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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)	Docket No. P-DR-2017-001
DECLARATORY RULING RE DISTRIBUTION)	
OF WATER TO WATER RIGHT NO. 95-0734)	CLARK’S RESPONSE
)	TO SYLTE’S PETITION FOR
)	DECLARATORY RULING

Colby Clark hereby responds to the Sylte’s Petition for Declaratory Ruling (“Petition”) filed by Susan Goodrich and John Sylte (collectively hereinafter “Sylte”). The Petition should be denied in full as it is self-contradictory, makes incorrect assumptions, and incorrect conclusions of law. It is a blatant attempt to circumvent 1989 Final Decree, Memorandum Decision, Statutes, and clear guidance and instructions provided by the IDWR regarding the administration of water rights.

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I. WATER RIGHT 95-0734 IS LIMITED TO TRIBUTARY INFLOW

The Petitioners seek to re-interpret, re-litigate and expand the rights of water right 95-0734 through this proceeding. However, these matters have been thoroughly litigated and conclusively resolved in the Decree of 1989. Water Right 95-0734 is limited in accordance with the Decree. The Instructions prepared by Morgan Case dated September 20, 2016 (“Instructions”) accurately and correctly follow the 1989 Decree and should be upheld in its entirety.

Petitioners attempt to argue, “the Decree and Memorandum of Decision and Idaho’s prior appropriation doctrine require delivery of water to Sylte’s water right 95-0734 on a continuous year-round basis *irrespective* of the amount of natural tributary inflow.”¹ Petitioners go on to state that limiting water right 95-0734 to tributary inflow is in contravention to the Decree.

A. The Decree Conclusively Limits Water Right 95-0734 to Tributary Inflow.

The Findings of Fact on page xvi of the Decree conclusively and irrefutably classifies Water Right 95-0734 as a direct flow water right limited to flows passing through the lake only as follows:

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.**

¹ Sylte’s Petition for Declaratory Relief pages 6 and 7.

This clearly identifies that only two water rights are allowed to access storage water and 95-0734 is not one of them. Additionally, this section defines that there are 2 types of water rights: 1) storage rights and 2) direct flow rights. 95-0734 is a direct flow right and therefore can only be allocated up to the amount of water provided by tributary inflows to satisfy it.

The Conclusions of Law #12 and #14 of the Decree conclusively and irrefutably limit water right 95-0734 to tributary inflow²:

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.

...

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 water**, on the basis of water right priority.

Emphasis was added to the phrase “may divert the natural flow, but not the stored waters” to call attention to the fact that the Court singled out 95-0734 specifically calling it by name and stating that 95-0734, “may divert the natural flow, but not the stored water”. Stored waters are not to be distributed to 95-0734.

² See the 1989 Decree page xix. Emphasis added.

Petitioner even states in the Petition:

“Nowhere did Judge Magnuson qualify these plain, unambiguous statements with any language that the natural pre-dam outflow from Twin lakes, or the exercise of water right, 95-0734, was limited to the natural tributary inflow.”³

Apparently, the Petitioner was unaware of Judge Magnuson’s Conclusion of Law #14 naming water right 95-0734 specifically, that states in pertinent part:

“... **Water Right No.95-0734** ... **may divert the natural flow, but not the stored water**, on the basis of water right priority.”

In summary, water right 95-0734 is a **direct flow** right limited by **tributary inflow** into Twin Lakes. The Instructions dated September 20, 2016, prepared by Morgan Case accurately reflect these points in relation to the administration of water right 95-0734.

B. Water Right 95-0734 is not limited by evaporation and seepage; However, This Should Not Be Confused With, Nor Does It Eliminate, 95-0734’s Limitations to Tributary Inflow.

The Memorandum of Decision clarified that direct flow Rathdrum Creek water right holders, *except water right 95-0734*, were not entitled to flow when evaporation and seepage from Twin Lakes exceeded the natural direct inflow into Twin Lakes.⁴ However, Water Right 95-0734 is special and unique from all other Rathdrum Creek water right holders *in that evaporation and seepage rates are irrelevant to the exercise of 95-0734. This does not mean that*

³ See Sylte’s Petition for Declaratory Relief page 15.

⁴ Under those circumstances, Twin Lakes would naturally recede from the evaporation and seepage. These conditions would most likely occur between April 1st and October 31st. Then the two storage rights would be able to replenish themselves from November 1st to March 31st. See *infra* Section II(C).

tributary flow is irrelevant to 95-0734, as the Petition argues⁵. Quite to the contrary, 95-0734 is still a *direct flow right limited by the amount of direct flow there is* in any given season and time.

Specifically, the Memorandum of Decision states:

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,

...

