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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 MEMORANDUM IN
SUPPORT OF MOTION FOR
SUMMARY JUDGMENT**

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 Rules 260, 564, and 565 of the Idaho Department of Water Resources' ("IDWR") Rules of Procedure, IDAPA 37.01.01.260, .564, and .565, hereby submits this memorandum in support of *Sylte's Motion for Summary Judgment* ("Sylte's Motion") filed contemporaneously herewith.

I. INTRODUCTION

This case involves the Department's administration of decreed water rights under Idaho's Prior Appropriation Doctrine. In September 2016, IDWR's Northern Regional Manager, Morgan Case, sent a letter (the "*Instructions*")¹ to the Water District 95C ("WD 95C")

¹ A copy of the *Instructions* obtained from IDWR's website for WD 95C is attached as Exhibit A to the *Affidavit of Michael P. Lawrence* ("*Lawrence Affidavit*") filed contemporaneously herewith, and is incorporated herein by reference.

Watermaster, which provided the Department’s first ever guidance concerning the administration of water rights in WD 95C—including Sylte’s 1875-priority water right no. 95-0734, the most senior water right in the district. Sylte contends that the *Instructions* set forth water administration and distribution directives that are inconsistent with the historical delivery of water to water right no. 95-0734, are contrary to the 1989 *Decree* (defined below) issued by the First Judicial District Court of Idaho, and are otherwise contrary to Idaho’s Prior Appropriation Doctrine.

Summary judgment is appropriate because an evidentiary hearing is not required to resolve the questions presented in this contested case. These questions are purely legal—their answers depend only on the plain language of the *Decree* and the principles of law dictated by Idaho’s Prior Appropriation Doctrine. Because all of the facts material to these questions were conclusively determined in the *Decree*, there can be no genuine disputes of material fact. Accordingly, nothing precludes the Hearing Officer from determining that Sylte is entitled to the requested relief as a matter of law.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. The 1989 Decree

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 14, 1985 *Proposed Finding of Water*

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

*Rights in the Twin Lakes – Rathdrum Creek Drainage Basin (“Proposed Finding”).*³ 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*”),⁴ 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 to the *Decree* a copy of the Department’s amended portions of the *Proposed Finding* (the “*Amended Proposed Finding*”), with insertions underlined and deletions struck through.

Sylte holds a number of valid water rights recognized in the *Decree*, including year-round, natural flow stockwater water right no. 95-0734 diverted from Rathdrum Creek (tributary to sinks), whose 1875 priority date makes it the most senior priority of all water rights in WD 95C.⁵ The *Decree* recognizes a number of junior priority water rights held by Sylte and others, two of which are storage water rights associated with Twin Lakes: nos. 95-0973 and 95-0974,

³ A copy of the *Proposed Finding* obtained from IDWR’s website for WD 95C is attached as Exhibit C to the *Lawrence Affidavit*, and is incorporated herein by reference.

⁴ A copy of the *Decree* obtained from IDWR’s website for WD 95C is attached as Exhibit D to the *Lawrence Affidavit*, and is incorporated herein by reference. Because the *Decree* incorporates by reference the *Memorandum Decision*, and the *Proposed Finding* (as amended by the *Memorandum Decision*), references in this brief to the *Decree* include the *Memorandum Decision* and *Proposed Finding* (as amended by the *Memorandum Decision*).

⁵ Water right no. 95-0734 was decreed to John and Evelyn Sylte. *Proposed Finding* at 3. 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.

which are 1906 priority rights currently held by Twin Lakes-Rathdrum Creek Flood Control District No. 17 (“FCD”) and Twin Lakes Improvement Association (“TLIA”), respectively (together, the “1906 Storage Rights”).⁶

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, 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. . . .

⁶ 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. *Proposed Finding* at 21. 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. *Proposed Finding* at 21. The *Decree* determined water right no. 95-0975 to be disallowed.

