

Michael P. Lawrence [ISB No. 7288]
Jack W. Relf [ISB No. 9762]
GIVENS PURSLEY LLP
601 West Bannock Street
P.O. Box 2720
Boise, Idaho 83701-2720
Office: (208) 388-1200
Fax: (208) 388-1300
www.givenspursley.com
*Attorneys for Gordon Sylte, Susan Goodrich,
John Sylte, and Sylte Ranch Limited Liability Company*

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JUL 20 2017

DEPARTMENT OF
WATER RESOURCES

**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 RESPONSE TO TWIN LAKES
IMPROVEMENT ASSOCIATION'S
CROSS-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, hereby respond to *Twin Lakes Improvement Association's Amended Cross-Motion for Summary Judgment* ("TLIA's Amended Cross-Motion") dated July 10, 2017, and *Twin Lakes Improvement Association's Memorandum in Support of Cross-Motion for Summary Judgment and in Opposition to Sylte's Motion for Summary Judgment* ("TLIA's Brief") dated July 7, 2017.

For the reasons set forth herein, *TLIA's Amended Cross-Motion* should be denied and *Sylte's Motion for Summary Judgment* should be granted.

I. PROCEDURAL BACKGROUND

On February 16, 2017, Sylte initiated the above-captioned matter when it filed *Sylte's Petition for Declaratory Ruling*.

On May 22, 2017, a pre-hearing conference was held.

**SYLTE'S RESPONSE TO TWIN LAKES IMPROVEMENT ASSOCIATION'S
CROSS-MOTION FOR SUMMARY JUDGMENT - 1**

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On June 23, 2017, Sylte filed *Sylte's Motion for Summary Judgment* ("*Sylte's Motion*") and *Sylte's Memorandum in Support of Motion for Summary Judgment* ("*Sylte's Opening Brief*"), together with the *Affidavit of Michael P. Lawrence* ("*Lawrence Affidavit*").

On July 6, 2017, Colby Clark filed *Clark's Response to Sylte's Motion for Summary Judgment* ("*Clark's Response*").

On July 7, 2017, Twin Lakes Improvement Association ("TLIA") filed *Twin Lakes Improvement Association's Cross-Motion for Summary Judgment* (which was amended by *TLIA's Amended Cross-Motion*) and *TLIA's Brief* on its own behalf and as the spokesperson designated by various intervenors. *TLIA's Brief* at 2.

On July 13, 2017, Sylte filed *Sylte's Reply Memorandum in Support of Motion for Summary Judgment* ("*Sylte's Reply*"), which replied to *Clark's Response*.

In this brief, Sylte responds to *TLIA's Amended Cross-Motion* and *TLIA's Brief*.¹

II. ARGUMENT

TLIA's Amended Cross-Motion and *Sylte's Motion* both request a decision on summary judgment. Neither party believes an evidentiary hearing is required to resolve the questions presented in this contested case. *TLIA Brief* at 2 ("TLIA agrees that this matter can be decided on summary judgment, based upon the record, and that an evidentiary hearing is not necessary."); *Sylte's Opening Brief* at 2 ("nothing precludes the Hearing Officer from determining that Sylte is entitled to the requested relief as a matter of law."). There are no genuine disputes of material fact—all of the facts material to the questions presented were

¹ Unless otherwise indicated, defined terms used in this brief have the same meanings as in *Sylte's Motion*, *Sylte's Opening Brief*, and *Sylte's Reply*, which are hereby incorporated by reference.

conclusively determined in the *Decree*.² The questions presented are purely legal. They can be answered based solely on the plain language of the *Decree* and the principles of law dictated by Idaho's Prior Appropriation Doctrine.

As described below, the suggested interpretations of the *Decree* set forth in *TLIA's Amended Cross-Motion* and *TLIA's Brief* are not supported by Idaho law or the plain language of the *Decree*. Accordingly, *TLIA's Amended Cross-Motion* should be denied and *Sylte's Motion* should be granted.

A. The Director has authority to issue instructions to watermasters, but he does not have the authority to issue instructions that are contrary to law.