The Court concludes the rights of all other Objectors [except for 95-0734] are limited to the natural tributary inflows to Twin Lakes, less evaporation and seepage from Twin Lakes.⁶

These paragraphs in the Memorandum Decision point out that Rathdrum Creek water right holders (other than 95-0734) are limited to the following equation:

(natural tributary inflow) minus (evaporation + seepage) = direct flow available via priority

Importantly, these provisions of the Memorandum Decision specifically exclude Water Right 95-0734 from this equation. The Petition argues that this also means that the amount of tributary inflow is also irrelevant to the exercise of Water Right 95-0734. This is absolutely incorrect. 95-0734 is a direct flow water right. It is only entitled to waters flowing directly through Twin Lakes (irrelevant of evaporation & seepage). Therefore, to satisfy 95-0734, the watermaster may release up the natural tributary inflow, but only as much as is actually needed

⁵ See Sylte's Petition for Declaratory Relief pages 14-15.

⁶ See Memorandum of Decision on page 12 and 13.

to supply .07 cfs at the point of diversion and no more than the tributary inflow.⁷

Nowhere in the Decree or Memorandum Decision does it say that 95-0734 has no limits and can take all water in Twin Lakes and Rathdrum Creek to service 95-0734 as the Petition asserts. Nowhere in the Decree or its associated documents does it say that 95-0734 can injure the two storage rights on Twin Lakes. On the contrary, the Decree and supporting documents state in multiple places that 95-0734 is limited to tributary inflow and cannot injure the two storage rights⁸. In fact the Conclusions of Law #14 of the Decree 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 ... may divert the natural flow, but not the stored waters**, on the basis of water right priority.

Thus, when inflow is less than evaporation & seepage, Water Right 95-0734 is allowed to enough of the direct flow to satisfy their right, as a priority over the storage rights⁹ and other Rathdrum Creek appropriators. That does not allow Water Right 95-0734 to take from the storage waters, just the current natural direct flow. In fact, the Court stressed that by stating:

A water right is different from other forms of property rights in that the water right is a usufructuary 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.¹⁰

⁷ Times of the year also affect when and how tributary inflows are distributed. See *infra* Section II(C).

⁸ See *Infra* Section II for an analysis that the Petitioners have no right to the storage waters in Twin Lakes.

⁹ Subject to the time of year as further analyzed *infra* in Section II(C).

¹⁰ See Memorandum of Decision page 13 and 14.

Although Water Right 95-0734 is exercisable even when inflow is less than evaporation & seepage, Water Right 95-0734 is not allowed to the release at the dam of more than the natural tributary inflow and is not allowed to deplete the storage waters. Rather, under these conditions (less inflow than evaporation & seepage), Water Right 95-0734 is only entitled to the direct flow to the extent it can satisfy its 0.07 cfs at its point of diversion.

The Instructions dated September 20, 2016, prepared by Morgan Case accurately reflect these points in relation to the administration of water right 95-0734.

C. Water Right 95-0734 is Limited by Direct Flow Natural Conditions

Petitioners argue that Water Right 95-0734 grants them a year round guarantee to an abundant direct flow of waters due to their assertion that the natural tributary inflows were abundant at the time they secured their water rights. This is simply incorrect.

Water Right 95-073 is a direct flow right. This kind of right is dependant upon the amount of direct flow that exists. If there is little direct flow, they will receive little. If there is an abundance, they will receive up to their right and sometimes even more.

However, their “right” does not guarantee them the flow irrespective of the natural fluctuations of the climate. For instance, if a water right is established in a flood or high water year, it does not guarantee the recipient the same flood stage conditions in following years. It is unreasonable and illogical to expect that. Conversely, if there is a drought, then there likely will be insufficient direct flow. Drought conditions do not give the water right holder the authority

to take water from stored water rights. Rather, their direct flow right ebbs and flows with the ebb and flow of the direct flow as affected by climate and natural conditions.

Just because there was an abundance of direct flow at the time Water Right 95-0734 was established does not give the Sylte's a "guarantee" that natural conditions and the climate will always provide such an abundant flow. Also, if they enjoy an abundance of water at the time they secured their water right, allowing them to utilize more than the 0.07 cfs (akin to a 1 ½" hose) they are allotted, they are not then "guaranteed" to always have an abundance. The previous abundance does not give them the right to then injure the storage water rights of others.

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

While it may be true that weather and forest conditions have changed since 1875, resulting in faster snow melt earlier in the year and subsequently less or no snow melt later in the year and subsequent drier conditions, it still does not permit 95-0734 to be serviced using water belonging to other water rights holders, specifically 95-0973 and 95-0974. As a reminder, the Decree, Conclusions of Law #14 states "Water Right No. 95-0734 ... may divert the natural flow, but not the stored waters, on the basis of water right priority."

Moreover, low water conditions do not justify disregarding the stated "recreational" purpose of the Twin Lakes reservoir and depleting it by approximately 3-4 feet over the summers

of 2015 and 2016 in order to service 95-0734, clearly above and beyond its allotment. Per the terms, conditions, and definition of a free-flow water right, regardless of date established, unless there is sufficient water flowing to service the request, the water right cannot be satisfied. It is unlawful to deplete storage waters for such purposes. Moreover, having a water right of any date is not a guarantee against drought conditions or an assurance of water delivery in adverse conditions.

