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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 APPEAL, EXCEPTIONS, REQUEST FOR RECONSIDERATION AND CLARIFICATION, AND REQUEST FOR HEARING**

Gordon Sylte, Susan Goodrich, John Sylte, and Sylte Ranch Limited Liability Company (collectively, "Sylte"), by and through their counsel of record Givens Pursley LLP, and pursuant to Idaho Code Sections 67-5245(3) and 67-5246(4), and IDWR Rules of Procedure 730, 740, and 770, IDAPA 37.01.01.730, .740, and .770, hereby appeal to the Director of the Idaho Department of Water Resources ("IDWR" or "Department"), and take exceptions to, and request reconsideration and clarification of the Hearing Officer's September 6, 2017 *Order on Motions for Summary Judgment; Order Amending Instructions; Order Vacating Hearing Dates and Schedule* ("*Order*") in the above-captioned matter, as well as the Hearing Officer's September 7, 2017 letter ("*Letter*") identifying the *Order* as a "final action of the agency." Sylte also requests a hearing before the Director pursuant to Idaho Code § 42-1701A(3), on the grounds described herein.

Sylte requests that the Director reverse and set aside the Hearing Officer's *Order* in which he denied *Sylte's Motion for Summary Judgment* dated June 23, 2017 ("*Sylte's MSJ*"), granted *Twin Lakes Improvement Association's Cross-Motion for Summary Judgment* dated July 7, 2017 ("*TLIA's MSJ*"),[1] and upheld and *sua sponte* amended the Department's September 20, 2016 letter containing "*Instructions*" sent to the Watermaster of Water District 95C. Sylte further requests that the Director issue a final order granting *Sylte's MSJ* and denying *TLIA's Amended MSJ.*

The *Order* should be reversed and *Sylte's MSJ* should be granted for the reasons set forth herein, as well as in *Sylte's Memorandum in Support of Motion for Summary Judgment* dated June 23, 2017 ("*Sylte's Opening Brief*"), *Sylte's Reply Memorandum in Support of Motion for Summary Judgment* dated July 23, 2017 ("*Sylte's Reply*"), and *Sylte's Response to Twin Lakes Improvement Association's Cross-Motion for Summary Judgment* dated July 20, 2017 ("*Sylte's Response*"), and based on the record in this proceeding, all of which are incorporated herein by reference.

In summary, the *Order* is contrary to express findings and conclusions made by First Judicial District Court Judge Richard Magnuson in his February 22, 1989 *Memorandum Decision* ("*Memorandum Decision*") and April 19, 1989 *Final Decree* ("*Decree*") issued in a general stream adjudication entitled *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.). In addition, the Hearing Officer erred by reviewing and citing documents outside

[1] *TLIA's MSJ* was amended on July 10, 2017 by *Twin Lakes Improvement Association's Amended Cross-Motion for Summary Judgment* ("*TLIA's Amended MSJ*").

the summary judgment record and outside the four corners of the *Decree* and *Memorandum Decision*, and also by *sua sponte* adding a volume limitation to the *Instructions*.

At the outset, however, Sylte asks the Director to determine whether the *Order* is a preliminary order or a final order or final agency action. As explained further below, the Hearing Officer originally deemed the *Order* a preliminary order, but subsequently issued the *Letter* in which he explained that "the Order should have been identified as a final action of the agency" and with which he enclosed "Explanatory Information to Accompany a Final Order." Because answering the question of whether the *Order* is a preliminary or final order (or final agency action) could affect how the Director addresses Sylte's other issues with the *Order*, that question is addressed first below.[2] Following that, Sylte addresses the other errors in the *Order*, beginning with a short introduction into the background of the case.