TLIA suggests that Sylte disputes whether the Department was allowed to issue instructions to the Watermaster. *TLIA's Brief* at 10. This mischaracterizes Sylte's arguments. Sylte argues that the substance of the *Instructions* is contrary to law, not that the Department has no authority to issue instructions to watermasters regarding the administration of water rights. The Director's authority to supervise watermasters is clearly set forth in Idaho Code § 42-602: "Distribution of water within water districts . . . shall be accomplished by watermasters as provided in this chapter and supervised by the director."

However, the Director has no authority to issue watermaster instructions that are contrary to decrees and Idaho's Prior Appropriation Doctrine. Rather, 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). See also *Sylte's Opening Brief* at 9-12 (discussing how the Department's administration of water rights is controlled by decrees and prior appropriation

² Because the *Decree* incorporates by reference the *Memorandum Decision*, for ease of reading, references in this brief to the *Decree* also include the *Memorandum Decision*.

law). Sylte's contention in this proceeding is that the *Instructions* must be reversed and set aside because they do not "follow the law." See Sylte's *Opening Brief* at 24 ("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").

TLIA also contends that, "as the Director has previously concluded, IDWR properly exercised its statutory authority when it issued the Instructions to the Watermaster." *TLIA's Brief* at 10 (citing *Watermaster Removal Order* at 18, Conclusion of Law No. 3). But the Director's findings and conclusions in the *Watermaster Removal Order* expressly did not address whether the *Instructions* properly describe how water right no. 95-0734 should be administered according to the *Decree* and Idaho law. See *Watermaster Removal Order* at 2 n.2 (stating "questions regarding administration of water right no. 95-0734 will be addressed in the matter of Sylte's Declaratory Ruling Petition"). In sum, the question of whether the *Instructions* are consistent with the *Decree* and Idaho law is properly presented to the Hearing Officer for decision in this case.

B. Instructions to the Watermaster must follow the *Decree* and Idaho's Prior Appropriation Doctrine.

Citing *BW 17*, TLIA characterizes the *Instructions* as merely "'details' properly left to the Director and IDWR." *TLIA's Brief* at 11. Sylte disagrees. The issues in this case are nothing like those presented in *BW 17*. The so-called "details" left to the Director in *BW 17* involve the Department's computerized accounting methodology for determining how water is counted toward the satisfaction of storage water rights (which are junior to some water rights, and senior to others) associated with on-stream reservoirs in Basin 63, particularly in light of the reservoirs' flood control operations. This case is about the Department's distribution of water to a natural

flow water right that pre-dates upstream artificial storage facilities and all other water rights on the system. Notably, no one litigating the Basin 63 case—not IDWR, not the storage water users, not the junior or senior natural flow users—has ever disputed that downstream natural flow water rights senior to the storage rights are entitled to the natural flow that would have been available to them in the absence of the manmade dams. But that is the simple premise disputed by TLIA and Clark in this case. They (and the *Instructions*) are wrong.

In any case, even if one assumes that the *Instructions* consist of some “details” left to the Director’s discretion, the law is clear that the Director’s discretion is limited by Idaho’s Prior Appropriation Doctrine and applicable water rights decrees. *BW 17*, 157 Idaho at 393, 336 P.3d at 800 (“from the statute’s plain language, as long as the Director distributes water in accordance with prior appropriation, he meets his clear legal duty.”); *id.* (quoting *BW 17*, 157 Idaho at 393, 336 P.3d at 800 (“the Director cannot distribute water however he pleases at any time in any way; he must follow the law.”)).

[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.

A water right is a valuable property right entitled to protection under the law. As the Idaho Supreme Court has stated:

“When one has legally acquired a water right, he has a property right therein that cannot be taken from him for public or private use except by due process of law and upon just compensation being paid therefor.” *Bennett v. Twin Falls North Side Land & Water Co.*, 27 Idaho 643, 651, 150 P. 336, 339 (1915). “Priority in time is an essential part of western water law and to diminish one's priority works an undeniable injury to that water right holder.” *Jenkins v. State, Dept. of Water Resources*, 103 Idaho 384, 388, 647 P.2d 1256, 1260 (1982). When there is insufficient water to satisfy both the senior appropriator’s and the

junior appropriator's water rights, giving the junior appropriator a preference to the use of the water constitutes a taking for which compensation must be paid. *Montpelier Milling Co. v. City of Montpelier*, 19 Idaho 212, 219, 113 P. 741, 743 (1911); Idaho Const. Art. XV, § 3.