The Petition references the Memorandum Decision, Page 14, which states: “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 exercise of the right. *Bennett v. Nourse*, 22 Ida. 249, 125 P. 1038 (1912).” Note that this statement is not a promise of weather conditions, an assurance of adequate snowfall, a promise against drought, or any other guarantee of supremacy or control over mother nature. It is entirely possible and more than likely that there were times of greater or lesser water flow or even drought given the stream conditions in a reasonable time window around 1875.

Clearly the ruling in *Bennett v. Nourse* is meant to describe unnatural alterations to the stream, such as the man made structures that would impound, divert, or otherwise alter streambed conditions. Such alterations have the potential to affect the water delivery to a downstream water right holder and previous water right holders have protections against this. Obviously, in this situation, the Twin Lakes dam does not prevent or in any way impede the release of “up to the natural tributary inflow” for the purpose of satisfying 95-0734 and *Bennett v. Nourse* is not a justification for unlawful access of storage waters.

**D. Water Right 95-0734 Has Always Been Limited by Natural Tributary Inflow
Even in 1875.**

**1. The natural state of Rathdrum Creek changed from 1875 to 1989
regardless of the construction of the dam.**

In the Decree, the Court evaluated conditions of flow and use of 95-0734 during three main periods of time. The first was at the inception of 95-0734 in 1875. During this time (1875), the Court found:

“... 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.”¹¹

Then the Court makes a very important finding. It states that natural conditions of Rathdrum Creek changed between 1875 and 1906, before the dam was built. In other words, had the dam never even been built, the natural state of Rathdrum Creek would still have been changed anyway. And as stated *supra* in Section I(C) herein, 95-0734 was not ever given a guarantee that the climate and natural conditions would not change with time. The “natural state” of things change and evolve with time, climate factors other natural changes. The Memorandum Decision states:

This Court finds the natural state of Rathdrum Creek in 1875 was definitely not the same as the natural state in 1906 or now [1989], assuming no storage facilities had ever been built. There have been changes in the area which affect the inflow to 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.”¹²

¹¹ See Memorandum of Decision page 11. Emphasis added.

¹² See Memorandum of Decision page 11 -12. Emphasis added.

The “In addition” added to the last sentence quoted above, emphasizes that the dam was only a fraction or part of the changes affecting the creek. ***Had the dam never even been built, the Court conclusively found that Rathdrum Creek’s natural condition in 1906 and 1989 still would not have been the same as it was in 1875.*** The Court even emphasized this point even further when stating:

While such natural condition of Rathdrum Creek is found to have existed in 1875, it is apparent that such [natural] condition has not existed on a year-round basis at all times since the dam and outlet structure were constructed in 1906.¹³

The Court determined, considered and ruled that the natural state of Rathdrum Creek changed from 1875 to 1989, with or without the dam.

The Instructions dated September 20, 2016, prepared by Morgan Case accurately reflect these points in relation to the administration of water right 95-0734.

2. Natural Tributary Inflow has Reduced Over the Years, but 95-0734

Has Always been Limited to Natural Tributary Inflow, Even in 1875.

In the Decree, the Court evaluated conditions of flow and use of 95-0734 at its inception in 1875. During this time (1875), the Court found:

“... 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.”¹⁴

During this time (1875), natural direct flow entered into Twin Lakes and flowed through

¹³ See Memorandum Decision pg. 12. Emphasis added.

¹⁴ See Memorandum of Decision page 11. Emphasis added.

the lake's natural storage waters, and flowed out to Rathdrum Creek (1) over the lip of the natural lake obstruction at the bottom of Lower Twin Lakes ("natural obstruction"); and (2) through holes in the natural obstruction.¹⁵

The natural obstruction (pre-dam) naturally held water up to the 10'4" gauge on the lake. The Decree states:

10. ... 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 heights 0.0 feet and 6.4 feet. ... 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. ...
 - 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. ...

¹⁶

This Finding of Fact clearly and conclusively establishes that the two water storage rights (95-0973 & 95-0794) in Twin Lakes from 0.0 to 10'4" on the Staff Gauge, were, "at one time part of the natural lake storage, but was made available for appropriation by excavation of the outlet from Lower Twin Lakes." This clearly indicates that the water stored between 0' and 10'4" on the staff gauge was not part of direct flow water right 95-0734.

The Petitioners even admit in their Petition:

"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 ..."¹⁷

¹⁵ There is also mention of water going down through seepage of the Lake and back up through springs in Rathdrum Creek.

¹⁶ See the Decree Finding of Fact #10.

¹⁷ See Sylte's Petition for Declaratory Ruling page 12.

When 95-0734 was created in 1875, the dam had not yet been installed in Lower Twin Lakes. **Hence, at the time 95-0734 was appropriated, the condition of the stream included the lake's natural obstruction which provided for "natural lake storage" of 10'4" on the Staff Gauge.** Water below the 10'4" gauge was only made available after the dam was installed, which was more than 20 years after 95-0734 was created. The natural condition of the stream at the time 95-0734 was created did not include on-demand access to waters below the 10'4" gauge and thus did not include any right to the waters held by the two storage rights.