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).⁷

B. The 2016 Instructions

On September 20, 2016, the Manager of IDWR's Northern Regional Office sent a letter—the *Instructions*—to the WD 95C Watermaster⁸ “[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.

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

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

5) 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

⁷ The *Order Creating Water District* is available in WD 95C's online documents at http://www.idwr.idaho.gov/apps/ExtSearch/DocsImages/clgg01_.PDF.

⁸ 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 Exceptions Re: Amended Preliminary Order Removing a Watermaster*, Docket No. C-RWM-2016-001 (Apr. 24, 2017) (“*Watermaster Removal Order*”). A copy of the *Watermaster Removal Order* is attached as Exhibit E to the *Lawrence Affidavit*, and is incorporated herein by reference.

released to satisfy water right no. 95-734, the watermaster shall satisfy water rights that divert from Twin Lakes and its tributaries using the remainder of the natural flow, on the basis of water right priority.

6) From April 1 to October 31 of each year, when seepage and evaporation losses from Twin Lakes do not exceed the total natural tributary inflow (as determined by steady or increasing lake level), the watermaster shall distribute the total natural tributary inflow to water rights that divert from Twin Lakes and its tributaries and Rathdrum Creek on the basis of water right priority. *See Decree at Conclusions of Law 12, 14.*

Instructions at 2. In addition, the *Instructions* require a futile call determination if the release of all natural tributary inflow into Rathdrum Creek does not satisfy water right no. 95-0734. It states:

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

Instructions at 2.

The *Instructions* were issued in response to a letter to IDWR from Mr. Colby Clark complaining about the Watermaster. *Instructions at 1.* Also because of Mr. Clark's letter, the 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 [the] 2016 [*Instructions*] 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 6 (Finding of Fact No. 16).⁹

On February 16, 2017, Sylte initiated this proceeding by filing its *Petition for Declaratory Ruling*. Numerous individuals and entities—including FCD and TLIA—filed petitions to intervene.¹⁰

III. LEGAL STANDARDS

A. Summary judgment is appropriate when there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.

This contested case can be decided as a matter of law, and without an evidentiary hearing, because there are no genuine issues of material fact. The *Decree* and Idaho’s Prior Appropriation Doctrine control the outcome of this case.

Summary judgment must be granted “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” I.R.C.P. 56(a). “A material fact is one upon which the outcome of the case may be different.” *Rife v. Long*, 127 Idaho 841, 849, 908 P.2d 143, 151 (1995). A “genuine” dispute of material fact exists if the evidence is such that a reasonable tribunal could return a decision for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The Idaho Supreme Court has stated: “The non-moving party must respond to the summary judgment motion with specific facts showing there is a genuine issue for trial.” *Stafford v. Weaver*, 136 Idaho 223, 225, 31 P.3d 245, 247 (2001). To that end, neither a mere scintilla of

⁹ 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. *Watermaster Removal Order* at 6 (Finding of Fact No. 15).

¹⁰ A large number of individuals and entities (over 70) filed petitions to intervene in this matter. Some have been granted intervention, some have been denied intervention, some have withdrawn their intervention, and some have chosen to have another intervenor or attorney act represent their interests in this proceeding. As of the date of filing *Sylte’s Motion*, the status of all persons and entities who filed petitions to intervene is not completely resolved.

evidence, slight doubt, or conclusory assertion is sufficient to create a genuine issue of material fact. *Mendenhall v. Aldous*, 146 Idaho 434, 196 P.3d 352, 354 (2008). Rather, the non-moving party must “go beyond the pleadings and by [its] own affidavits, or by depositions, answers to interrogatories and admissions on file, designate specific facts showing there is a genuine issue for trial.” *Celotex Corp.*, 477 U.S. at 323-24. In a motion for summary judgment, the non-moving party’s case “must be anchored in something more than speculation, and a mere scintilla of evidence is not enough to create a genuine issue of fact.” *Pena v. Minidoka Cty.*, 133 Idaho 222, 225, 984 P.2d 710, 713 (1999).

