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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  
REGARDING DISTRIBUTION OF WATER  
TO WATER RIGHT NO. 95-0734

Docket No. P-DR-2017-001

**TWIN LAKES IMPROVEMENT  
ASSOCIATION'S MEMORANDUM IN  
SUPPORT OF CROSS-MOTION FOR  
SUMMARY JUDGMENT AND IN  
OPPOSITION TO SYLTE'S MOTION  
FOR SUMMARY JUDGMENT**

COMES NOW, Twin Lakes Improvement Association ("TLIA"), by and through  
Norman M. Semanko of the law firm MOFFATT THOMAS BARRETT ROCK & FIELDS,  
CHTD., pursuant to Rules 260, 270, 564 and 565 of the Idaho Department of Water Resources  
("IDWR") Rules of Procedure, IDAPA 37.01.01, and hereby submits **TWIN LAKES  
IMPROVEMENT ASSOCIATION'S MEMORANDUM IN SUPPORT OF CROSS-**

**TWIN LAKES IMPROVEMENT ASSOCIATION'S MEMORANDUM  
IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT AND  
IN OPPOSITION TO SYLTE'S MOTION FOR SUMMARY JUDGMENT - 1**

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**MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO SYLTE'S  
MOTION FOR SUMMARY JUDGMENT.**

**I. INTRODUCTION**

TLIA agrees that this matter can be decided on summary judgment, based upon the record, and that an evidentiary hearing is not necessary. In addition to the arguments set forth below, TLIA joins in, supports and hereby incorporates by reference *Clark's Response to Sylte's Motion for Summary Judgment* (July 6, 2017). TLIA, by and through counsel, also submits this briefing, and the accompanying Cross-Motion for Summary Judgment as the spokesperson designated by various Intervenor in this matter.

The Instructions to the Watermaster were issued pursuant to IDWR's authority. They are consistent with the 1989 Decree and Idaho law. As a result, *Sylte's Motion for Summary Judgment* (June 23, 2017) should be denied and *TLIA's Cross-Motion for Summary Judgment* should be granted, thereby denying *Sylte's Petition for Declaratory Ruling* (Feb. 16, 2017) and upholding IDWR's Instructions to the Watermaster (Sep. 20, 2016).

**II. ADDITIONAL FACTUAL AND PROCEDURAL BACKGROUND**

**A. The Memorandum Decision, Proposed Finding of Water Rights, and 1989 Decree.**

*Sylte's Memorandum in Support of Motion for Summary Judgment* quotes at length from portions of the 1989 Memorandum Decision issued by Judge Magnuson (Exhibit B to the *Affidavit of Michael P. Lawrence* (June 23, 2017) ("*Lawrence Affidavit*")), as well as portions of IDWR's Proposed Finding of Water Rights (Exhibit C to *Lawrence Affidavit*) and the 1989 Decree (Exhibit D to *Lawrence Affidavit*). However, Sylte's briefing omits some key provisions of these documents, which are set forth below.

“After the Director of the Department of Water Resources filed its report with the court, various individuals or groups filed their objections to such report, which were responded to by the Director of said department. These objections were four in number:

1. By John Sylte and Evelyn Sylte, husband and wife; Gordon Sylte and Judith Sylte; husband and wife; and Sylte Ranch, hereinafter referred to as the Syltes.”

Memorandum Decision at 2-3.

“Before the subsequent trial of this matter, this Court did enter an Order Authorizing Interim Administration of Water Rights in the Twin Lakes Water System on February 2, 1988, pursuant to Chapter 6, Title 42 of the Idaho Code.” *Id.* at 4.

Immediately following the “Objectors Listing of Rights”, including Sylte’s claim no. 95-0734, the court noted: “None of these claims included storage as a purpose of the water rights.” *Id.* at 5-6.

“The points of diversion of all Objectors [including Syltes] are located on Rathdrum Creek, which is downstream from the outlet of Lower Twin Lake.” *Id.* at 7.

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

“The U. S. Dept. of Interior, Bureau of Reclamation filed a notice of claim to a water right that included storage in Twin Lakes, which was recommended in the Proposed Finding at p.21 as Water Right No. 95-0975.” *Id.* It is uncontested in the current matter that the correct water right number for this Twin Lakes storage right is 95-0973 and that the right is currently held by Intervenor Twin Lakes Rathdrum Creek Flood Control District 17.