So at the time 95-0734 was created in 1875, the natural obstruction of Lower Twin Lakes held in the natural storage waters at 10'4". Hence, as natural tributary inflow came into Twin Lakes, it flowed out of Twin Lakes over the lip and holes in the natural obstruction. In 1875, when 95-0734 was created, there was ample natural tributary flow coming into Twin Lakes and flowing out (over the lip and in the holes of the natural obstruction), to satisfy 95-0734 year round.

The Petitioners claim that since water was flowing from the natural holes in the natural obstruction of the lake, then they were taking water from the stored waters in Twin Lakes to service 95-0734. Therefore, they conclude that they have a prior right to use all the stored water in Twin Lakes to satisfy 95-0734. This is fundamentally wrong.

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When 95-0734 was appropriated **two conditions exist simultaneously:**

- 1) 95-0734 was served year round from water pouring over the lip of the natural obstruction and holes in the natural obstruction of Twin Lakes.

And at the same time:

- 2) the natural stored water of Twin Lakes was 10'4" even with having water flow out of the holes of the natural obstruction.

Therefore, the water flowing out of the holes of the natural obstruction was not from the stored water of Twin Lakes (which stayed at or around the 10'4" mark, even while servicing 95-0734 year round in 1875). Rather, it was the abundant natural tributary inflow coming into the lake and flowing out via the obstruction holes and lip. The natural tributary inflow is what was flowing down Rathdrum Creek to service 95-0734, not the stored waters (which were staying at or around 10'4", depending upon the quantity of inflow minus seepage and evaporation). The Petitioner's argument that they were utilizing the stored waters to service 95-0734 at the time of its appropriation is plainly wrong and is not supported by the 1989 Decree, which is settled law. 95-0734 is a direct flow right,¹⁸ and does not have right to the corpus of the stored water¹⁹.

For example, in 1875, if X cfs was the natural tributary inflow coming into Twin Lakes, than 95-0734 was entitled to receive up to X cfs to come out of Twin Lakes²⁰ to the extent

¹⁸ See *supra* Section I(A).

¹⁹ See *infra* Section II.

²⁰ Evaporation and seepage was irrelevant to 95-0734. See Section I(A)(2).

necessary to satisfy 95-0734 at the point of diversion.²¹ The natural tributary inflow basically flowed through the natural storage waters and out to Rathdrum Creek.

Hence, in 1875 when 95-734 was created, it was being serviced by an abundance in natural tributary inflows into and through Twin Lakes and down Rathdrum Creek. **It was not utilizing the stored water in Twin Lakes. Before the dam, 95-0734 had no on-demand access to release stored waters below the 10'4" mark on the gauge because the natural obstruction of the lake kept those waters in as the Court found calling it "natural lake storage" to 10'4". At the time 95-0734 was created, it had access to and was serviced only by abundant natural tributary inflows flowing through the reservoir, over the lip and through whatever holes or leaks may have existed in the natural obstruction at the time.**

Note that the pre-dam and post dam conditions are very similar in that pre-dam natural flow waters were released by spilling over the dam or leaking through the natural obstruction and post-dam natural flow waters spill over the top of the dam or are released by the dam's gate. In either situation, the result is the same - natural flow waters are released by either the man-made or natural obstruction, but in the case of the manmade obstruction there is more control over the release of water.

In 1875, there was abundant natural tributary inflows to allow year-round servicing of 95-0734. However, as stated *supra* in Section I(D)(1) herein and as conclusively determined by the Court, the natural conditions changed from 1875 to 1989. The inflows into the lake were no longer sufficient to service 95-0734 year-round. 95-0734 does not have a guarantee that natural

²¹ And subject to the time of year as further explained in Section II(C).

conditions will never change. A water right does not freeze the conditions of nature or stop the earth from spinning. As the natural tributary inflows decreased, so did the ability to service 95-0734 year round.

Even after the dam, this remained unchanged. The dam's height is 10'4", which is the same height as both (1) the natural obstruction pre-dam; and (2) the storage water rights on Twin Lakes. Hence, as water flows into Twin Lakes, it will flow out of Twin Lakes at the dam. To the extent evaporation & seepage reduce the inflow, the dam can be lowered below 10'4" to assure 95-0734 is not robbed by in-lake evaporation and seepage to the direct flow. Hence even after the dam was constructed, if X cfs comes into Twin Lakes, then up to X cfs (but not more) can flow out to service 95-0734. Nonetheless, if the natural tributary inflow (X cfs) is less than it was in 1875, then 95-0734 has no right to take water from the lake's two storage rights to compensate for lower amounts of natural tributary inflow. **95-0734 was limited to natural tributary inflow at its inception in 1875 and still is today.**

As stated, the only notable difference between how free-flow water was delivered between 1875 and after 1906 is that in 1875, freeflow water poured over or through the natural obstruction, whereas after 1906 it was delivered more efficiently via the dam gates. Specifically, the dam gates replaced the leaks.