Clear Springs Foods, Inc. v. Spackman, 150 Idaho 790, 797–98, 252 P.3d 71, 78–79 (2011).

There is no room for discretion here. The Department “must follow the law” and the plain language of the *Decree*.

C. The Decree and Idaho law require the delivery of pre-dam natural flow to water right no. 95-0734 irrespective of Twin Lakes' inflow.

TLIA mischaracterizes Sylte as “arguing that they are entitled to storage water.” *TLIA's Brief* at 13.³ Sylte is not asserting a right to “artificially stored waters,” as Judge Magnuson put it. *Memorandum Decision* at 21. Rather, Sylte asserts that water right no. 95-0734 is entitled to the natural, pre-dam outflow to Rathdrum Creek, which Judge Magnuson expressly found was always sufficient to satisfy the water right on a continuous year-round basis. As explained in *Sylte's Reply* at 4-6, the pre-dam natural outflows sufficient to always fill water right no. 95-0734 must have exceeded Twin Lakes' inflows throughout the summer (*i.e.*, during the times when, as Judge Magnuson found, pre-dam lake levels dropped faster than post-dam lake levels). *See Memorandum Decision* at 10. Water right no. 95-0734 is senior to the 1906 Storage Rights, which entitles it to the amounts of natural flow in Rathdrum Creek at the time of appropriation, which has been conclusively determined to have flowed on a continuous, year-round basis. *See Memorandum Decision* at 13 (“The holders of water right #95-0734 are therefore entitled to

³ The majority of *TLIA's Brief* consists of quoted statements from the *Memorandum Decision* and the *Watermaster Removal Order*. *See TLIA's Brief* at 2-9. But TLIA does not explain how these statements support its position that the *Instructions* are correct with respect to the administration of water right no. 95-0734, and specifically that the outflows from Twin Lakes to satisfy water right no. 95-0734 must be limited to Twin Lakes' natural tributary inflows. Sylte has explained why the *Instructions* are wrong in these respects in *Sylte's Opening Brief* and *Sylte's Reply*. In any case, as already noted, the *Watermaster Removal Proceeding* is not relevant to this case. *See Watermaster Removal Order* at 2 n.2 (stating “questions regarding administration of water right no. 95-0734 will be addressed in the matter of Sylte's Declaratory Ruling Petition”).

waters from the source of their appropriation on a basis of priority over those storage rights Nos. 95-0974 and 95-097[3]. The waters of this basin are to be administered in such manner as to give effect to such priority.”). *See also generally Sylte’s Opening Brief and Sylte’s Reply.*

TLIA cites two articles about Jackson Lake in the Upper Snake River, but these do not support its position. *TLIA’s Amended Cross-Motion* at 13 (citing Jerry R. Rigby, *The Development of Water Rights and Water Institutions in the Upper Snake River Valley*, THE ADVOCATE, Vol. 53, No. 11/12 (Nov./Dec. 2010) (“*Rigby Article*”), and R.A. Slaughter, *Institutional History of the Snake River 1850-2000*, University of Washington (2004) (“*Slaughter Article*”)).

Jackson Lake is not like Twin Lakes. Although both lakes involve dams constructed at the outlets of natural lakes, Jackson Lake’s dam actually increased the amount of storage in the lake.⁴ Here, however, Judge Magnuson found that the dam at Twin Lakes did not increase the amount of storage. *Memorandum Decision* at 10 (“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 [in 1906]. The primary result the dam had on the water level was to hold the water at a higher point longer through the summer months.”)