Here, the Hearing Officer is entitled to arrive at the most probable inferences based upon the undisputed evidence and may grant summary judgment despite the possibility of conflicting inferences. *J.R. Simplot Company v. Bosen*, 144 Idaho 611, 615, 167 P.3d 748, 752 (2006).¹¹ On appeal, the tribunal’s ruling on summary judgment will not be disturbed as long as the inferences drawn are reasonably supported by the record. *Id.*

B. IDWR’s administration of water rights is controlled by decrees and prior appropriation law.

Idaho Code Section 42-602 requires that the Director, through a watermaster, distribute water in water districts in accordance with the prior appropriation doctrine. I.C. § 42-602. 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 (“BW 17”)*, 157 Idaho 385, 393, 336 P.3d 792, 800 (2014).

¹¹ Generally, when a court or other tribunal assesses a motion for summary judgment, all controverted facts are to be liberally construed in favor of the nonmoving party. See *G & M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 517, 808 P.2d 851,854 (1991); *Tusch Entelprises v. Coffin*, 113 Idaho 37, 740 P.2d 1022 (1987). Likewise, all reasonable inferences which can be drawn from the record generally must be drawn in the nonmovant’s favor. *G & M Farms*, 119 Idaho at 517, 808 P.2d at 854; *Clarke v. Prenger*, 114 Idaho 766, 760 P.2d 1182 (1988); *Sanders v. Kuna Joint School Dist.*, 125 Idaho 872, 876 P.2d 154 (Ct.App. 1994). However, where a case will not be decided by a jury, the court—or in this case, the Hearing Officer—is entitled to draw the most probable inferences. *J.R. Simplot*, 144 Idaho at 615, 167 P.3d at 752.

The Idaho Supreme Court also has held that this duty requires the Director to interpret water right decrees. *Rangen, Inc. v. IDWR* (“*Rangen I*”), 159 Idaho 798, 367 P.3d 193, 204 (2016). “By statute, ‘decree[s] entered in a general adjudication shall be conclusive as to the nature and extent of all water rights in the adjudicated water system.’” *Rangen I*, 159 Idaho at ___, 367 P.3d at 200 (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.

BW 17, 157 Idaho at 394, 336 P.3d at 801; *see also Almo Water Co. v. Darrington*, 95 Idaho 16, 21, 501 P.2d 700, 705 (1972) (stating that a watermaster “is authorized to distribute water only in compliance with applicable decrees”); *Nettleton v. Higginson*, 98 Idaho 87, 91, 558 P.2d 1048, 1052 (1977) (“it is evident that a proper delivery can only be effected when the Watermaster is guided by some specific schedule or list of water users and their priorities, amounts, and points of diversion” (internal quotations omitted)).

“Generally, final judgments, *whether right or wrong*, are not subject to collateral attack.” *Cuevas v. Barraza*, 152 Idaho 890, 894, 277 P.3d 337, 341 (2012) (emphasis in original; internal quotation marks omitted).¹² The Idaho Supreme Court has held that a water rights decree is “conclusive proof of diversion of the water, and of application of the water to beneficial use, *i.e.*, the decree is *res judicata* as to the water rights at issue [in a subsequent proceeding].” *Crow v. Carlson*, 107 Idaho 461, 465, 690 P.2d 916, 920 (1984), *quoted in Mullinix v. Killgore’s Salmon River Fruit Co.*, 158 Idaho 269, 277, 346 P.3d 286, 294 (2015). The *Crow* Court’s “holding of

¹² The SRBA Court has consistently held that “a party cannot have its water use adjudicated or administratively determined in one proceeding and then re-adjudicate the right under a more favorable legal theory in a subsequent proceeding.” *Memorandum Decision and Order on Cross-Motions for Summary Judgment re:*

the presumption of accuracy of the decree is in keeping with the judicial policy of deterring the reopening of judgments long after cases are decided and the files are closed.” *Id.*