I. The Hearing Officer's attempt to convert the *Order* from a preliminary order to a final order should be reversed.

As an initial matter, it is important to recognize that Sylte is requesting clarification about whether the *Order* is properly deemed a preliminary order or a final order (or even a recommended order) so it can ensure it timely and appropriately pursues administrative remedies and judicial review. The Hearing Officer's after-the-fact determination that the *Order* is not a preliminary order but instead is a final order that constitutes a final agency action immediately appealable to the district court is not clearly correct under Idaho law and IDWR's Rules of Procedure. Indeed, as explained below, it appears incorrect. Sylte simply is not prepared to rely on the Hearing Officer's determination that the *Order* is an immediately appealable final agency

[2] Because of the confusion as to the nature of the *Order*, Sylte intends to petition the District Court for judicial review of the *Order*. Sylte is taking this approach in addition to filing these exceptions and requests for clarification to ensure exhaustion of administrative remedies (if the *Order* is a preliminary order) and to timely seek judicial review (if the *Order* is a final order).

action when doing so might be prejudicial if the Hearing Officer is wrong. For example, if Sylte were to appeal the *Order* to district court on the Hearing Officer's determination that it is an immediately appealable final order and final agency action, a court's later determination that the *Order* was in fact a preliminary order that could have and should have been first appealed to the agency head would severely prejudice Sylte.[3] In short, Sylte needs clarity as to how it can properly proceed so it can protect its interests.

A. The *Order* appears to be a preliminary order.

As mentioned, the Hearing Officer originally included "Explanatory Information to Accompany a Preliminary Order" with the *Order*, but subsequently issued the *Letter* explaining that "the Order should have been identified as a final action of the agency," and with the *Letter* he enclosed "Explanatory Information to Accompany a Final Order." Idaho's statutes and IDWR's Rules of Procedure, however, appear to dictate that the *Order* was in fact a preliminary order from which Sylte could appeal and take exceptions to the Director.

Idaho Code § 67-5243(1), which is entitled "Orders Not Issued By Agency Head," states:

> If the presiding officer is not the agency head, the presiding officer shall issue either:
>
> (a) A recommended order, which becomes a final order only after review by the agency head in accordance with section 67-5244, Idaho Code; or
>
> (b) A preliminary order, which becomes a final order unless reviewed in accordance with section 67-5245, Idaho Code.

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[3] Sylte is aware of a seemingly persuasive district court decision holding that a preliminary order that becomes final after 14 days is immediately appealable to district court without exhausting any additional administrative remedies. *See Memorandum Decision and Order, A&B Irr. Dist., et al., v. IDWR and Karl and Jeffery Cook, In the Matter of Application for Permit No. 35-14402*, Case No. CV-42-2015-2452 (Fifth Jud. Dist. Ct. Dec. 14, 2015). However, Sylte is not aware that the same question has ever been addressed by the Idaho Supreme Court. Given the Idaho Supreme Court's decisions concerning exhaustion of administrative remedies and the Idaho Administrative Procedure Act, it is unknown whether the Idaho Supreme Court would agree with it.

By contrast, Idaho Code § 67-5246(1) states: "If the presiding officer is the agency head, the presiding officer shall issue a final order." According to a plain reading of these statutes, because the presiding officer who issued the *Order* was not the agency head, his *Order* must be a preliminary or recommended order. The Department's Rules of Procedure are consistent with these statutes. *See, e.g.,* IDAPA 37.01.01.413.01.d ("Unless the agency otherwise provides hearing, [sic] officers have the standard scope of authority, which is . . . [a]uthority to issue a written decision of the hearing officer, including a narrative of the proceedings before the hearing officer and findings of fact, conclusions of law, and recommended or preliminary orders by the hearing officer, following the submission of evidence through stipulation of the parties, affidavits, exhibits, or hearing testimony." (emphasis added)).

If the *Order* is a preliminary order as the Hearing Officer initially determined, a party may seek reconsideration by the presiding officer or review by the agency head within 14 days of the *Order's* service date. I.C. § 67-5243(3);[4] I.C. § 67-5245(3);[5] IDAPA 37.01.01.730.02.a-.b.[6]

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[4] "Unless otherwise provided by statute or rule, any party may file a motion for reconsideration of a recommended order or a preliminary order within fourteen (14) days of the service date of that order. The presiding officer shall render a written order disposing of the petition. The petition is deemed denied if the presiding officer does not dispose of it within twenty-one (21) days after the filing of the petition." I.C. § 67-5243(3).

