF STOCK, NATURAL FLOW APPROPRIATION.	05-01-1950	IRRIGATION 03-15 11-15	1.00 CFS	LT03 S30 T52N R04W	WESE(121) SESE(121) LT03(101) LT04(110) LT04 S30 S30 T52N R04W T52N R04W	BENEFICIAL USE
			STOCKWATER 01-01 12-31	14.00 AFA .23 CFS		LT03 LT04 S30 T52N R04W	
				---"AFA 1.23" CFS			
95-3076	PARK, CHESTER R. PARK, NADINE RT. 4 BOX 730 RATHERUM ID 83858 REMARKS: NATURAL FLOW APPROPRIATION.	06-28-1952	IRRIGATION 03-15 11-15	.07 CFS	INNW S20 T52N R04W	INNW(15.9) S20 T52N R04W	LICENSE
95-7269	MOGAN, JEDDY E. MOGAN, BETTY MOSE RT. 4 BOX 801 RATHERUM ID 83858 REMARKS: NATURAL FLOW APPROPRIATION.	05-29-1973	IRRIGATION 03-15 11-15	.20 CFS	INNW S20 T52N R04W	INNW(110) S20 T52N R04W	PERMIT
						10 ACRES	
95-7604	SYLVE RANCH INC. RT. 4 BOX 854 RATHERUM ID 83858 REMARKS: NATURAL FLOW APPROPRIATION.	06-14-1976	IRRIGATION 03-15 11-15	.34 CFS	LT03 S30 T52N R04W	SWSE(101) WESE(191) INNE(201) S30 T52N R04W	LICENSE
						65 ACRES	

95-7613	HOGAN, JERRY E. HOGAN, BETTY ROSE RT. 4 BOX 800 RATHORUM 10 83858 REMARKS: FOR 10 HEAD OF STOCK. NATURAL FLOW APPROPRIATION.	04-30-1976 IRRIGATION 03-15 11-15	.10 CFS	SWNM 520 SWNM1051	LICENSE
		STOCKWATER 01-01	.30 AFA .02 CFS		SAME AS OTHER USE
		DOMESTIC 01-01 12-31	1.30 AFA .03 CFS		SAME AS OTHER USE
			.13 CFS		
95-7617	WILLADSEN, MARYIN K. WILLADSEN, SHIMLEY J. RT. 4 BOX 812 RATHORUM 10 83858 REMARKS: NATURAL FLOW APPROPRIATION.	04-30-1976 IRRIGATION 03-15 11-15	4.06 CFS	HWNE 530 HESE1141 SWSE1281 PERMIT HESE 519 SESE1141 S19 SESE 519 HESW1251 HNSW1071 SWSE 519 SWSW1251 SESW1391 SENN 530 S20 HNSW1201 T52N RD4W HNSW1201 SEHW1151 S30 T52N RD4W	
		FIRE PROTECTION 01-01 12-31	4.06 CFS ---AFA 4.06 CFS		203 ACRES*
95-7630	SYLTE, OGDON SYLTE, JOHITH RT. 1 BOX 890 RATHORUM 10 83858 REMARKS: NATURAL FLOW APPROPRIATION.	03-26-1976 IRRIGATION 03-15 11-15	.10 CFS	L703 S30 LT03(05) LT04(05) PERMIT T52N RD4W S30 T52N RD4W	
					10 ACRES*
95-7710	PRIMER, DEAN A. PRIMER, CLARA J. RT. 4 BOX 810 RATHORUM 10 83858 REMARKS: NATURAL FLOW	06-27-1977 IRRIGATION 03-15 11-15	.20 CFS	SWSE 519 SESE1101 PERMIT T52N RD4W S19 T52N RD4W	
					10 ACRES*
95-7727	PARK, CHESTER A. PARK, DIANE J. RT. 4 BOX 712 RATHORUM 10 83858 REMARKS: NATURAL FLOW APPROPRIATION.	05-09-1977 IRRIGATION 03-15 11-15	.10 CFS	HWNE 520 HWNE101 T52N RD4W S20 T52N RD4W	PERMIT
					10 ACRES*

The two claimed water rights which were recommended for disallowal on p. 98 of the Proposed Findings, were based on permits which had been cancelled. None of these claims included storage as a purpose of the water rights.

The first of these water rights (No. 95-0734) has a priority date of May 1, 1875. The other eleven water rights have priority dates of May 1, 1945 or later.

The points of diversion of all Objectors are located on Rathdrum Creek, which is downstream from the outlet of Lower Twin Lake.

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.

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.

Each of these two storage rights had a priority date of March 23, 1906.

The two water rights recommended which include storage were based on historic use. Those water rights recommended to the Rathdrum Creek Objectors were of both types: historic use rights and/or statutory rights.

The date of priority of statutory water rights related back to the date of posting the required notice or the date of filing an application with the proper department of the State of Idaho. The date of priority under the storage use rights is the date of appropriation of the water to the beneficial use.