In Idaho, water decrees are interpreted “using the same interpretation rules that apply to contracts.” *Rangen I*, 159 Idaho at ___, 367 P.3d at 202. Consequently, the intent of a decree is to be ascertained from the language of the decree itself. *Hap Taylor & Sons, Inc. v. Summerwind Partners, LLC*, 157 Idaho 600, 610, 338 P.3d 1204, 1214 (2014). “In the absence of ambiguity, a document must be construed by the meaning derived from the plain wording of the instrument.” *Brown v. Greenheart*, 157 Idaho 156, 166, 335 P.3d 1, 11 (2014); *see also Chavez v. Barrus*, 146 Idaho 212, 219, 192 P.3d 1036, 1043 (2008) (“In the absence of ambiguity, the document must be construed in its plain, ordinary and proper sense, according to the meaning derived from the plain wording of the instrument.” (internal quotation marks omitted)). “In deciding whether a document is ambiguous, this Court must seek to determine whether it is ‘reasonably subject to conflicting interpretation.’” *Id.* (quoting *Bondy v. Levy*, 121 Idaho 993, 997, 829 P.2d 1342, 1346 (1992)). “Ambiguity results when reasonable minds might differ or be uncertain as to its meaning, however ambiguity is not established merely because different possible interpretations are presented to a court.” *McKay v. Boise Project Bd. of Control*, 141 Idaho 463, 469–70, 111 P.3d 148, 154–55 (2005).

When the intent behind a decree is clear from the language of that decree, interpretation of the decree is to be resolved as a purely legal matter. *Farnsworth v. Dairymen's Creamery Ass'n*, 125 Idaho 866, 870, 876 P.2d 148, 152 (Ct. App. 1994) (“Thus, where the parties’ intention is clear from the language of their contract, its interpretation and legal effect are to be resolved by the court as a matter of law.”). In such cases, summary judgment is appropriate. *Id.*;

Bureau of Reclamation Streamflow Maintenance Claim at 16, In re SRBA, Case No. 39576, Subcase No. 63-03618 (Fifth Judicial District, Sept. 28, 2008).

Hap Taylor & Sons, Inc., 157 Idaho at 610, 338 P.3d at 1214. It is only where a legal document cannot be understood from its own language that an issue of fact is created and extrinsic evidence may be examined. *Farnsworth*, 125 Idaho at 870, 876 P.2d at 152. An ambiguity exists only “[i]f there are two different reasonable interpretations of the [decree’s] language” *Hap Taylor & Sons, Inc. v. Summerwind Partners, LLC*, 157 Idaho 600, 610, 338 P.3d 1204, 1214 (2014). A written instrument must be read “as a whole and [to] give meaning to all of its terms to the extent possible.” *Twin Lakes Vill. Prop. Ass’n, Inc. v. Crowley* (“*Twin Lakes*”), 124 Idaho 132, 138, 857 P.2d 611, 617 (1993) (citing *Magic Valley Radiology Assocs., P.A. v. Prof’l Bus. Servs., Inc.*, 119 Idaho 558, 565, 808 P.2d 1303, 1310 (1991)). “[V]arious provisions in a contract must be construed, if possible, so to give force and effect to every part thereof.” *Twin Lakes*, 124 Idaho at 137, 857 P.2d at 616.

Thus, in this case, any “interpretation” of the *Decree*, *Memorandum Decision*, and *Proposed Finding* (as amended by the *Memorandum Decision*) must be based on their plain language to give force and effect to all of their parts.

IV. ARGUMENT

By limiting the outflow of water into Rathdrum Creek to the amount of Twin Lakes’ tributary inflow, the *Instructions* impermissibly limit the amount of water available to water right no. 95-0734 contrary to the express and unambiguous findings and conclusions contained in the *Decree*, *Memorandum Decision*, and *Proposed Finding* (as amended by the *Memorandum Decision*). The *Instructions* also impermissibly require that water right no. 95-0734 be subject to a futile call determination based on Twin Lakes’ natural tributary inflow. For the reasons set forth herein, the *Instructions* must be set aside and reversed.