The Instructions dated September 20, 2016, prepared by Morgan Case accurately reflect these points in relation to the administration of water right 95-0734.

E. Water Right 95-0734 is Part of a Interconnected Watershed Including Twin Lakes.

The Syltes appear to claim to be exempt from Decree Conclusion of Law #12, which states:

“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.”²²

Petitioner attempt to exclude themselves from this provision by stating that the source of 95-0734 is Rathdrum Creek tributary to sinks, and not Twin Lakes tributary to Rathdrum Creek.

²³ However, this overlooks the obvious interconnection of the entire watershed system. The Decision Memorandum, page 9, explains:

“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.”

As such, the entire watershed from Fish Creek down to the “sinks” or sump is part of the same interconnected system. It is not possible or reasonable to distinguish or claim that a water right on Rathdrum Creek is not subject to the limitations of release from Twin Lakes when Twin Lakes is the primary tributary to Rathdrum Creek most of the year and often the only tributary to

²² Emphasis added.

²³ See Sylte’s Petition for Declaratory Relief page 16.

Rathdrum Creek during summer months.

The Decree Findings of Fact #13 states:

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.²⁴

The Decree Conclusion of Law #13 states:

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.²⁵

The Petitioners claim that Rathdrum Creek is their source, not Twin Lakes, is tantamount to one stating that their brain gets blood from their carotid artery, not their heart and lungs, therefore one is not subject to physical limitations of their heart and lungs. It ignores the obvious interconnections and complexity of the watershed as a comprehensive system. Considering the entire system is interconnected and the primary tributary for the entire system is Fish Creek, the Sylte claim is completely without merit. Further, if the Sylte's, per their petition, did not receive water from Twin Lakes, but only that sourced from Rathdrum Creek, they would receive very little water at all and only during wet months.

²⁴ Emphasis added.

²⁵ Emphasis added.

Moreover, how can they credibly claim that on the one hand their source is not Twin Lakes (and hence not subject to Conclusions of Law #12), and simultaneously claim that they have the right to take the storage waters of Twin Lakes?

Further, even if we accept their argument (which we do not) that their source is Rathdrum Creek and not Twin Lakes thereby allegedly resulting in Conclusions of Law #12 not applying to them, they still are subject to Conclusions of Law #14 which states:

Water Right No. 95-0734 ... may divert the *natural flow*, but *not the stored waters*, on the basis of water right priority.²⁶

Hence, their argument that their source is Rathdrum Creek, and thus they are not subject to Conclusions of Law #12, is not only wrong, but irrelevant since it does not eliminate the application of Conclusions of Law #14, which lists their water right by name (95-0734) and specifically limits 95-0734 to “natural flow” and “not the stored waters.”

This is a perfect example of their standard method of legal argument being, “look at this law, but not at that law”.²⁷ The Instructions dated September 20, 2016, prepared by Morgan Case accurately reflect these points in relation to the administration of water right 95-0734.

F. Water Right 95-0734 is Limited by Tributary Inflow, Even Considering the Conditions from 1875 through 1989.

The Court duly considered (1) natural conditions in 1875 at the time their water right was secured; (2) conditions in 1906 before and during the construction of the dam; and (3) conditions

²⁶ Emphasis added.

²⁷ See also Section V *infra* herein.

through the time of the Decree in 1989.²⁸ Taking all these conditions into account, the Court found that the Petitioners water right was limited by tributary inflow as shown herein above. Petitioner's cannot now re-argue the natural conditions at the time they secured the water right. See Section III herein *infra* for further analysis of the conclusiveness of the Decree on these matters.

II. WATER RIGHT 95-0734 CANNOT TAKE FROM STORAGE WATERS ON TWIN LAKES.

A. Water Right 95-0734 Has No Right to Utilize the Stored Waters from Water Rights 95-0973 or 95-0974.

Petitioners argue that Water Right 95-0734 grants them the authority to utilize all water in Twin Lakes, including the stored water of Water Rights 95-0973 and 95-0974, to provide them year round continuous use of water right 95-0734. This is blatantly incorrect.

The Findings of Fact on page xviii of the Decree conclusively and irrefutably prevents water right 95-0734 from robbing water from Water Rights 95-0973 and 95-0974²⁹ as follows:

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.**

²⁸ See the Decree, Findings of Fact #10, 13, 14 and 20 and Conclusions of Law 11-14.

²⁹ See the 1989 Decree page xix. Emphasis added.

The Conclusions of Law of the Decree further conclusively and irrefutably limit water right 95-0734 from robbing from the storage rights of Water Rights 95-0973 and 95-0974³⁰:

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.**

...