The Court's analysis of the objections to the proposed findings of fact and conclusions of law was made more difficult by the failure to use precise names, numbers or other specific designations for each objector. For example, the name Syltes is used throughout the pleadings herein without specific reference to which of the several claims are referenced, while these claims are referred to in the Director's Report as standing in the names of:

John and Evelyn Sylte (#95-0734)
Sylte Ranch, Inc. (#95-0733)
Sylte Ranch, Inc. (#95-7604)
Gordon and Judith Sylte (#95-7630)

This Court had great difficulty in understanding what was meant by the term "Rathdrum Creek Drainage Association" which identified in the objection filed on September 14, 1987 as "comprising of several individual claimants as enumerated in the proposed findings of water rights in the Twin Lakes - Rathdrum Creek Drainage Basin". Recognizing there were hundreds of individual claimants enumerated in such proposed findings, such characterization was confusing. For the purpose of this opinion, this Court understands the name Rathdrum Creek Drainage Association, as used herein, to be a generic term encompassing all the individual Objectors who had previously filed their objections her in, and used for the purpose of amending (or supplementing) their previously filed objections to such findings. Similarly, this Court understands the term Rathdrum Creek Water Users to refer to the Objectors, as this Court is

unaware any entity by that name having filed an objection herein.

* * * * *

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.

A portion of the storage made available by construction of 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.

This Court finds all the points of diversion of water which were actually used by the Spokane Valley Land and Water Company were points of diversion below the City of Rathdrum, and both the natural and stored water from Twin Lakes was diverted down Rathdrum Creek past the points of diversion of all the Objectors, and then diverted to flumes and channels which were constructed by the irrigation company.

Rathdrum Creek is the only natural outlet to Twin Lakes; however, the parties were not in agreement as to whether the outflow of Lower Twin Lakes (pre-dam construction) went over the top of the lip of Lower Twin Lakes at its lowest point, or whether its outlet was under water, surfacing to the top of the land at a lower level to form Rathdrum Creek, or, whether it

flowed over the top of the lip during periods of high water only and continued for the rest of the time underground as a spring.

In any event, before the dam was built the outflow water flowed in Rathdrum Creek for about four miles downstream to the John Sylte (#95-0734) place of diversion. Thereafter it flowed into a sink area and went back into the ground. At an early date, someone captured this water, before it flowed back into the sink, and transported it four and one-half miles for use an irrigation, thus completing an appropriation.

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 during periods of high water and through the natural pre-dam obstruction at all times, forming the source waters for 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 was persuaded in making this finding to a large extent by the historical testimony and report of David Osterberg. While not conclusive, it was more significant than other evidence regarding the natural condition of Rathdrum Creek in 1875 and before 1906.

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.

The case of Cartier v. Buck, 9 Ida. 571, involved a factual dispute regarding changes in conditions in a stream dating from the early 1860's until 1904. The Supreme Court discussed conflicting evidence on the subject before concluding the fact finder might have had some difficulty in arriving at the true state of facts as to change of such natural conditions.

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 waters 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.

A water right is different from other forms of property rights in that the water right is a usufructury right. The appropriator has the right to divert and make beneficial use of a portion of the public waters of the state, but he does not have a property right in the corpus of water while it is flowing in a

natural water source. Boise City Irrigation v. Stewart, 10 Ida.

38. Once the appropriator lawfully diverts the water from its natural source to his diversion works, the appropriator does become the owner of the corpus of the water lawfully diverted.

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 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 immediate use.

The use of a natural channel to convey stored water after impoundment is also statutorially recognized in Idaho. The water released downstream from an onstream reservoir may be commingled with the water naturally occurring in the stream, and may be reclaimed later. Sections 42-105, 42-801 and 49-602 I.C.

To 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.

In the Carey Lake Reservoir Company v. Strunk case, 39 Ida. 332, the Supreme Court held the trial court should have allowed

the appellants to show, if they could, that they held a prior water right, that the coulee or wash in question was in fact a natural stream or watercourse, from which they had regularly received water appropriated by them, and that respondent had no right to maintain its dam without letting their water through. The case was remanded for retrial in accordance with that

opinion.

It 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).

An appropriator has the right to make a change in the use of the water so long as no injury results to the rights of other appropriators. After 1969, any person seeking to make a change in the use of water had to apply for and obtain approval of the proposed change as provided by Section 42-222 I.C. A change in use includes a change in the point of diversion, place of use, period of use, or nature of use. I.C. 42-222.

The testimony of Mr. George Maddox reached the conclusion that there were several wells in Twin Lakes area which actually drew water from Twin Lakes. It was the Objectors' contention that nothing in the Director's Report made any reference to any ground water wells and said Objectors contended this subject must be addressed by the Director's Report. - - - Mr. Haynes

testified in opposition to the Maddox conclusions and concluded the effect of the ground water withdrawals upon surface water supply were so small as to be both unmeasurable and insignificant.

This Court was persuaded, by a preponderance of the evidence, that these wells did not have a significant effect upon the surface water supply, which is the subject of the Director's Report herein.