A. Water right no. 95-0734 is entitled to delivery on a continuous year-round basis irrespective of the amount of natural tributary inflow.

The *Instructions* impermissibly limit the delivery of water to water right no. 95-0734 based on the amount of Twin Lakes' tributary inflow. *Instructions* at 2 ¶¶ 4, 5, and 6. The *Decree*, *Memorandum Decision*, and *Proposed Finding* (as amended by the *Memorandum Decision*) clearly, expressly, and unambiguously require delivery of water to water right no. 95-0734 on a continuous year-round basis irrespective of the amount of natural tributary inflow to Twin Lakes.

In his *Memorandum Decision*, after describing the parties' disagreement about the pre-dam nature of Twin Lakes' natural outflow to Rathdrum Creek, Judge Magnuson found that:

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 then found that “[w]hile 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.” *Memorandum Decision* at 12. Judge Magnuson continued:

Since 1906, evaporation and seepage from the impounded water of Twin Lakes sometimes exceed natural tributary inflow to Twin Lakes. At such times, Twin Lakes is not a significant source of water to Rathdrum Creek, except for Water Right #95-0734. Therefore, when evaporation and seepage from the

impounded waters of Twin Lakes exceed natural tributary inflow to Twin Lakes, the Rathdrum Creek appropriators, except for John and Evelyn Sylte, No. 95-0734, are not entitled to the release of water from Twin Lakes, and the direct flow appropriators upstream from the outlet at the lower end of Lower Twin Lakes are entitled to divert the natural tributary inflow to Twin Lakes in accordance with their priorities.

Memorandum Decision at 12-13 (emphasis supplied). These specific findings unambiguously exclude Sylte's water right no. 95-0734 from the natural tributary inflow limitation placed on other Rathdrum Creek appropriators. 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.

Rather, in the *Memorandum Decision's* very next paragraphs, Judge Magnuson expressly found that water right no. 95-0734 must be administered so its 1875 priority is given effect in the manner in which it was appropriated, and that other rights are limited to natural tributary inflows:

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

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

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

Memorandum Decision at 13 (italics added).¹³ In other words, Judge Magnuson expressly limited the rights of "all the other Objectors" to natural tributary inflow, but expressly singled

¹³ In addition to water right no. 95-0734, the "rights of all the other Objectors" are listed on pages 5 and 6 of the *Memorandum Decision*. The "other" objectors' water rights (some of which are Sylte's) claimed "priority

out and excluded water right no. 95-0734 from any such limitation. These findings and conclusions concerning the administration of water right no. 95-0734 are consistent with Judge Magnuson's other findings and conclusions quoted above concerning the natural, pre-dam stream conditions existing when the right was appropriated.

In his *Decree*, Judge Magnuson incorporated the *Memorandum Decision* by reference and "adopted [it] as findings of fact and conclusions of law" *Decree* at 3. In addition, the *Decree* attached and incorporated by reference the "general findings and conclusions in the Proposed Finding" which he had instructed the Department to amend "in accordance with the *Memorandum Decision*. *Decree* at 3; see also *Memorandum Decision* at 21 (instructing the "attorney for the Idaho Water Resource Board" to prepare draft amendments to "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.").

Consistent with the *Memorandum Decision*, the following finding of fact was added to the Department's *Amended Proposed Finding* attached to the *Decree*: "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." *Decree* at xvii (Finding of Fact No. 20) (underline in original depicting addition to *Proposed Finding*).

Also consistent with the *Memorandum Decision*, the following conclusion of law was added to the Department's *Amended Proposed Finding* attached to the *Decree*: "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

dates of May 1, 1945 or later," and "the points of diversion of all Objectors are located on Rathdrum Creek, which is downstream from the outlet of Lower Twin Lake." *Memorandum Decision* at 7.

with the proper exercise of the water right.” *Decree* at xix (Conclusion of Law No. 11) (underline in original depicting addition to *Proposed Finding*).