[5] "A petition for review of a preliminary order must be filed with the agency head, or with any person designated for this purpose by rule of the agency, within fourteen (14) days after the service date of the preliminary order unless a different time is required by other provision of law. If the agency head on his own motion decides to review a preliminary order, the agency head shall give written notice within fourteen (14) days after the issuance of the preliminary order unless a different time is required by other provisions of law. The fourteen (14) day period for filing of notice is tolled by the filing of a petition for reconsideration under section 67-5243(3), Idaho Code." I.C. § 67-5245(3)

[6] "a. This is a preliminary order of the hearing officer. It can and will become final without further action of the agency unless any party petitions for reconsideration before the hearing officer issuing it or appeals to the hearing officer's superiors in the agency. Any party may file a petition for reconsideration of this preliminary order with the hearing officer issuing the order within fourteen (14) days of the service date of this order. The hearing officer issuing this order will dispose of the petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See Section 67-5243(3), Idaho Code.

b. Within fourteen (14) days after:

i. The service date of this preliminary order;

Otherwise, as a preliminary order, the *Order* would become final 14 days after its service date. I.C. § 67-5243(b); IDAPA 37.01.01.730.01.[7]

It is possible (although seemingly less likely) that the *Order* is a recommended order that will become a final order only after review by the agency head. I.C. § 67-5243(a); IDAPA 37.01.01.720.01. This seems less likely because the Hearing Officer did not "include a statement of the schedule for review of that order by the agency head or his designee" as required by Idaho Code § 67-5244(1).[8]

In any case, however, Idaho Code Sections 67-5243(1) and 67-5246(1) strongly support the conclusion that the *Order* is much more likely to be a preliminary order or a recommended order than a final order because it was not issued by the agency head. If the *Order* is a preliminary or recommended order, Sylte is entitled to take exceptions to the Director.

B. The *Order* does not appear to be a final order or final agency action.

After issuing the *Order* and deeming it a preliminary order, the Hearing Officer's *Letter* stated that "pursuant to Idaho Code § 67-5255(3) and Rule 402 of the Department's Rules of Procedure (IDAPA 37.01.01.402), the Order should have been identified as a final action of the

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> ii. The service date of the denial of a petition for reconsideration from this preliminary order; or
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> iii. The failure within twenty-one (21) days to grant or deny a petition for reconsideration from this preliminary order, any party may in writing appeal or take exceptions to any part of the preliminary order and file briefs in support of the party's position on any issue in the proceeding to the agency head (or designee of the agency head). Otherwise, this preliminary order will become a final order of the agency."

IDAPA 37.01.01.730.02.a-.b.

[7] "Preliminary orders are orders issued by a person other than the agency head that will become a final order of the agency unless reviewed by the agency head (or the agency head's designee) pursuant to Section 67-5245, Idaho Code." IDAPA 37.01.01.730.01

[8] IDWR's Rules of Procedures set forth a schedule by which "any party may in writing support or take exceptions to any part of this recommended order and file briefs in support of the party's position with the agency head or designee on any issue in the proceeding." IDAPA 37.01.01.720.02.b. That schedule allows a party to take exceptions to the agency head within 14 days from the service date of the recommended order. Thus, if the *Order* in fact is a recommended order, Sylte's exceptions are timely.

agency. . . . Consequently, with this letter I have enclosed an information sheet titled *Explanatory Information to Accompany a Final Order* for your reference in connection with the Order." This attempt to re-characterize the *Order* as a final order or final agency action is inconsistent with Idaho law and IDWR's Rules of Procedure.

First, as described above, the Hearing Officer could not issue a final order because he is not the agency head. I.C. § 67-5243(1); I.C. § 67-5246(1); IDAPA 37.01.01.413.01.d.