This general adjudication of water rights was commenced by an order of the district court which determined the scope of the adjudication. Said order provided for a commencement of an adjudication of the rights to the use of the surface waters of Twin Lakes - Rathdrum Creek Drainage Basin and did not include a determination of ground water rights, including the elements of the ground water rights, or matters necessary for administration of ground water rights. The Joint Pretrial Statement filed herein did not include any issue of fact or law as to ground water, and it expressly provided that all other issues of law were abandoned.

Regarding the Rathdrum Creek Drainage Association 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 matter. 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.

The Court concludes water stored by the holders of Water Rights Nos. 95-0974 and 95-0975 is not unappropriated water subject to appropriation by others.

Further, this Court concludes the Objectors have not acquired a portion of the water right recommended to the United States Bureau of Reclamation by adverse possession. The burden of proof is on the claimant of the water right to establish the elements of adverse possession, and the extent and amount of use by clear and convincing evidence. Gilbert v. Smith, 97 Ida. 735; Loosli v. Heseman, 66 Ida. 469. Sears v. Berryman, 101 Ida. 843.

In order to establish a water right based on adverse possession, it is necessary to prove by clear and convincing evidence the adverse use for a period of five years where the use is open, hostile, exclusive, continuous and under claim of right. It must be shown the adverse claimant's use of water deprived the appropriator of water at times when the appropriator actually needed the water. Sears v. Berryman, 101 Ida. 843. The Objectors have not met their burden in this regard.

This Court finds it is more likely than not the diversion of that unnamed stream, which is currently tributary to Twin Lakes immediately above the outlet of Lower Twin Lakes, was made about April 5, 1906 when the outlet was described as having been constructed.

An appropriator is entitled to the natural conditions of the

stream at the time of the appropriation. This Court concludes only those persons with priorities predating the 1906 change in the course of the unnamed stream are entitled to administration of said unnamed stream as if it were tributary to Rathdrum Creek instead of Twin Lakes.

Therefore this Court adopts the Director's proposed additional Finding of Fact No. 19:

Finding of Fact No. 19: The unnamed stream that is currently tributary to Twin Lakes immediately above the outlet at the lower end of Lower Twin Lakes was tributary to Rathdrum Creek immediately below the outlet prior to April 5, 1906.

and the Director's proposed additional Conclusion of Law No. 16:

Conclusion of Law No. 16: With respect to those rights to the use of water from Rathdrum Creek with a priority date prior to April 5, 1906, the unnamed stream that is currently tributary immediately above the outlet at the lower end of Lower Twin Lake will be administered as if the stream were tributary to Rathdrum Creek immediately below the outlet.

The Director's proposed Finding of Fact No. 14 shall be amended to read, in the final decree, as follows:

"There are periods during most years since 1906 when the seepage and evaporation losses from Twin Lakes exceed the natural tributary inflow."

Regarding the objection filed by Chester Park et al, this court concludes there has not been a water right established to an instream flow in Rathdrum Creek for recreation, fish and wildlife, because no one submitted a claim of notice for such water right in a timely manner. No notice of a claim to an instream flow for such purposes was filed by said Objectors. and

the time of filing notices of claims has past.

The Court further concludes there is no basis for a claim that water stored in Twin Lakes by the Bureau of Reclamation for recreations and wildlife purpose properly includes the release of water to Rathdrum Creek for instream flows for recreation and water life purposes. The place of use cannot be changed without application by the owner of the water right to the Idaho Department of Water Resources for approval of a change in place of use. See I.C. 42-108 and 42-222.

The Rathdrum Creek Drainage Association has requested an order from this court establishing "there is stored water rights which are still available for the purpose of appropriations by these Claimants." In this regard, this Court concludes future appropriations of water may not be established to water that is already appropriated and put to a beneficial use by the Spokane Valley Land and Water Company and its successors in interest. (Washington County Irr. District v. Talboy, 55 Ida. 382.)

The Rathdrum Creek Drainage Association has not met its burden of proof to establish the holders of the storage rights have lost their rights by forfeiture, abandonment, acquiescence, estoppel or laches.

This Court further concludes it is without authority to establish there is storage water available for appropriation in Twin Lakes. A future appropriation may be acquired only in accordance with the permit and license requirements of Title 42, Chapter 2 Idaho Code by proper application made to the Department

of Water Resources. - - - Such an order would be outside the scope of this adjudication proceeding.

The amended objection, presented by Rathdrum Creek Drainage Association, sought an order restricting further appropriations in the water system on the grounds the Idaho Department of Water Resources was continuing to allow further appropriations when there is no excess water available, causing injury to the vested right to the Objectors. This Court concludes it does not have the power or authority to issue such order because the purpose of a general adjudication is to determine the existing rights to the use of water in a water system. Chapter 14, Title 42 I.C. The Idaho Water Resources Department is authorized by the Idaho Legislature to hear and decide applications to appropriate water in the future.

This Court has considered the Syltes' objections to findings of fact Nos. 3, 5 and 6 and finds them without merit. The testimony and evidence at trial leaves this Court to believe those findings have been established by a preponderance of the evidence.

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 the beneficial use on an historical basis by Syltes, this Court finds that all said claimed diversions were described in the listing of water rights.

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.