And, also consistent with the *Memorandum Decision*, the conclusions of law in the Department’s *Amended Proposed Finding* exclude water right no. 95-0734 from the natural tributary inflow limitation placed on other water rights. *Decree* at xix (Conclusion of Law No. 14).¹⁴ Although the Department’s amendment of Conclusion of Law No. 14 could have been “more artfully drafted,”¹⁵ the only reasonable interpretation is that water right no. 95-0734 is excluded from the natural tributary inflow limitation placed on other rights.

To give force and effect to every part of the *Decree*, *Memorandum Decision*, and *Proposed Finding* (as amended by the *Memorandum Decision*), the Department must recognize that pre-dam “natural lake storage”¹⁶ in Twin Lakes supplies the “natural flow” to which water right no. 95-0734 is entitled to in priority under Conclusion of Law No. 14.¹⁷ Judge Magnuson found that construction of the dam and outlet did not actually impound any more water than

¹⁴ 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 additions to Department’s original *Proposed Finding*).

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

¹⁶ Finding of Fact No. 10 in *Amended Proposed Finding* attached to 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).

¹⁷ See *supra* n. 14, quoting Conclusion of Law No. 14 (“Water Right No. 95-0734 . . . may divert the natural flow, but not the stored waters, on the basis of water right priority.”).

Twin Lakes naturally stored prior to dam construction: “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 10.¹⁸ In other words, prior to dam construction, Twin Lakes naturally filled to the same level as after dam construction, but water did not stay at that level as long during the summer months. Instead, “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,” *Memorandum Decision* at 11 (emphasis in original), the result of this naturally gradual outflow being that “at the time the John Sylte and Evelyn Sylte Water Right #95-0734 was created in 1875 there was sufficient direct flow water in Rathdrum Creek, in its then natural condition, furnished from the water of Twin (Fish) Lakes, to provide .07 cubic foot per second to the appropriator *on a continuous year-round basis. . . .*” *Id.* (emphasis added).

In short, when water right no. 95-0734 was appropriated in 1875, Twin Lakes always supplied continuous year-round natural flow to Rathdrum Creek in amounts that would satisfy the water right. By the terms of the *Decree* and *Memorandum Decision*, water right no. 95-0734 is not dependent on the release of water held “at a higher point longer through the summer months,” *Memorandum Decision* at 10, or the amount of natural tributary 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 Rights.

¹⁸ Consistent with this, the *Proposed Finding* was amended to reflect that all of the water in Twin Lakes is, or was at one time, “the natural lake storage,” *see supra* n.16, and 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.

The Department has defined “natural flow” as “water that would be flowing in the river system absent reservoir operations and diversions.” *Amended Final Order* at 7 n.7, *In the Matter of Accounting for Distribution of Water to the Federal On-Stream Reservoirs in Water District 63* (Oct. 20, 2015). Judge Magnuson expressly found that the dam and outlet structure changed the natural conditions that existed in Rathdrum Creek prior to their construction. *Memorandum Decision* at 12 (“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. . . .”). Sylte is entitled to the year-round pre-dam natural flow in Rathdrum Creek that existed when the right was established in 1875, and not simply the amount of Twin Lakes’ tributary inflow.¹⁹

The Department may not read the *Decree* in way that would render meaningless Judge Magnuson’s specific findings and conclusions in the *Memorandum Decision*. *Twin Lakes*, 124 Idaho at 138, 857 P.2d at 617 (“the Court will read a contract as a whole and will give meaning to all of its terms to the extent possible.”); *id.* at 137, 857 P.2d at 616 (“various provisions in a contract must be construed, if possible, so to give force and effect to every part thereof.”). Judge Magnuson’s detailed and specific findings and conclusions in the *Memorandum Decision*, which he incorporated by reference into the *Decree*, control over the Department’s amended “general findings and conclusions in the Proposed Finding.” *Decree* at 3 (emphasis added); *Twin Lakes*, 124 Idaho 132, 138, 857 P.2d 611, 617 (1993) (“It is well established that specific provisions in a contract control over general provisions where both relate to the same thing.”).