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.**

The Memorandum of Decision further emphasizes that no direct flow water right, including water right 95-0734, can appropriate water from the storage rights of Water Rights 95-0973 and 95-0974 as follows:³¹

The Court concludes **water stored by the holders of Water Right Nos. 95-0974 and 95-097[3] is not unappropriated water subject to appropriation by others.** Further, the Court concludes the **Objectors have not acquired a portion of the water right recommended to the United States Bureau of Reclamation by adverse possession.**

...

Objectors have not established any rights in the artificially stored waters in Twin

³⁰ See the 1989 Decree page xix. Emphasis added.

³¹ See Memorandum of Decision page 17, 20 and 21. Emphasis added.

Lakes. They have not diverted or appropriated such water.³²

As such, it is not credible for the Syltes to make any claim whatsoever on storage rights per the Memorandum Decision or the Decree when both documents specifically preclude them from such. At no time, either at the establishment of the 95-0734 water right in 1875 or afterwards did the Syltes have any valid claim to storage waters. While it may be true that at times they may have received the benefit of stored waters that flowed past to Spokane Valley Land and Water Company points of diversion for Green Acres irrigation purposes, it does not mean that this use was granted to them as a right.

Contrary to the Petitioner's argument, according to the 1989 Decree, Water Right 95-0734 clearly and conclusively has absolutely no right to, "injure the storage water rights" in Twin Lakes.

The Instructions dated September 20, 2016, prepared by Morgan Case accurately reflect these points in relation to the administration of water right 95-0734.

B. In 1875 When 95-0734 as Appropriated, 95-0734 Had No Access to Stored Water in Twin Lakes.

Per the Memorandum Decision, Page 9:

"Sometime around the turn of the century, ... 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.*"

³² Emphasis added.

Hence, Sylte water right 95-0734, which pre-dates the dam, did not have on-demand access to the naturally stored water below the 10'4" mark prior to the dam when 95-0734 was appropriated.

At the time the 1875 Sylte water right was established, there was no capability to manually lower the lake level below 10' 4", which was the lake's natural state. The Memorandum Decision, page 11, clearly identifies that:

"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 Petitioner's even admit in their Petition:

"Judge Magnuson found that construction of the dam and outlet did not actually impound any more water than Twin Lakes had naturally stored."³³

Thus, the dam did not add significant, additional storage capacity, but enabled Green Acres to draw the lake lower to facilitate the previous lake purpose of irrigation. Only by lowering the level at the dam (implemented in 1906) did those naturally stored waters become manually accessible on-demand to downstream water users. However, 95-0734 did not have a water right with access to this stored water.

As such, this new accessibility did not give the Syltes any additional water right, whatsoever, to use the naturally stored water below the 10'4" mark as that water was already subject to water rights of 95-0973 and 95-0974. Therefore, the Syltes have no right to use stored waters below the 10'4" mark or to make claim that "***All the remaining water available to be***

³³ See Sylte's Petition For Declaratory Ruling, page 10 under Section (B).

*discharged from Twin Lakes*³⁴ can be requested for their use, as naturally stored water was not manually accessible to them at the time their 1875 water right was created. With the pre-dam lake-level naturally at or around 10'4", there is no credible way the Sylte's could make claim to have full access to storage water below the 10'4" mark. When their direct flow stockwater right was established prior to the dam, the natural obstruction lip was at 10' 4", and they had to rely upon water that spilled over or through the natural obstruction of Lower Twin Lakes.

Prior to the construction of the dam and afterwards, if the Sylte's needed more water than the natural flow to facilitate their water rights, they would have to wait for weather conditions to facilitate additional natural flow. More rain or snow equals more natural flow. At no point have they legally had legitimate access to release storage waters to facilitate their water calls. Prior to the construction of the dam in 1906, on-demand access to stored waters was not possible. After construction of the dam, they did not have a right to access said stored waters.

All of these reasons evidence the fact that in 1875, when 95-0734 was appropriated, it did not utilize or have a right to the stored waters at Twin Lakes.

See also Section I(D)(2) above for further detailed analysis of conditions at the time 95-0734 was appropriated.

The Instructions dated September 20, 2016, prepared by Morgan Case accurately reflect these points in relation to the administration of water right 95-0734.

³⁴ See Sylte's Petition for Declaratory Relief page 17.

**C. Water Right 95-0734 Priority Over Stored Water Rights, Does Not Give It
the Right to Take Water From the Storage Banks of Water.**

Petitioners extract a certain paragraph from the Memorandum Decision from its context and supporting rulings within the Decree and use that paragraph to support their erroneous claim that Water Right 95-0734 can take water from the two storage rights (95-0973 and 95-0974) to satisfy 95-0734 year round. Specifically, Petitioners repeatedly cite the following paragraph:

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 95-097[3]³⁵. The waters of this basin are to be administered in such manner as to give effect to such priority.³⁶

However, to be fully understood this paragraph needs to be understood within the context of the Decree and not viewed in isolation. Consider the Decree's Conclusion of Law #12 which states as follows:

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 Lakes³⁷.

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" 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.³⁸

³⁵ It is believed this erroneously listed Water Right 95-0975, but meant 95-0973.

³⁶ Memorandum of Decision page 13.