This Court hereby adopts, as its own, all the uncontested proposed Findings of Fact and Conclusions of Law set forth in the Director's Report. (Pl's Ex. 45) In addition, it adopts the remaining (contested) proposed findings and conclusions, as herein amended and/or supplemented, as its own. This memorandum decision shall constitute to the Court's explanation of its decision in this regard.

This Court also adopts the prefatory material to the findings and fact in the Director's Report, along with the Instructions for Interpretating the Listing of Water Rights therein.

This Court will amend the Director's proposed findings of fact and proposed conclusions of law to reflect and effectuate this Court's determinations regarding No. 95-0734, as set forth in this memorandum decision. The attorney for the Idaho Water Resource Board is requested to prepare drafts of such proposed amendments for consideration by this Court. This will be done as a part of the proposed partial decrees later requested herein.

The attorney for the Idaho Department of Water Resources is requested to prepare a proposed partial decree, for the signature of this Court, embodying the adjudications made herein and in conformity with Sec. 42-1412(8) Idaho Code. Said decree shall include appropriate instructions to the clerk of this court

regarding notification to the Objectors and Claimants of each right as to which an objection was determined.

The attorney for the Department of Water Resources is requested to prepare a proposed partial decree, for presentation to this Court for those portions of parts I and II of the Director's Report, including all matter necessary for the efficient administration of the water rights, for which no objection has been filed, in conformity with Section 42-1412(9) Idaho Code.

If counsel for the Water Resources Board finds it necessary to seek further guidance from the court regarding the drafting of the proposed decrees, it is suggested this may be accomplished through a telephonic hearing, either formally or informally, depending upon the desires of both counsel.

DATED at Wallace, Idaho, this 22nd day of February, 1989.


District Judge

I hereby certify a true and correct copy
of the foregoing MEMORANDUM DECISION
was mailed, postage prepaid, this
23rd day of February, 1989, to the
following:

Michael Newell
Attorney at Law
1010 Ironwood Drive
Coeur d'Alene, Idaho 83814

A. Lynne Krogh-Hampe
Deputy Attorney General
Idaho Department of Water Resources
1301 North Orchard, Statehouse Mail
Boise, Idaho 83720

Courtesy copy to:

Warren S. Derbidge
Assistant United States Attorney
District of Idaho
Box 037 Federal Building
550 West Fort Street
Boise, Idaho 83724

2
Handwritten signature

EXHIBIT C

STATE
COUNTY
FILED.

APR 23 11 29 AM '89

James F. Moore

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

IN THE MATTER OF THE GENERAL
DETERMINATION OF THE RIGHTS TO
THE USE OF THE SURFACE WATERS
OF TWIN LAKES, INCLUDING
TRIBUTARIES AND OUTLETS.

Civil No. 32572

THE STATE OF IDAHO,
Department of Water Resources,

Plaintiff,

FINAL
DECREE

v.

ABBOTT, Knox and Spouse; et al.,

Defendants.

This action is a general adjudication of rights to the use of surface waters of Twin Lakes, including tributaries and outlets. This action was commenced by order of the district court on January 10, 1975, pursuant to Idaho Code §42-1407 (1977).

The director of the Idaho Department of Water Resources (IDWR) filed a Proposed Finding of Water Rights in the Twin Lakes

- Rathdrum Creek Drainage Basin (Proposed Finding) on January 14, 1985, pursuant to Idaho Code §42-1410 (Supp. 1984). The Proposed Finding contains a list of defendants; an introduction including a list of definitions; general findings of fact and conclusions of law, including matters necessary for the efficient administration of water rights from the source to be adjudicated; a listing of water rights, including instructions for interpreting the listing of water rights; a list of claims submitted and recommended to be disallowed; a name index and a water right number index; and maps of the Twin Lakes - Rathdrum Creek Basin. (Note that there is a numbering error in the Proposed Finding; there is no page 92.) The Proposed Finding is incorporated herein by reference.

The Proposed Finding was twice amended. The first amendment was an Order to Amend Proposed Finding of Water Rights in the Twin Lakes Rathdrum Creek Drainage Basin (Order), filed October 22, 1986, which amended pages 95 and 149 of the Proposed Finding by deleting one water right from the Proposed Finding which was not properly included in the adjudication. An amended page 95 and an amended page 149 are attached hereto and incorporated herein by this reference. The second amendment was a Supplement to Report (Supplement), filed May 21, 1987, which added to the Proposed Finding Page 100A, entitled Claims Not Submitted. Page 100A is attached hereto and incorporated herein by reference.

Four objections were filed to the Proposed Finding, and responses were filed to the objections by IDWR. Trial on the objections was held May 12 - 14, 1988. A Memorandum Decision was entered February 22, 1989. The Memorandum Decision is adopted as

findings of fact and conclusions of law as permitted by IRCP 52(a), and is incorporated herein by reference. The Memorandum Decision directed IDWR to amend the general findings and conclusions in the Proposed Finding in accordance with the Memorandum Decision. The amended proposed findings and conclusions, consisting of pages xiii and xv to xx, are attached hereto and incorporated herein by reference.