This means that the Department must abide by Judge Magnuson’s specific findings and conclusions that: (1) an appropriator is entitled to maintenance of stream conditions

¹⁹ Water right no. 95-0734 does not fit within the definition of the “direct flow water rights . . . entitled to divert, on the basis of priority, a combined rate of flow equal to the inflow to the lakes.” *Decree* at xix (Conclusion of Law No. 12). This provision defines “direct flow water rights” as having a “source of Twin Lakes tributary to

substantially as they existed at the time of their appropriation, (2) there was always water to serve water right no. 95-0734 on a continuous year-round basis when it was appropriated in 1875, (3) the holders of water right no. 95-0734 are entitled to water as against the holders of the 1906 Storage Rights (not to mention all other junior water rights), (4) water rights administration must give effect to 95-0734's priority over the 1906 Storage Rights, and (5) other water rights (*i.e.*, water rights other than no. 95-0734) are limited to the natural tributary inflows to Twin Lakes. *Memorandum Decision* at 13. It is impossible to give force and effect to these specific findings and conclusions about delivery of water to water right no. 95-0734 if Twin Lakes' outflows are limited to the lakes' natural tributary inflow.

Interpreting the *Decree*, *Memorandum Decision*, and *Proposed Finding* to allow the 1906 Storage Rights to retain water to the detriment of water right no. 95-0734 would violate fundamental prior appropriation doctrine. 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 be satisfied ahead of the 1906 Storage Rights. This means that, when the 1906 Storage Rights are "filling" during their authorized period of November 1 to March 31, they must continue to bypass water sufficient to satisfy water right no. 95-0734. Likewise, during the rest of the year, sufficient water must continue to outflow into Rathdrum Creek to satisfy water right no. 95-0734, so as to give effect to its priority and Judge Magnuson's express findings and conclusions.

Put another way, the 1906 Storage Right holders are allowed to keep water in Twin Lakes longer than it naturally was held prior to dam construction, but they are not entitled to retain water to the extent that, absent reservoir operations and diversions, it would have naturally flowed down Rathdrum Creek to satisfy right no. 95-0734. The contrary view, which is reflected

Rathdrum Creek." *Id.* Water right no. 95-0734's source is Rathdrum Creek tributary to sinks, not Twin Lakes tributary to Rathdrum Creek. *Proposed Finding* at 3.

in the Department's *Instructions*, effectively gives upstream junior water rights priority over water right no. 95-0734. As Judge Magnuson put it, "[t]o accept the [D]epartment's interpretation of the facts as they pertain to the 1875 Sylte water right (#95-0734), would be to deprive the holders of such right of the use of the water to which they are entitled and to which use they have a prior right to those possessing the storage rights." *Memorandum Decision* at 14.

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" in Conclusion of Law No. 14 must be read to mean water stored under the 1906 Storage Rights, not the natural lake storage to which water right no. 95-0734 is entitled. In other words, water right no. 95-0734 never diverts "stored water" when it diverts water once naturally held in Twin Lakes—it diverts natural lake storage that supplied Rathdrum Creek's natural flow when the right was created. The contrary conclusion—*i.e.* that water right no. 95-0734 is not entitled to water that once was natural lake storage, and is instead limited to natural tributary inflow to Twin Lakes—would undermine the many express findings and conclusions in the *Decree* and *Memorandum Decision* providing otherwise.

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.

It bears emphasis that the 1906 Storage 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.

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

B. 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 already discussed, the delivery of water to water right no. 95-0734 is not dependent on the amount of natural tributary inflow to Twin Lakes.