Second, even if the Hearing Officer could issue a final order, it is not clear that the Hearing Officer's *Letter* could have effectively changed his initial determination that the *Order* is a preliminary order. The *Order* included "Explanatory Information to Accompany a Preliminary Order" as required by Idaho Code §§ 67-5245(1)[9] and 67-5248(1)[10] and IDAPA 37.01.01.712.02[11] and IDAPA 37.01.01.730.02.[12] The Hearing Officer's *Letter* did not purport to amend or modify the *Order*, and it is not clear that merely issuing the *Letter* could have properly amended or modified the *Order* since it does not indicate that the Hearing Officer was acting on his own motion or that he was withdrawing the *Order* and issuing a substitute order. *See* IDAPA 37.01.01.760 ("A hearing officer issuing a recommended or preliminary order may modify the recommended or preliminary order on the hearing officer's own motion within

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[9] "A preliminary order shall include: (a) A statement that the order will become a final order without further notice; and (b) The actions necessary to obtain administrative review of the preliminary order." I.C. § 67-5245(1).

[10] "An order must be in writing and shall include: (a) A reasoned statement in support of the decision. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts of record supporting the findings. (b) A statement of the available procedures and applicable time limits for seeking reconsideration or other administrative relief." I.C. § 67-5248(1).

[11] "Pursuant to Section 67-5248, Idaho Code, an order that determines the legal rights or interests of one (1) or more parties must be in writing and shall include the following: . . . An order shall contain a statement of the available procedures and applicable time limits for seeking reconsideration or other administrative relief." IDAPA 37.01.01.712.02.

fourteen (14) days after issuance of the recommended or preliminary order by withdrawing the recommended or preliminary order and issuing a substitute recommended or preliminary order.").

Third, even if the Hearing Officer's *Letter* could have properly re-characterized the *Order* as a "final agency action" pursuant to IDAPA 37.01.01.402.01 (the rule cited in the *Letter*), the Hearing Officer did not provide the correct information that must accompany such an order. *See* IDAPA 37.01.01.402.02.[13] Instead, the Hearing Officer provided "Explanatory Information to Accompany a Final Order . . . (Required by Rule of Procedure 740.02)." (Emphasis added). This "Explanatory Information" states that "[t]he accompanying order is a "**Final Order**" issued by the department pursuant to section 67-5246, Idaho Code." (Emphasis in original). Section 67-5246 does not apply to a purported "final agency action" issued by a non-agency head Hearing Officer on a petition for declaratory ruling. Rather, Section 67-5246 addresses final orders issued by the agency head where (1) he was acting as the presiding officer, (2) he reviewed a recommended order, or (3) he reviewed a preliminary order. Sylte's petition

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[12] "Every preliminary order must contain or be accompanied by a document containing the following paragraphs or substantially similar paragraphs: [describing available procedures and applicable time limits for seeking reconsideration or other administrative relief]." IDAPA 37.01.01.730.02.

[13] "The order issuing the declaratory ruling shall contain or must be accompanied by a document containing the following paragraphs or substantially similar paragraphs:

a. This is a final agency action issuing a declaratory ruling.

b. Pursuant to Sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by this declaratory ruling may appeal to district court by filing a petition in the District Court in the county in which:

i. A hearing was held;

ii. The declaratory ruling was issued;

iii. The party appealing resides; or

iv. The real property or personal property that was the subject of the declaratory ruling is located.

c. This appeal must be filed within twenty-eight (28) days of the service date of this declaratory ruling. See Section 67-5273, Idaho Code."

IDAPA 37.01.01.402.02.

for declaratory ruling sought relief under Idaho Code § 67-5232,[14] so the "Explanatory Information to Accompany a Final Order" referencing Section 67-5246 is not applicable, and does not accurately describe the procedures available to Sylte.

In short, because the Hearing Officer's *Order* was not issued by the agency head, and his *Letter* and the "Explanatory Information to Accompany a Final Order" did not comply with Idaho law or IDWR's Rules of Procedures, the *Order* does not appear to be a final order or a final agency action.