Idaho Code §42-1411(1)&(4) (Supp. 1988) describes a three-part director's report and a notice of filing the report which includes notice of a hearing on a partial decree of the uncontested portions of the report. Idaho Code §42-1412(8)&(9) (Supp. 1988) describes a partial decree of uncontested portions of the report and additional partial decrees after trial on objections. The Proposed Finding is not a three part director's report, and the procedures for obtaining a partial decree of uncontested matters was not followed in this adjudication because these provisions were not adopted until after the filing of the report and expiration of the period for filing objections and responses. This decree therefore decrees all matters, including uncontested matters pursuant to Idaho Code §42-1411(8) (Supp. 1988) and contested matters pursuant to Idaho Code §42-1411(9) (Supp. 1988), in this adjudication, and constitutes a final decree pursuant to Idaho Code §42-1412(10) (Supp. 1988).

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the rights to the use of surface water from the Twin Lakes - Rathdrum Creek Drainage Basin are as described in the Proposed Finding, amended

as set forth in pages xiii, xv to xx, ^{95, 100A} 100A and 149 attached hereto.

IT IS FURTHER ORDERED that IDWR shall provide to the Clerk of the District Court a service list, stamped addressed envelopes, and sufficient copies of this judgment together with all attachments, for service of conformed copies of this judgment upon the parties to the trial on objections. IDWR shall prepare a notice of entry of decree, and provide to the Clerk of the District Court a service list, stamped addressed envelopes, and sufficient copies of the notice of entry of decree for service of conformed copies of the notice of entry of decree upon all other claimants in this adjudication. Upon receipt of these materials from IDWR, the Clerk of the District Court shall serve the conformed copies of the judgment and the conformed copies of the notice of entry of the decree on the persons listed in the service lists by mailing in the U.S. Mail. This further order is made pursuant to Idaho Code §42-1412(8) and (9), and IRCP 77(d).

DATED this 19th day of April, 1989.


Richard G. Magnuson
District Judge

FINDINGS OF FACT

1. Twin Lakes, formerly known as Fish Lakes, is a body of water comprised of two lakes joined by a natural channel which flows from the upper lake into the lower lake, with Fish Creek being the major inlet of the lakes and Rathdrum Creek the only outlet. Twin Lakes is located approximately three miles north of the City of Rathdrum at the foot of the Selkirk Mountain Range. The Twin Lakes-Rathdrum Creek Drainage Basin contains over forty-eight square miles, most of which is mountainous timberland, in which the streams feeding Twin lakes and Rathdrum Creek originate. These tributaries are contained within Kootenai County, except for an intermittent tributary of Fish Creek which originates in the State of Washington on the eastern slopes of Shadow Mountain. Boundaries of the Twin Lakes-Rathdrum Creek Drainage Basin include all of the drainage basin located in Idaho, as shown in Both Exhibit 1 and Figure 1.
 2. Beneficial use rights from surface water sources are those rights which were commenced by diversion and application of water to a beneficial use prior to May 20, 1971. All surface water rights with priority dates later than May 20, 1971, must have been initiated by application and permit filed with the Department of Water Resources or its predecessor agency, the Department of Water Administration.
 3. The mean consumptive irrigation requirement for irrigated lands is found to be 2.1 acre-feet per acre per annum. (Reference: Allen, R.G. and C.E. Brockway, 1983, "Estimating Consumptive Irrigation Requirements for Crops in Idaho", Research Technical Completion Report, Idaho Water and Energy Resources Research Institute, University of Idaho.)
 4. Water is found to be beneficially used for irrigation during the period of each year when the chance of a 28° F frost is fifty (50) percent or less. For the Twin Lakes area, this period is 246 days, from March 15 to November 15 each year. (Reference: Stevlingson, David J and Dale O. Everson, Spring and Fall Freezing Temperatures in Idaho, University of Idaho Agricultural Experiment Station, Bulletin 494.)
 5. The amount of water required for stockwatering purposes is found to be 12 gallons of water per day per head for cows, calves and horses; 35 gallons per day per head for dairy cattle; and 2 gallons per day per head for sheep. (Reference: U.S. Environmental Protection Agency, 1974, Manual of Individual Water Supply Systems.)
 6. The diversion requirement for domestic use is found to be 0.02 CFS for household needs and/or 0.02 CFS for the irrigation of up to one half acre of land and stockwater for domestic animals kept with and for the use of the household.
 7. "Fire Protection" is an alternate use to which any water right can be beneficially applied.
-

8. Regulation of the diversion and use of water within the Twin Lakes-Rathdrum Creek Drainage Basin requires that each user who diverts must install a means for the watermaster to measure and control the diversion, with the exception that for diversions of less than 0.20 CFS, a means of measurement is not required.
9. May 23, 1977, was the final day for filing claims in this action. Seven (7) claims were filed after that date.