³⁷ Emphasis added. See Decree Conclusions of Law #12.

³⁸ Emphasis added.

From April 1st to October 31st, the tributary inflow first must satisfy water right 95-0734, before it refills any evaporation and seepage lost to the storage rights. It is within this context, that the subject paragraph points out that, “95-0734 are therefore entitled to waters from the source of their appropriation on a basis of priority over those storage rights...” During those times, 95-0734’s has priority to the tributary inflow before the storage rights can use tributary inflow replenish its storage bank.

Further, 95-0734 has priority to natural tributary inflow, not to the corpus of the storage water. 95-0734 is still limited to the amount of natural tributary inflow. The paragraph that the Petitioner referenced (cited above) from the Memorandum of Decision does not say that 95-0734 can injure the two storage water rights (95-0974 & 95-0973). The Petition is in error in its attempt to use this paragraph (quoted above) to support its claim that 95-0734 can therefore take water from the two storage rights (95-0974 & 95-0973). **Rather, when read with the rest of the Decree** (including Conclusions of Law #12 quoted above), **this paragraph simply clarifies that from April 1st to October 31st, 95-0734 has priority to tributary inflow over the storage rights’ right to refill loss due to evaporation and seepage.** It does not have a right to deplete the storage waters, just a priority for the release of water up to the natural tributary inflow into Twin Lakes, but not to injure storage waters. Further, this pattern of misquoting, selective partial quoting, and twisting of language in the 1989 Decree and Memorandum Decision is consistent throughout arguments and claims in the Petition.

The Instructions dated September 20, 2016, prepared by Morgan Case accurately reflect

these points in relation to the administration of water right 95-0734.

III. THE IDAHO APPROPRIATIONS LAW AND RELATED ISSUES HAVE BEEN LITIGATED AND CONCLUSIVELY RESOLVED IN THE 1989 DECREE AND CANNOT NOW BE RE-LITIGATED.

Petitioners attempt to argue that Idaho appropriations laws undermine and contradict the limitations to water right 95-0734 as outlined in the Decree and Instructions. Idaho appropriations laws were fully litigated and conclusively resolved in the 1989 Decree.

In the Decree and in the Memorandum of Decision, the Court considered all the natural conditions at all the relevant times in light of the appropriations doctrines and all relevant law relating to it. The Memorandum of Decision states:

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 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.³⁹

The Decree states in Conclusions of Law #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.

These passages prove that the Court was fully aware of and already considered, applied and ruled upon the appropriations doctrine and laws in the Decree. The Court also considered all of the relevant facts as asserted by all parties and weighed the evidence and made findings of fact as

³⁹ See Memorandum of Decision page 13.

to these matters. Arguments were made on both sides and evidence was presented and weighed by the finder of fact.⁴⁰ Even the Findings of Fact and Conclusions of Law outlined in the Decree clearly reveal that the Court considered all the issues surrounding the appropriation laws and the conditions as they were when Water Right 95-0734 was granted.

Taking all the appropriation laws and all other laws into account and also considering all the facts and conditions that came into play, the Court conclusively found that water right 95-0734 was limited by tributary inflow and could not access or injure stored water rights.⁴¹

The Decree plainly states:

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).⁴²

The Court already considered and incorporated into its decision (1) the natural conditions as they existed when right 95-0734 was granted in 1875, (2) the conditions when the dam was erected in 1906; and (3) the conditions at the time the Decree was issued in 1989.⁴³ All these issues are also thoroughly discussed and conclusively resolved in the Memorandum of Decision. All these matters were already fully and conclusively litigated.

Petitioners have no right to now re-litigate these resolved matters and basically attempt a

⁴⁰ See the Decree, Findings of Fact #10, 13, 14 and 20 and Conclusions of Law 11-14.

⁴¹ See Sections I and II herein above.

⁴² See the Decree page 3.

⁴³ See the Decree, Findings of Fact #10, 13, 14 and 20 and Conclusions of Law 11-14.

second bite at the apple. The time to appeal the Decree has long since passed. The Decree and its supporting documents and law are settled and final. Water right 95-0734 is subject to all restrictions outlined in the Decree and its supporting documents as accurately reflected in Morgan Case's Instructions of 2016.

To the extent that Petitioners seek for a redetermination of the Idaho appropriation laws as they relate to the conditions in 1875, to the conditions when the dam was constructed in 1906 and/or the conditions through the 1989 Decree, their request should be denied in full.

**IV. THE INSTRUCTIONS PREPARED BY MORGAN CASE OF IDWR
ACCURATELY INSTRUCT THE WATERMASTER ON ADMINISTRATION OF
WATER RIGHT 95-0734.**

All of the points made in this Response support the Instructions dated September 20, 2016 ("Instructions") prepared by Morgan Case of IDWR. The Instructions are an accurate summary of what the Watermaster should properly do to fulfill his/her duty. The Instructions are thoroughly backed up by the conclusive determinations of fact and law in the Decree and its supporting documents as detailed in this Response. Any attempt by the Petitioners to undermine the Instructions should be denied outright.