II. The Hearing Officer's *Order* is contrary to the *Memorandum Decision,* the *Decree*, and Idaho law.

A. Introduction

This case involves Sylte's *Petition for Declaratory Ruling* filed on February 16, 2017 ("*Sylte's Petition*"). *Sylte's Petition* asked the Department to reverse and set aside the *Instructions* because they incorrectly limit the distribution of water to water right no. 95-0734 to the "natural tributary inflow to Twin Lakes." Sylte contends that this limitation is contrary to the *Memorandum Decision*, the *Decree*, and Idaho's prior appropriation doctrine.

Because this case involves purely legal questions—*i.e.*, how IDWR must distribute water according to the *Memorandum Decision*, the *Decree*, and Idaho's prior appropriation doctrine—and no disputed facts, Sylte filed *Sylte's MSJ* requesting judgment as a matter of law without the need for an evidentiary hearing. Twin Lakes Improvement Association ("TLIA") agreed that the case could be decided on summary judgment. *Twin Lakes Improvement Association's Memorandum in Support of Cross-Motion for Summary Judgment and in Opposition to Sylte's*

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[14] The Hearing Officer's *Letter* incorrectly cited Section 67-5255 as the statute relevant to a declaratory ruling in this proceeding.

Motion for Summary Judgment at 2 (July 7, 2017) ("TLIA agrees that this matter can be decided in summary judgment, based upon the record, and that an evidentiary hearing is not necessary.").

As mentioned, the Hearing Officer's *Order* denied *Sylte's MSJ,* granted *TLIA's MSJ*, and upheld and *sua sponte* amended the *Instructions.*

For the sake of brevity, Sylte refers the Director to Sylte's summary judgment briefing, and particularly *Sylte's Opening Brief* (pages 1-12) and *Sylte's Response* (pages 1-2), for further factual and procedural background in this matter and with respect to Judge Magnuson's findings and conclusions in his *Memorandum Decision* and *Decree.* Also, in addition to the issues and arguments set forth herein, Sylte incorporates by reference *Sylte's Opening Brief, Sylte's Reply*, and *Sylte's Response.*

B. The Hearing Officer ignored Judge Magnuson's express findings and conclusions about Twin Lakes' natural outflow.

In his *Memorandum Decision*, Judge Magnuson made extensive findings and conclusions concerning the history and hydrology of the Twin Lakes – Rathdrum Creek water system. Many of these findings and conclusions specifically addressed the nature of the water system in 1875, when Sylte appropriated water right no. 95-0734 from Rathdrum Creek.

In summary, Judge Magnuson found that at the time water right no. 95-0734 was appropriated in 1875, there was sufficient water in Rathdrum Creek, furnished from the waters of Twin Lakes (then called Fish Lakes), to satisfy the water right on a continuous year-round basis. *Memorandum Decision* at 11. He also found that, at that time, Rathdrum Creek was the sole natural outlet of Twin Lakes—a natural lake that typically filled with water during spring high flows, and gradually decreased in capacity during the summer months as water flowed out of Twin Lakes into Rathdrum Creek over the top of the natural lake obstruction during periods of high water and through the natural obstruction at all times. *Memorandum Decision* at 10-11.

Judge Magnuson also found that, in 1906, a dam and outlet structure were constructed at the natural outlet of Twin Lakes. *Memorandum Decision* at 10. He expressly found that this structure did not actually increase the amount of water above what had been naturally stored in Twin Lakes, but rather it merely "h[e]ld the water at a higher point longer through the summer months." *Id.* In other words, prior to construction of the dam and outlet structure, Twin Lakes' held the same volume of water as afterward, and that water naturally and gradually flowed from Twin Lakes into Rathdrum Creek throughout the summer, lowering the water level in Twin Lakes. Basic hydrology dictates that Twin Lakes' level naturally and gradually dropped throughout the summer because natural outflow would at those times exceed the natural inflow. Judge Magnuson determined that this natural outflow—which during the summer months would exceed the natural inflow—always satisfied the Sylte's water right no. 95-0734 on a continuous year-round basis. *Memorandum Decision* at 11-13. Thus, the distribution of water to water right no. 95-0734 is not limited by Twin Lakes' tributary inflow, as stated in the *Instructions*.