<u>Claim No.</u>	<u>Claimant(s)</u>	<u>Date Filed</u>
95-0970	Alfred and/or Ruby Hesterman	May 5, 1978
95-0971	Lawrence and/or Judy McIntosh	January 12, 1980
95-0972	Terry Kiefer	June 27, 1980
95-4357	Park, Inc.	December 2, 1981
95-0975	Russell Del and/or Susan May Reed	June 7, 1983
95-0976	Robert G. Bishop	June 8, 1983
95-0977	Robert L. and/or Margaret M. Simon	September 9, 1983

These claims were treated as though they were filed in a timely fashion.

10. Twin Lakes originally consisted of two distinct natural bodies of water. Near the turn of the century Upper Twin Lake was hydraulically connected to Lower Twin Lake by a man-made channel, and a dam and outlet structure was constructed at the outlet of Lower Twin Lake. ~~that provided the capability to raise the level of the lakes.~~ In 1969, a decision of the District Court of the First Judicial District of the State of Idaho in Kootenai County, Case No. 18420, entitled Twin Lakes Improvement Assoc., Inc., vs. East Greenacres Irrigation District, (affirmed on appeal to the Idaho Supreme Court, 93 Idaho 922), established minimum and maximum levels for the lakes. The minimum level was held to be 6.4 feet on the Staff Gauge which correlates to 2,308.39 mean sea level elevation (per U.S. Bureau of Reclamation datum in publications after 1966). The maximum level was held to be 10.4 feet on the Staff Gauge which correlates to 2,312.39 mean sea level elevation.

There are three distinct blocks of storage identified within Twin Lakes:

- a. The first block of storage is the natural lake storage located between the bottom of the lake and Staff Gauge height 0.0 feet. No water right has been developed for the use of this water because it provides a base for the overlying storage rights.
- b. The second block of storage is located between Staff Gauge height 0.0 feet and 6.4 feet. A ~~portion of~~ This storage water was at one time part of the natural lake storage, but was made available for appropriation by excavation of the outlet from Lower Twin Lakes. The right to use this water for recreational purposes was confirmed by the 1969 district court decision, which held that a lowering of the water level below 6.4 feet would constitute an infringement upon the rights of the plaintiff, Twin Lakes Improvement Association. The water right for this block of storage is Right No. 95-0974 in the amount of 5360 acre-feet. This water right has been claimed in this adjudication by the Twin Lakes Improvement Association.

- c. The third block of storage is located between Staff Gauge heights 6.4 feet and 10.4 feet. This storage water was also at one time part of the natural lake storage, but was made available for appropriation by excavation of the outlet from Lower Twin Lakes. The water right by which East Greenacres Irrigation District (EGID) used this water for irrigation purposes, No. 95-0973, was confirmed by the 1969 district court decision. However in 1976, EGID ceased using water from Twin Lakes, and conveyed ownership of their storage water right and the outlet works to the U.S. Department of Interior, Bureau of Reclamation (BOR). The BOR has entered into a fifty-year lease agreement with Kootenai County which gives the county the responsibility of operating the outlet facilities in a manner to benefit recreation and fish and wildlife enhancement.
11. On August 23, 1982, the BOR filed with the Department an application for transfer to change the nature of use of storage Water Right No. 95-0973 from irrigation storage to recreation and wildlife storage. The application was advertised and protested. On January 10, 1983, the BOR amended the application for transfer to include direct flow Water Right No. 95-2059. The proposed use of the direct flow was to provide "make up" water to replace depletions of storage caused by evaporation and seepage from Twin Lakes. A hearing regarding the application was held on March 24, 1983, and the transfer application was subsequently approved, in part, by the Director on August 1, 1984. The change in nature of use of storage Water Right No. 95-0973 from irrigation storage to recreation and fish and wildlife enhancement was approved. The change in nature of use of direct flow Water Right No. 95-2059 was denied, and no appeal to the decision was subsequently filed.
12. Water rights identified herein with the source of Twin Lakes tributary to Rathdrum Creek are categorized as either storage water rights or direct flow water rights. Only Water Right No. 95-0973 in the name of the BOR, and No. 95-0974 in the name of Twin Lakes Improvement Association are storage water rights. All other water rights that divert from Twin Lakes are direct flow water rights. Storage water rights utilize the storage capacity of the lake. Direct flow water rights utilize the flows passing through the lake and are established on a priority basis.
13. Within the Twin Lakes - Rathdrum Creek Drainage Basin many sources are hydraulically related. For example, Fish Creek is tributary to Twin Lakes which is tributary to Rathdrum Creek. The rate of flow provided by these sources fluctuates from day to day and from season to season.
14. There are periods during most years since 1906 when the seepage and evaporation losses from Twin Lakes exceed the natural tributary inflow.
15. This Proposed Finding of Water Rights includes permit rights initiated by application and permit from the Department of Water Resources. These permit rights are subject to the requirement that proof of beneficial use of the water must be submitted to the Department and the rights will be limited to and confirmed by such licenses as may subsequently be issued by the Department.