“The two water rights recommended which include storage were based on historic use.” *Id.*

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

“Storage of spring flows of water for later use is recognized in Idaho. Idaho Code. Sec. 42-202. Storage water rights differ from direct flow rights in the water is impounded and stored for later use, while waters, subject to direct flow rights, are diverted for immediate use.” *Id.* at 14.

“The Court concludes there are only two storage rights recognized as a result of this adjudication proceeding, to-wit:

1. Twin Lakes Improvement Association storage right between 0.0 to 6.4 feet on the staff gauge (95-0974);
2. Bureau of Reclamation’s right between 6.4 to 10.4 feet on the staff gauge (95 0975) [again, this storage right is actually 95-0973 and now belongs to the Flood Control District]

“An appropriator has the right to make a change in use of the water so long as no injury results to the rights of other appropriators. After 1969, any person seeking to make a change in the use of water had to apply for and obtain approval of the proposed change as provided by Section 42-222 I.C. A change in use includes a change in the point of diversion, place of use, period of use, or nature of use. I.C. 42-222.” *Id.* at 15.

“Regarding the Rathdrum Creek Drainage Association [‘a generic term encompassing all the individual Objectors’, *Id.* at 8] claim that they have a vested right in storage rights in Rathdrum Creek, it is noted such claimants were required to submit a notice of claim for



each water right claimed on a claim form prepared by the Idaho Department of Water Resources, setting forth each element of the water right claimed. Such claims must be filed in a timely manner. The evidence herein does not disclose any claim to a water right for storage purposes was submitted by the Objectors. The time for filing such claims in this adjudication is past.” *Id.* at 16-17.

“The Court concludes water stored by the holders of Water Right Nos. 95-0974 and 95-0975 [actually 95-0973] is not unappropriated water subject to appropriation by others.

“Further, this Court concludes the Objectors have not acquired a portion of the water right recommended to the United States Bureau of Reclamation [now held by the Flood Control District] by adverse possession.” *Id.* at 17.

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

“The Rathdrum Creek Drainage Association has not met its burden of proof to establish the holders of the storage rights have lost their rights by forfeiture, abandonment, acquiescence, estoppel or laches.” *Id.* at 19.

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

application made to the Department of Water Resources. Such an order would be outside the scope of this adjudication proceeding.” *Id.* at 19-20.

“Regarding the Objectors’ objection to finding of fact No. 18 on the basis that the listing of water rights did not include all the water which had been diverted and applied to beneficial use on an historical basis by Syltes, this Court finds that all said claimed diversions were described in the listing of water rights.” *Id.* at 20.

“This Court concludes there is a difference between storage rights and natural flow water rights and the Objectors have not established any rights in the artificially stored waters in Twin Lakes. They have not diverted or appropriated such water.” *Id.* at 20-21.

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

“This Court also adopts the prefatory material to the findings of fact in the Director’s Report, along with the Instructions for Interpreting the Listing of Water Rights therein.” *Id.* at 21.

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

“No water right exists for the natural storage below the level of 0.0 feet on the Staff Gauge located at the outlet of Lower Twin Lake.” *Id.* at xix (Conclusions of Law No. 8).

“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 diverts 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 (amended/final Conclusions of Law No. 14).

**B. Order on Exceptions.**

Sylte’s briefly reference the Director’s *Order on Exceptions Re: Amended Preliminary Order Removing a Watermaster* (Apr. 24, 2017) in their memorandum. This order is Exhibit E to *Lawrence Affidavit*. Particular Findings and Conclusions made in that matter which are relevant in this matter are listed below.

The Syltes were parties to the action which resulted in the removal of the watermaster. Order on Exceptions at 4 (listing Susan C. Goodrich and John Sylte as individuals who submitted notices of intent to participate in the hearing).

The Director found that: “The Decree determined the elements of the water rights from Twin Lakes and its tributaries.” *Id.* at 5 (Finding of Fact No. 4).

The Director also found that, for the water from the bottom of the lakes to 0.0 feet on the staff gauge: “No water right exists for this water”. *Id.* at 5 (Finding of Fact No. 6)

Twin Lakes Improvement Association’s storage water right no. 95-0974 “authorizes the year-round storage of 5,360 acre-feet (‘AF’) of water in Twin Lakes for Recreation Storage purposes.” *Id.* at 5 (Finding of Fact No. 7).