The Hearing Officer completely ignored this aspect of Judge Magnuson's *Memorandum Decision*. This was clear error. These findings and conclusions unambiguously answer the questions presented in Sylte's summary judgment motion: whether the delivery of water to water right no. 95-0734 is limited by the amount of natural tributary inflow to Twin Lakes; whether the application of the futile call doctrine as applied to water right no. 95-0734 is dependent on the amount of natural tributary inflow to Twin Lakes; and whether the *Instructions* should be set aside because they require that the distribution of water to water right no. 95-0734 be limited to Twin Lakes' natural tributary inflow.

For example, the Hearing Officer omitted Judge Magnuson's express findings that the second and third "blocks" of storage in Twin Lakes (held by the 1906 storage rights) is the same

volume of water that was natural lake storage prior to the 1906 construction of the dam and outlet structure. *Order* at 4-5. By doing so, the Hearing Officer failed to recognize that all of the water currently stored in Twin Lakes was the same natural lake storage that furnished the natural outflow to Rathdrum Creek in sufficient amounts to satisfy water right no. 95-0734 at all times, on a continuous year-round basis when it was appropriated in 1875. *Memorandum Decision* at 11.

Similarly, the Hearing Officer cites "[t]hree key statements" from Judge Magnuson's findings and conclusions that he alleges Sylte relies on, *Order* at 7-8, but he ignores Judge Magnuson's findings and conclusions (and Sylte's arguments) about the amount of natural outflow from Twin Lakes prior to 1906. Sylte's summary judgment briefing included extensive argument on this subject (*see, e.g., Sylte's Reply* at 2-6) which is incorporated herein by reference.

The Hearing Officer also mischaracterized Sylte's argument as asserting an entitlement to the water "stored" in Twin Lakes. *See, e.g., Order* at 8. As Sylte's summary judgment briefing makes clear, Sylte does not claim an entitlement to artificially stored waters in Twin Lakes, but rather the natural, pre-dam outflow to Rathdrum Creek from Twin Lakes which was supplied by natural lake storage. *See, e.g., Sylte's Reply* at 2; *see also Sylte's Response to Twin Lakes Improvement Association's Cross-Motion for Summary Judgment* ("*Sylte's Response*") at 9 ("In sum, contrary to TLIA's assertions, Sylte is not asserting a right to artificially stored waters in Twin Lakes. 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." (internal quotation marks and citation omitted)).

Very simply, Sylte is entitled to the natural, pre-dam outflow because water right no. 95-0734's priority is senior to the 1906 storage rights—another fundamental principle the Hearing Officer ignored. Nowhere does the Hearing Officer explain how junior water rights can be entitled to interfere with a senior's natural flow. Idaho law simply does not allow this. *See Sylte's Reply* at 7-11.

Nevertheless, the Hearing Officer's analysis elevates the junior storage rights over the Sylte's senior water right by mischaracterizing the water stored in Twin Lakes pursuant to the 1906 storage rights as not subject to "re-appropriation." *Order* at 10. This approach warps time and Idaho's priority system. Of course Sylte's 1875 water right did not appropriate waters appropriated in 1906—Sylte's right came first! Indeed, as the most senior right on the system, Sylte's water right no, 95-0734 obviously appropriated unappropriated waters. The 1906 storage rights, on the other hand, appropriated water subject to Sylte's 1875 right and therefore, must be administered as junior to Sylte's right.

In sum, there is no support for the Hearing Officer's reasoning that "[b]ecause the water stored pursuant to Water Rights Nos. 95-0973 and 95-0974 has been appropriated and is, therefore, owned by the owners of those water rights, it cannot be 'the source of [Sylte's] appropriation." *Order* at 10. The Hearing Officer's logic would mean that a junior upstream reservoir is not required to let water pass to downstream senior right holders which, of course, is contrary to fundamental prior appropriation principles. The Hearing Officer's logic also ignores Judge Magnuson's findings that prior to 1906 Twin Lakes supplied water to Rathdrum Creek on a continuous year-round basis and, thus, such waters were the source of the Sylte's

appropriation. *Memorandum Decision* at 11. *See also Decree* at xvi, Finding of Fact No. 13 ("Fish Creek is tributary to Twin Lakes which is tributary to Rathdrum Creek.").