16. Among the various water rights and the numerous permits, licenses, and claims to water rights recorded in the files of the Department are several which describe rights which were unclaimed by the present landowner. These recorded rights represent uses which no longer exist due to forfeiture or abandonment.
17. The Department has historically taken the position that because a water right must generally have both a diversion and a beneficial use, the in-stream watering of livestock does not constitute a water right. New guidance has been provided on stock water rights in the case of R.T. Nahas Co. vs. Hulet, ___ Idaho ___, 674 P.2d 1036 (App. 1983), and Section 42-113, Idaho Code. A total of six (6) claims to water rights for the purpose of in-stream watering of livestock were submitted in this proceeding. However, based on its understanding of the law at the time of claim-taking, the Department did not attempt to obtain and record all in-stream livestock watering uses within the Twin Lakes-Rathdrum Creek Drainage Basin.
18. With the exception of the in-stream watering of livestock, the Department investigated all claimed diversions and uses of surface water in the Twin Lakes-Rathdrum Creek Drainage Basin when claim-taking was completed on May 23, 1977. Water has been found to be diverted and applied to a beneficial use as described in the "Listing of Water Rights".
19. The unnamed stream that is currently tributary to Twin Lakes immediately above the outlet at the lower end of Lower Twin Lake was tributary to Rathdrum Creek immediately below the outlet prior to completion of construction of the dam and outlet at the lower end of Lower Twin Lake on April 5, 1906.
20. At the time Water Right No. 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 Lakes, to provide 0.07 cfs to the appropriator on a continuous year-round basis. Since completion of construction of the dam and outlet structure at the lower end of lower Twin Lake on April 5, 1906, when evaporation and seepage from Twin Lakes exceed the natural tributary inflow to Twin Lakes, Twin Lakes is not a significant source of water to Rathdrum Creek.

CONCLUSIONS OF LAW

1. This recommended decree includes all the existing rights to the surface waters within the Twin Lakes and Rathdrum Creek Drainage Basin defined by Exhibit 1 as of May 23, 1977, and upon its adoption supersedes all prior judgments of the Court. Any water user who heretofore diverted surface water within the Basin or who owns land to which previously established water rights were appurtenant and who, upon being joined in this action, failed to claim such water rights, has forfeited such water rights as provided in Section 42-1411, Idaho Code.
2. The consumptive irrigation requirement for irrigated lands in the Twin Lakes-Rathdrum Creek Drainage Basin is 2.1 acre-feet per acre per annum. Regulation of diversion by the watermaster shall be on the basis of the rates of diversion herein specified rather than by the acre-foot allotment.
3. The normal irrigation season is from March 15 to November 15 of each year. Water rights used for irrigation shall be allowed to be diverted during both the pre-irrigation and post-irrigation seasons, provided:
 - a. The waters so diverted are applied to a beneficial use; and
 - b. Water rights for existing and future uses are satisfied.
4. The duty of water for stockwatering purposes is 12 gallons of water per day per head for cows, calves, and horses; 35 gallons per day per head for dairy cattle; and 2 gallons per day per head for sheep.
5. The duty of water for domestic uses is 0.02 cubic feet per second for household needs and/or 0.02 cubic feet per second for irrigation of up to one half acre of land and stockwater for domestic animals kept with and for the use of the household.
6. "Fire Protection" is an additional, implied use for each water right herein, to the extent of the maximum rate of diversion for the right.
7. Water users whose rights are described herein are required to install a means of measurement and control acceptable to the Department at the point(s) of diversion for use by the watermaster with the exception that for diversion of less than 0.20 CPS, a means of measurement is not required.
8. 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. Water Right No. 95-0974 for 5360 acre-feet of recreation storage maintains the reservoir at a minimum level of 6.4 feet on the Staff Gauge.

9. The nature of use of Water Right No. 95-0973 in the name of the BOR is storage for recreation and fish and wildlife enhancement. This water right is for 3,730 acre-feet, between Staff Gauge heights 6.4 and 10.4 feet.
10. Water Right No. 95-2059 in the name of BOR has been forfeited or abandoned, and is of no further force or effect.
11. An appropriator is entitled to maintenance of the stream conditions substantially as they were at the time the appropriator made his or her appropriation, if a change in the stream conditions would interfere with the proper exercise of the water right.
- ~~11-~~ 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.

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.
- ~~12-~~ 13. The priority system of water rights within the Twin Lakes - Rathdrum Creek Drainage Basin applies to all water rights on sources that are hydraulically connected. For example, an early priority water right on Rathdrum Creek is senior to a later priority water right on Fish Creek.
- ~~13-~~ 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.
- ~~14-~~ 15. Based on new statutory and case law, the six (6) claims to water rights for the purpose of in-stream watering of livestock are found to represent valid water rights. In addition, there may exist other valid water rights for this purpose within the Twin Lakes-Rathdrum Creek Drainage Basin which will not be recorded as part of this proceeding.

- ~~15.~~ 16. Water has been diverted and applied to a beneficial use as described in the "Listing of Water Rights".
17. With respect to those rights to the use of water from Rathdrum Creek with a priority prior to April 5, 1906, the unnamed stream that is currently tributary immediately above the outlet at the lower end of Lower Twin Lake will be administered as if the stream were tributary to Rathdrum Creek immediately below the outlet.