Twin Lakes Rathdrum Creek Flood Control District 17's storage water right no. 95-0973 "authorizes the year round storage of 3,730 AF of water in Twin Lakes for Recreation Storage and Wildlife Storage purposes." *Id.* at 5 (Finding of Fact No. 8).

"From November 1 of each year until March 31 of the next year,' water right no. 95-0974 and water right no. 95-0973 'enable Twin Lakes to be filled to the level of 10.4 feet on the Staff Gauge.' [citing the Decree at Conclusion of Law No. 12]. 'From April 1 to October 31 of each year, the rights to fill the lakes is superseded by the right of existing and future direct flow water rights to divert natural inflows to the lakes.' [again citing the Decree at Conclusion of Law No. 12]". *Id.* at 5-6 (Finding of Fact No. 9).

"The Flood Control District commissioners do not rely on the Decree to decide how much water to allow to flow from Twin Lakes into Rathdrum Creek during the summer and fall, nor does the Department oversee Flood Control District decisions." *Id.* at 7 (Finding of Fact No. 25).

"There is no minimum stream flow water right for Rathdrum Creek for wildlife habitat or for any other purpose." *Id.* at 8 (Finding of Fact No. 33).

"The Flood Control District believes it can use storage water right no. 95-0973 for instream purposes." *Id.* at 9 (Finding of Fact No. 35).

Water flowing out of Twin Lakes into Rathdrum Creek seeps into the ground before it gets to the Syltes' property. As much as two-thirds of Rathdrum Creek is estimated to be lost. This has impacted the availability of Sylte's water right no. 95-0734, rendering it unavailable during low flow periods. *Id.* at 9, 11 (Finding of Fact Nos. 37-39, 46, 49).

“In September and October of 2016, Department staff testified that futile call conditions in Rathdrum Creek prevented the delivery of water to Syltes to satisfy stockwater right no. 95-0734.” *Id.* at 13 (Finding of Fact No. 53).

The Water District 95C Advisory Board adopted a resolution in 2016, expressing concerns about the watermaster “violating the decree by releasing storage water to satisfy Rathdrum Creek natural flow water rights.” *Id.* at 11-12 (Finding of Fact No. 50).

The September 20, 2016 Instructions to the Watermaster “describe the Department’s understanding of how the two Twin Lakes storage water rights and the natural flow water rights from Rathdrum Creek, Twin Lakes, and Twin Lakes’ tributaries are to be administered.” *Id.* at 12 (Finding of Fact No. 52).

“Pursuant to Idaho Code Sec. 42-602, the Department ‘shall distribute water in water districts in accordance with the prior appropriation doctrine.’ The Decree established the water rights and their priorities within WD95C. Therefore, the Director must see to the distribution of water in WD95C as determined in the Decree.” *Id.* at 18 (Conclusion of Law No. 2).

“The Department properly exercised its statutory authority when it issued its Instructions to [the watermaster] regarding application of the prior appropriation doctrine to water distribution in WD95C.” *Id.* at 18 (Conclusion of Law No. 3).

Proper administration by the watermaster includes seeking a futile call determination and refraining from turning storage water rights into Rathdrum Creek. *Id.* at 18 (Conclusion of Law No. 5).

### III. ARGUMENT

In the current action, the Syltes seek to have storage water released into Rathdrum Creek as a supplemental supply to fulfill their natural flow water right, in order to guarantee an uninterrupted supply of water. This is contrary to the 1989 Decree and related documents, as well as the prior appropriation doctrine in Idaho.

The Instructions to the Watermaster correctly interpret the Decree and related documents, consistent with the prior appropriation doctrine in Idaho, within the duties and authorities granted to IDWR.

As a result, *Sylte's Motion for Summary Judgment* should be denied, and *TLIA's Cross-Motion for Summary Judgment* should be granted, thereby denying Sylte's Petition for Declaratory Ruling and upholding the Instructions to the Watermaster.

#### **A. The Instructions to the Watermaster Are Within IDWR's Authority.**

The Syltes characterize IDWR's actions in this matter as contrary to law. However, as the Director has previously concluded, IDWR properly exercised its statutory authority when it issued the Instructions to the Watermaster. Order on Exceptions at 18 (Conclusion of Law No. 3). In fact, IDWR has a duty under I.C. Sec. 42-602 to distribute water in water districts in accordance with the prior appropriation doctrine, which includes oversight and direction to watermasters.