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

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

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

Applying the *Gilbert* Court’s analysis here, the state’s policy against waste must not be construed to permit upstream junior water rights to interfere with the delivery of water to water right no. 95-0734 so long as the natural flow of water in its natural channels would reach the point of diversion.²⁰ As discussed above, all the water in Twin Lakes is the natural lake storage that, prior to dam construction, naturally flowed “over the top of the lip during periods of high

²⁰ The Department already has determined that “it is not in the interest of the local public to dry up the channel of Rathdrum Creek downstream of the [Twin Lakes dam] control structure.” *Proposed Memorandum Decision and Order* (“*Proposed Order*”) at 5, *In the Matter of Application for Transfer No. 2745 of Water Right No. 95-0973 and 95-2059 filed by the United States of America, acting through the Regional Director, Bureau of Reclamation* (Jun. 26, 1984). The *Proposed Order* was adopted as a final decision by the Director of IDWR. *Order Adopting Proposed Memorandum Decision and Order* (“*Order Adopting*”) (Aug. 1, 1984). Copies of the *Proposed Order* and *Order Adopting* obtained from the IDWR backfile for water right no. 95-0973 are attached as **Exhibit F** to the *Lawrence Affidavit*, and are incorporated herein by reference. The Department’s decision was not appealed. *Decree* at xvi (Finding of Fact No. 11).

water and 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. Thus, Sylte is entitled to have the pre-dam amount of natural flow—*i.e.*, the water that would be flowing in Rathdrum Creek absent reservoir operations and diversions²¹—continue in Rathdrum Creek’s natural channel as it did in 1875, and to be subject to the futile call doctrine under *Gilbert* only if, due to seepage, evaporation, channel absorption or other conditions beyond the control of the appropriators, such water will not reach water right no. 95-0734’s point of diversion in sufficient quantity to apply to beneficial use.

V. CONCLUSION

Idaho law requires that the Department give force and effect to all of the provisions in the *Decree*, *Memorandum Decision*, and *Proposed Finding* (as amended by the *Memorandum Decision*). The *Instructions* fail to do so with respect to water right no. 95-0734 by limiting outflow of water from Twin Lakes into Rathdrum Creek to the natural tributary inflow into Twin Lakes. The *Instructions* disregard Judge Magnuson’s express and unambiguous findings that the pre-dam natural conditions always allowed sufficient direct flow water in Rathdrum Creek to provide the full amount of water appropriated under water right no. 95-0734 on a continuous year-round basis, and that other water rights (but not right no. 95-0734) are limited to natural tributary inflow. In turn, the *Instructions* also misapply Idaho’s futile call doctrine by limiting the amount of outflow available to satisfy water right no. 95-0734 to Twin Lakes’ natural tributary inflow.

²¹ See *supra* n.17 (quoting *Amended Final Order* at 7 n.7, *In the Matter of Accounting for Distribution of Water to the Federal On-Stream Reservoirs in Water District 63* (Oct. 20, 2015)).

Because there are no genuine disputes of material fact, Sylte is entitled to judgment as a matter of law. Accordingly, for the reasons set forth herein, Sylte requests that the Hearing Officer enter an order determining that, as a matter of law: (1) the holders of water right no. 95-0734 are entitled to delivery of water to the water right on a continuous year-round basis irrespective of the amount of natural tributary inflow into Twin Lakes; (2) the application of the futile call doctrine with respect to water right no. 95-0734 is not dependent on the amount of natural tributary inflow into Twin Lakes; and (3) the *Instructions* must be set aside and reversed on grounds that they are contrary to the *Decree*, *Memorandum Decision*, and *Proposed Finding* (as amended by the *Memorandum Decision*) and are not in accordance with Idaho's Prior Appropriation Doctrine as required by Idaho Code Section 42-602.

Respectfully submitted this 23^d day of June, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of June, 2017, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:²²

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