Following on these errors, the Hearing Officer read amended Conclusion of Law No. 14 in a manner which gives no effect to Judge Magnuson's express findings and conclusions about the pre-dam natural outflow from Twin Lakes that always satisfied water right no. 95-0734 on a continuous year-round basis. The portion of amended Conclusion of Law No. 14 relied on by the Hearing Officer states that "Water Right No. 95-0734 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." *Order* at 10. He says this language is "unambiguous." *Id.* However, the Hearing Officer does not attempt to reconcile this single statement with the rest of the *Decree* and *Memorandum Decision*. 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*, 124 Idaho 132, 138, 857 P.2d 611, 617 (1993) (citing *Magic Valley Radiology Assocs., P.A. v. Profl Bus. Servs., Inc.*, 119 Idaho 558, 565, 808 P.2d 1303, 1310 (1991)) [hereinafter "*Twin Lakes*"]. "[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; *see also Rangen, Inc. v. Idaho Dep't of Water Res.,* 159 Idaho 798, 367 P.3d 193, 202 (2016) (holding that water decrees are interpreted "using the same interpretation rules that apply to contracts").

As explained in Sylte's summary judgment briefing and above, the only way to read this single statement from amended Conclusion of Law No. 14 consistently with Judge Magnuson's extensive findings and conclusions about the pre-1906 natural conditions present when water right no. 95-0734 was appropriated is to conclude that Sylte's water right no. 95-0734 is entitled

to the natural pre-1906 outflow from Twin Lakes, which pre-dates and is distinct from the artificially "stored waters."

C. The Hearing Officer's futile call analysis is incorrect.

The Hearing Officer's futile call analysis is flawed because it is predicated on the amount of tributary inflow to Twin Lakes. *Order* at 12-13. As already discussed, the water right no. 95-0734 is not limited by Twin Lakes' tributary inflow. Accordingly, the application of the futile call doctrine to water right no. 95-0734 is not dependent on Twin Lakes' tributary inflow.

The Hearing Officer's futile call analysis relies on the Director's "discretion" in the administration, citing the Idaho Supreme Court's decision in SRBA Basin Wide Issue 17, *In re SRBA*, 157 Idaho 385, 336 P.3d 792 (2014) [hereinafter "*BW 17*"]. But he ignores critical language in that decision that strictly limits the Director's discretion:

> [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. However, it is within the Director's discretion to determine when that number has been met for each individual decree. In short, the Director simply counts how much water a person has used and makes sure a prior appropriator gets that water before a junior user. Which accounting method to employ is within the Director's discretion and the Idaho Administrative Procedure Act provides the procedures for challenging the chosen accounting method.

BW 17, 157 Idaho at 393-94, 336 P.3d at 800-01 (quotation marks and citation omitted). This passage makes clear that the Director's discretion to choose accounting methodologies is constrained by water right decrees and Idaho's priority system. He does not have discretion to pick a junior water right over a senior water right. As the Supreme Court said, "the Director cannot distribute water however he pleases at any time in any way; he must follow the law." *BW 17*, 157 Idaho at 393, 336 P.3d at 800. "[A]s long as the Director distributes water in accordance with prior appropriation, he meets his clear legal duty." *Id.*

Without any citation to authority, the Hearing Officer says the Director "is responsible for balancing the right to divert water against the obligation not to waste it." *Order* at 13. Whatever these asserted responsibilities and obligations might involve, they cannot mean that a senior can be deprived of water by a junior when there is sufficient water upstream to reach the senior's headgate.

> 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.

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

In any case, even if the Director's discretion extended as far as the Hearing Officer suggests, a conclusion that delivering water to water right no. 95-0734 is wasteful cannot be reconciled with the Department's prior determination 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).[15]

D. The Hearing Officer improperly reviewed and used documents outside the record.

The Hearing Officer's *Order* cites and quotes from two documents that are not a part of the record in this proceeding. Doing so violated Sylte's due process right to notice and a

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[15] 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

meaningful opportunity to respond, as well as the Department's Rules of Procedure. *See, e.g.*, IDAPA 37.01.01.650 ("The agency shall maintain an official record for each contested case and (unless statute provides otherwise) base its decision in a contested case on the official record for the case.").