///

V. ALL APPLICABLE LAWS SHOULD BE FOLLOWED.

The Petition asks us to ignore relevant facts and law and conveniently picks out a few select points of facts or sentences out of context that it attempts to re-argue, re-negotiate, reinterpret, and twist. It appears to basically say, “don’t look at this”, but “look at that”. Moreover, the Petition takes many conclusions of law or sentences out of context and uses them to invert the intended meaning and conclusions of the same, as contained in the Memorandum Decision and the Decree.

In some instances, the Petition calls on the Decree, Memorandum Decision, statutes, and other documents and their respective interpretations for support. In other cases it states that the reference of such is inappropriate and beyond the jurisdiction of the IDWR and respective Instructions.

Interestingly the Petition claims that it is inappropriate for the IDWR to interpret the same documents and statutes that the Petition also attempts to interpret. Moreover, the Petition makes claim that the Director of the IDWR is administering water “as he pleases,” irrespective of the law, notwithstanding all of the research and rigor that went into the accurate watermaster Instructions issued by Morgan Case and the North Idaho Division of IDWR on September 20, 2016.

Ironically, this attitude of picking the laws and facts that seem most convenient is exactly the kind of behavior and thinking that caused the removal of the watermaster of District 95C and is the basis for the continuing contention within the Fish Creek - Twin Lakes - Rathdrum Creek watershed. One cannot choose which laws to follow and which to ignore.

VI. PETITIONERS ARE ESSENTIALLY CLAIMING THAT THEY HAVE THE RIGHT TO DRAIN TWIN LAKES DRY TO FULFILL 95-0734.

For all the above reasons, the Petitioners are **absolutely incorrect** in their assertion that 95-0734 is not limited to tributary inflow and that 95-0734 can injure the stored water in Twin Lakes. The Petitioners extrapolate sections of the Decree and present them out of context to support their incorrect and incoherent conclusions.

The Petitioners even attempt to argue:

“The Decree and Memorandum of Decision and Idaho’s prior appropriation doctrine require delivery of water to Sylte’s water right 95-0734 on a continuous year-round basis irrespective of the amount of natural tributary inflow.”⁴⁴

This quote (directly above) shows that the Petitioners are asking for a determination that they have a right to satisfy 95-0734 year-round without any limitations of tributary inflow and thereby necessarily take, utilize and deplete Twin Lakes storage water. This is absolutely incorrect as clearly show above in Section I herein.

Furthermore, the Petitioners even state outright, that they have the right to take from the two storage rights on Twin Lakes. Petitioners argue:

“... Those junior rights [the two storage rights in Twin Lakes 95-0973 & 95-0974] are not entitled to store water to the injury of water right 95-0734 ...”⁴⁵

In other words, the Petitioners believe that they can take the storage waters from the two storage rights on Twin Lakes to service 95-0734. They are arguing that the storage rights cannot hold on to their storage water if 95-0734 is not being serviced and satisfied. This is absolutely

⁴⁴ Sylte’s Petition for Declaratory Relief pages 6 and 7.

⁴⁵ Sylte’s Petition for Declaratory Relief page 13. Bracketed part added for clarity.

incorrect as clearly shown above in Section II herein.

Finally, the Petitioners argue that they should be allowed to take, “**all the remaining water**” in Twin Lakes to satisfy 95-0734 before a futile call can be made.

“... [95-0734] 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 sufficient quantity to apply to beneficial use.”⁴⁶

If granted, the result of the Petitioners’ requests would give them (via 95-0734) the right to drain Twin Lakes completely of (“**all remaining water**”). This a flagrant, malicious power grab by Petitioners and an attempt to undermine and twist the conclusive rulings within the Decree and its supporting documents.

The Petitioner's requested relief, if granted, would violate the 1989 Decree. It also would have the effect of destroying not only the navigability of the waterway connecting Upper and Lower Twin Lakes, but the entire “recreational” purpose of the lake and all stakeholders and water right holders therein. When storage waters are depleted, it is no longer possible for motorized watercraft to pass through the channel connecting the two lakes and the stated purpose of the lake (“recreation”), and if the lake level were to drop by over 10’ (according to the supposed right of the petitioners), the upper lake would be almost completely drained. This would destroy the beneficial use of around 300 Domestic Water Right holders on Twin Lakes and countless others that use the lake for recreation purposes. Petitioners’ request to be able to

⁴⁶ Sylte’s Petition for Declaratory Relief page 17. The word, “all” was underlined in Petitioner's Petition to emphasize they meant clearly that the Sylte’s can take “all” the waters. Bold was added.

drain, "**all remaining water**" from Twin Lakes should be denied outright.

The Respondent hereby respectfully requests that the Sylte's Petition for Declaratory Relief be denied in full and that the Instructions dated September 20, 2016, prepared by Morgan Case of IDWR be upheld as is.

Respectfully Submitted,


Colby Clark

2017-3-7