Thus, it makes sense that when the additional storage created in Jackson Lake was released to the storage right holders, Upper Snake senior natural flow water users “were ordered to close their headgates later in the season even though there was water in the river.” *Rigby*

⁴ See Jackson Lake Dam Overview, available at the Bureau of Reclamation’s website: <https://www.usbr.gov/projects/index.php?id=162> (“Jackson Lake Dam, a temporary rockfilled crib dam was completed in 1907 by the Bureau of Reclamation at Jackson Lake to store 200,000 acre-feet for the Minidoka Project until the storage requirements could be determined. A portion of this dam failed in 1910, and in 1911 a concrete gravity structure with earth embankment wings was built at the site. The new dam increased storage capacity to 380,000 acre-feet. In 1916, further construction raised the dam 17 feet to a structural height of 65.5 feet, with a total storage capacity of 847,000 acre-feet (active 847,000 acre-feet).”).

Article at 53. That was because “[d]ue to releases from Jackson Dam, the water in the River was considered storage water . . . and not natural flow water” *Id.* In other words, the stored water that was released above and beyond the natural flow was not available to the senior natural flow users because it belonged to the storage water users. This, however, did not mean that the senior natural flow users were not entitled to their natural flow. *Id.* (describing the state’s desire to “manage and shepherd the storage water down the rivers ‘on top’ of the river’s surface water to the storage water’s intended users”). Not surprisingly, the Upper Snake senior natural flow users and the junior storage users squabbled about “what amount of water flowing down the Snake below Jackson was storage water and what amount was natural flow water.” *Id.*

The situation here is much less complicated. Judge Magnuson conclusively found that the natural outflow from Twin Lakes always was sufficient to satisfy water right no. 95-0734 on a continuous year-round basis before the dam was constructed. Sylte is entitled to this amount of outflow, which is the natural flow. In other words, the natural outflow is whatever it takes to satisfy water right no. 95-0734. This is required by Idaho law. As described in *Sylte’s Reply*, a long line of Idaho cases protect downstream senior natural flow water users from interference by upstream junior water users. *Sylte’s Reply* at 7-8.

TLIA also cites a paper by Tony Olenichak, IDWR’s Program Manager in Water District 01. See *TLIA’s Brief* at 14 (citing TONY ONLENICHAK, CONCEPTS, PRACTICES, AND PROCEDURES USED TO DISTRIBUTE WATER WITHIN WATER DISTRICT #1 (“*Olenichak Paper*”) at 28 (Mar. 2, 2015)). But this paper supports Sylte’s position, not TLIA’s. The paper states:

The priority date of a water right indicates when the water right was first developed and its relative delivery sequence when compared to other water rights with different priority dates. The earliest (or senior) priority water right is delivered natural flow ahead of later (or junior) priority water rights when the natural flow is not sufficient to fill all water rights in a reach.

Olenichak Paper at 28 (italics removed). It goes on to describe how “[n]atural flow delivery is limited to the amount of natural flow available in the reach containing the diversion.” *Id.* (italics removed). Again, Judge Magnuson conclusively determined that the amount of natural flow in the reach where water right no. 95-0734 is diverted always was sufficient to satisfy water right no. 95-0734 on a continuous year-round basis before the dam was constructed. Thus, Sylte is entitled to have its senior priority right satisfied by its historical, year-round natural flow without impairment by later priority rights such as the 1906 Storage Rights. *See Sylte’s Reply* at 9-11.

TLIA alleges that the “Decree and Memorandum Decision specifically found that there is no water right to the natural storage in Twin Lakes.” *TLIA’s Brief* at 14.⁵ However, TLIA ignores Judge Magnuson’s finding that all of the water in Twin Lakes (even the water stored under the 1906 Storage Rights) was “natural lake storage” prior to the dam’s construction. *Decree* at xv-xvi (Finding of Fact No. 10).