#### **B. The Instructions Properly Incorporate and Interpret the Decree, Related Documents and Idaho's Prior Appropriation Doctrine.**

A review of the Instructions to the Watermaster reveal that it is replete with specific references to the Decree and the Memorandum Decision issued by Judge Magnuson.



That is perhaps why certain of the Syltes objected to the removal of the previous watermaster, who refused to follow the Decree and the Instructions.

The Director has recently had ample opportunity to review and interpret his authority in various contested matters, including his authority to distribute water under I.C. Sec. 42-602.

Idaho Code Section 42-602 “gives the Director a ‘clear legal duty’ to distribute water” and “broad powers to direct and control distribution of water from all natural water sources within water districts.” *In re SRBA (Basin Wide Issue 17)*, 157 Idaho 385, 393 (2014). “[T]he Director cannot distribute water however he pleases at any time in any way; he must follow the law.” *Id.* “[T]he details of the performance of the duty,” however, “are left to the director’s discretion.” *Id.* “Therefore, from the statute’s plain language, as long as the Director distributes water in accordance with prior appropriation, he meets his clear legal duty. Details are left to the Director.” *Id.*

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

The Idaho Supreme Court has historically “recognized the Director’s discretion to direct and control the administration of water in accordance with the prior appropriation

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

That is precisely what IDWR has done with the Instructions to the Watermaster. Consistent with the plain language of the Decree and the Memorandum Decision, IDWR has determined that Sylte’s water right no. 95-734 is filled or satisfied by natural flow, without penalty for evaporation or seepage. IDWR has also determined that the right is not filled or satisfied by the delivery of storage water. That is directly contrary to the Decree and the Memorandum Decision.

The Syltes objected to the Director’s Report for water rights in the Twin Lakes Adjudication and argued that they were entitled to storage. The court clearly disagreed. Memorandum Decision at 16-17. The court also found that storage rights are different from natural flow water rights. *Id.* at 20-21; *see also, Am. Falls Reservoir Dist. No. 2*, 143 Idaho 862, 880 (2007) (There is a “fundamental difference” between water rights for direct diversion use and water rights for storage). While under direct diversion water rights, the water must be put to immediate use, “the very purpose of storage is to retain and hold for subsequent use. . .hence retention is not of itself illegal and does not deprive the user of the right to continue to hold.” *Rayl v. Salmon River Canal Co.*, 66 Idaho 199, 208 (1945).

As a result, the court specifically concluded that Sylte's water right no. 95-734 could be satisfied by natural flow, but not storage. Decree at xix (amended/final Conclusions of Law No. 14).

The Syltes – despite being precluded by res judicata – are back at it again. In the current action, they are again arguing that they are entitled to storage water. They characterize it as being part of the natural storage of the lake, and therefore not really “storage” but somehow part of the natural flow. This bizarre argument turns the Decree, Memorandum Decision and Idaho appropriation doctrine on their heads.

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

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

The Decree and Memorandum Decision specifically found that there is no water right to the natural storage in Twin Lakes. The Director made the same finding in the Order on Exceptions. Order on Exceptions at 5 (Finding of Fact No. 6). This result cannot be changed through the current Petition for Declaratory Ruling. It must therefore be denied.

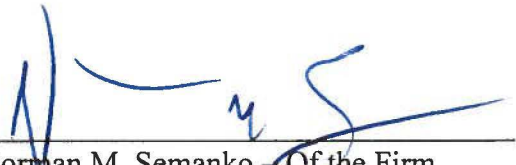
The Instructions to the Watermaster correctly apply the Decree, related documents and Idaho's appropriation doctrine, within the authorities and discretion afforded to IDWR. As a result, the Instructions should be upheld.

#### IV. CONCLUSION

For the reasons set forth above, *Sylte's Motion for Summary Judgment* should be denied, and *TLIA's Cross-Motion for Summary Judgment* should be granted, thereby denying Sylte's Petition for Declaratory Ruling and upholding the Instructions to the Watermaster.

DATED this 7th day of July, 2017.

MOFFATT, THOMAS, BARRETT, ROCK &  
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By   
Norman M. Semanko - Of the Firm  
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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of July, 2017, I caused a true and correct copy of the foregoing **TWIN LAKES IMPROVEMENT ASSOCIATION'S MEMORANDUM IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO SYLTE'S MOTION FOR SUMMARY JUDGMENT** to be served on the parties listed below by U.S. Certified Mail, Return Receipt Required:

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