CLAIMS SUBMITTED
RECOMMENDED TO BE DISALLOWED

NUMBER	NAME ADDRESS	REMARKS
95-0970	MESTERMAN, ALFRED MESTERMAN, RUBY ROUTE 1, BOX 616 RATHDRUM, ID 83858	NO DIVERSION WORKS.
95-0975	REED, RUSSELL DEL REED, SUSAN MAY BOX 464 RATHDRUM, ID 83858	NO DIVERSION WORKS.
95-0976	BISHOP, ROBERT G. E. 8523 COURTLAND SPOKANE, WA 99212	NO DIVERSION WORKS.
95-2002	UNCLAIMED	NO BENEFICIAL USE FOUND-USE FORFEITED OR ABANDONED.
95-2005	HEITMAN, CHARLES L. RATHDRUM, ID 83858	NO BENEFICIAL USE FOUND-USE FORFEITED OR ABANDONED.
95-2024	CHICAGO MILWAUKEE RAILROAD 640 SKINNER BLDG. SEATTLE, WA 98901	NO BENEFICIAL USE FOUND-USE FORFEITED OR ABANDONED.
95-2059	U. S. DEPARTMENT OF INTERIOR BUREAU OF RECLAMATION FEDERAL BLDG. BOX 043, 550 WEST FORT STREET BOISE, ID 83724	NO BENEFICIAL USE FOUND-USE FORFEITED OR ABANDONED.
95-2071	FRANKLIN, CLARA RATHDRUM, ID 83858	NO BENEFICIAL USE FOUND-USE FORFEITED OR ABANDONED.
95-7018	PITTSLEY, ERNEST H. RT. 1 RATHDRUM, ID 83858	PERMIT LAPSED.

CLAIMS NOT SUBMITTED

The following people were summoned, but did not submit adjudication claims on their respective statutory claims.

NUMBER	NAME	REMARKS
95-4043	Ray Kempton	
95-4201	N. F. Rouleau	Recommended as 95-2032B
95-4308	Louis R. Becker	Recommended as 95-0811

NUMBER INDEX

NUMBER	NAME	PRIORITY DATE	SOURCE OF WATER	TRIBUTARY TO
95-0962	KERN, ALBERT V. KERN, RUTH J.	04-01-1947	TWIN LAKES	RATHDRUM CREEK
95-0963	JONES, ROBERT O.	05-15-1961	TWIN LAKES	RATHDRUM CREEK
95-0964	GALBRAITH, LARRY E.	05-01-1942	SPRING BRANCH CREEK	RATHDRUM CREEK
95-0965	SCHRAMM, ROGER H. SCHRAMM, JUNE G.	05-01-1949	TWIN LAKES	RATHDRUM CREEK
95-0966	CITY OF RATHDRUM	01-01-1880	SPRING BRANCH CREEK	RATHDRUM CREEK
95-0967	STATE OF IDAHO	06-01-1971	SPRING BRANCH CREEK, S. FORK SPRING BRANCH CREEK, N. FORK	SPRING BRANCH CREEK SPRING BRANCH CREEK
95-0968	MUNRO, HERBERT B. MUNRO, MARYAN E.	01-06-1958	TWIN LAKES	RATHDRUM CREEK
95-0969	FARMERS WATER INC.	05-01-1902	SPRINGS	SPRING BRANCH CREEK
95-0970	WESTERMAN, ALFRED WESTERMAN, RUBY	DISALLOWED		
95-0971	MC INTOSH, LAWRENCE V. MC INTOSH, JUDY	05-01-1958	TWIN LAKES	RATHDRUM CREEK
95-0972	KIEFER, TERRY	05-01-1957	TWIN LAKES	RATHDRUM CREEK
95-0973	U.S. DEPT. OF INTERIOR	03-23-1906	TWIN LAKES	RATHDRUM CREEK
95-0974	TWIN LAKES IMPROVEMENT ASSN.	03-23-1906	TWIN LAKES	RATHDRUM CREEK
95-0975	REED, RUSSELL DEL REED, SUSAN MAY	DISALLOWED		
95-0976	BISHOP, ROBERT G.	DISALLOWED		
95-0977	SIMON, ROBERT L. SIMON, MARGARET M.	06-01-1965	TWIN LAKES	RATHDRUM CREEK
95-2002	UNCLAIMED	DISALLOWED		
95-2005	HEITMAN, CHARLES L.	DISALLOWED		
95-2024	CHICAGO MILWAUKEE RAILROAD	DISALLOWED		
95-2032A	SPRING WATER ASSOCIATION, INC.	03-13-1917	SPRINGS	TWIN LAKES
95-2032B	EXCELSIOR BEACH ASSN., INC.	03-13-1917	SPRING	TWIN LAKES
95-2055	CRANER, FRED V. CRANER, SALLY A.	06-22-1914	UNNAMED STREAM	TWIN LAKES
95-2059	U.S. DEPARTMENT OF INTERIOR	DISALLOWED		
95-2071	FRANKLIN, CLARA	DISALLOWED		
95-2096	PARK, CHESTER R. PARK, NAOMI	06-28-1952	RATHDRUM CREEK	SINKS