In sum, contrary to TLIA’s assertions, Sylte is not asserting a right to “artificially stored waters in Twin Lakes.” *Memorandum Decision* at 21. Rather, Sylte asserts that, according to the plain language of the *Decree* and pursuant to Idaho’s Prior Appropriation Doctrine, water right no. 95-0734 is entitled to be satisfied on a continuous year-round basis by the pre-dam natural outflow from Twin Lakes, and is not limited by Twin Lakes’ tributary inflows. TLIA’s and Clark’s arguments must be rejected, and the *Instructions* must be reversed and set aside, because they improperly subordinate water right no. 95-0734 to junior water rights, including the 1906 Storage Rights. *See Memorandum Decision* at 13 (“The holders of water right #95-0734

⁵ TLIA also alleges that the *Watermaster Removal Order* “made the same finding” with respect to the storage rights in Twin Lakes. *TLIA’s Brief* at 14. However, the *Watermaster Removal Order* cannot change Judge Magnuson’s finding that all of the water in Twin Lakes (even the water presently stored under the 1906 Storage Rights) was “natural lake storage” prior to the dam’s construction. In any event, as already noted, the *Watermaster Removal Order* does not control this case. *See, e.g., supra* note 3.

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]. The waters of this basin are to be administered in such manner as to give effect to such priority.”)

III. CONCLUSION

For the reasons set forth above as well as in *Sylte’s Motion*, *Sylte’s Opening Brief*, and *Sylte’s Reply*, and based on the record in this case, Sylte requests that the Hearing Officer grant *Sylte’s Motion* and deny *TLIA’s Amended Cross-Motion*.

Respectfully submitted this 20th day of July, 2017.

GIVENS PURSLEY LLP

A handwritten signature in blue ink, appearing to read "MP Lawrence", is written over a horizontal line.

Michael P. Lawrence

Jack W. Relf

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

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of July, 2017, I caused to be filed and served a true and correct copy of the foregoing by the method indicated below, and addressed to the following⁶:

DOCUMENT FILED:

Shelley Keen, Hearing Officer,
Idaho Department of Water Resources
322 East Front Street
P.O. Box 83720
Boise, ID 83720-0098

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

DOCUMENT SERVED:

Norman M. Semanko
Moffatt, Thomas, Barrett, Rock & Fields,
Chartered
nms@moffatt.com
(CONSENTED TO EMAIL SERVICE)

Representing or Spokesperson for:

Alice, Mary A.
Anderson, Mary F
Anderson, Mary F et al
Andrews, Debra
Andrews, John
Bafus, Matthew A.
Benage, Charles and Ruth
Chetlain Jr., Arthur
Clarence & Kurt Geiger Families
Clark, Kathy
Collins, Mary K./Bosch Properties
Cozzetto, Sandra
Crosby, Wes
Curb, James
DeVitis, Maureen
Ellis, Don
Ellis, Susan
Erickson, Scott

Freije, Joan
Hatrock, Amber
Herr, Barbara
Hilliard, Wendy & James
Hogan, Pat & Denise
Holmes, Steven & Elizabeth
Houkam, Leif
Jayne, Donald
Jayne, Douglas I & Bertha Mary
Kiefer, Terry
Knowles, Michael
Kremin, Adam
Kuhn, Robert
Lacroix, Rene
Lake-Ommen, Joan
Larry D & Janice A Faris Living Trust
LaLiberte, Terry
Miller, Patrick E.
Minatre, William H
Murray, Angela

Nipp, David R.
Nooney, John
Rodgers, Steve & Pam
Roth, Kimberli
Schafer, David & Lori
Schultz, Darwin R.
Seaburg, Molly
Sunday, Hal
TCRV LLC
Twin Echo Resort
Twin Lakes Improvement Assoc.
Upper Twin Lakes, LLC
Van Zandt, Rick & Corrinne
Weller, Gerald J.
Wilson, Bruce & Jamie
Ziuchkovski, Dave

⁶ The certificate of service is taken from the *Order Regarding Certificate of Service*, issued July 20, 2017, by the Hearing Officer.

Clark, Colby
30701 N. Clagstone Road
Athol, ID 83801

Estate of Carmela G. Dempsey and
Curran D. Dempsey Disclaimer Trust
3224 S. Whipple Road
Spokane Valley, WA 992016-6310

Finman, Paul
pfinman@lcfamps.com
(CONSENTED TO EMAIL SERVICE)

Twin Lakes/Rathdrum Creek FDC #17
William Gumm
wm.gumm@gmail.com
bahunsinger@yahoo.com
(CONSENTED TO EMAIL SERVICE)



Michael P. Lawrence