First, the Hearing Officer quoted Sylte's predecessor's *Objection to Proposed Findings of Water Rights* ("*Sylte Objection*"),[16] filed March 20, 1985, in the proceedings before Judge Magnuson. *Order* at 6. Second, he cited and quoted IDWR's *Notice of Entry of Final Decree* ("*IDWR Notice*") filed after Judge Magnuson's *Decree* was entered. *Order* at 9. Reviewing, citing, or quoting from either of these was clear error.

The Hearing Officer did not find any ambiguity in the *Decree* or *Memorandum Decision* that would justify looking outside their four corners. "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). Indeed, the Hearing Officer's only comment as to whether he found the *Decree* or *Memorandum Decision* ambiguous is with respect to Conclusion of Law No. 14, which he calls "unambiguous." *Order* at 10.

In addition, no party put either document this proceeding's record, the Hearing Officer did not take official notice of them under Rule of Procedure 602 (IDAPA 37.01.01.602), and no party received notice of them before the issuance of the *Order* or was given an opportunity to contest or rebut them as required by that rule. Accordingly, it was error for the Hearing Officer to review and quote from such documents in his findings and conclusions. IDAPA

Affidavit, and are incorporated herein by reference. The Department's decision was not appealed. *Decree* at xvi (Finding of Fact No. 11).

[16] Sylte's predecessor-in-interest that filed the objection included John and Evelyn Sylte, Gordon and Judith Sylte, and Sylte Ranch, Inc.

37.01.01.712.01 ("Findings of fact must be based exclusively on the evidence in the record of the contested case and on matters officially noticed in that proceeding."). The Hearing Officer's review and quotation of these documents in the *Order* violated Idaho law, IDWR's Rules of Procedure, and Sylte's due process right to notice and a meaningful opportunity to respond.

In any case, even if *Sylte's Objection* and *IDWR's Notice* were properly in the record, they do not support the conclusions reached by the Hearing Officer.[17] Of course, because Sylte contends the *Memorandum Decision* and *Decree* are unambiguous, there is no reason to look outside their four corners at these other documents. Nevertheless, since the *Order* quotes from them, Sylte addresses them briefly here.

Concerning *Sylte's Objection*, the Hearing Officer mischaracterized its substance by selectively quoting from it, and implying (if not asserting outright) that Judge Magnuson rejected the same arguments Sylte is making in this proceeding. *Order* at 6-8.

The full context of the language the Hearing Officer quoted from *Sylte's Objection* is as follows:

> 2) As to paragraph 11 [of the Proposed Finding's Conclusions of Law],[18] Syltes specifically object that any rights of storage to the water rights

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[17] In offering argument concerning *Sylte's Objection* and *IDWR's Notice*, Sytle in no way admits that additional documents are needed to interpret the *Memorandum Decision* and *Decree*. As already argued, the *Decree* and *Memorandum Decision* unambiguously support Sylte's summary judgment arguments and petition for declaratory ruling. Also, Sylte in no way waives any argument or issue, now or on appeal, that the Department's citation and quotation of such documents violated Idaho law, IDWR's Rules of Procedure, and Sylte's due process rights. Nor does Sylte waive its right to meaningfully respond to such documents with further argument or other documents, if necessary.

[18] Paragraph 11 of the Proposed Finding's Conclusions of Law (which was later amended to be paragraph 12) stated:

> Only two water rights identified herein, Nos. 95-0973 and 95-0974, are entitled to store water and to make beneficial use of stored waters in Twin Lakes. All other water rights with source of Twin Lakes tributary to Rathdrum Creek are direct flow water rights and are entitled to divert, on the basis of priority, a combined rate of flow equal to the inflow to the lakes. Stated in another manner, direct flow water rights can be utilized to divert from Twin Lakes only if the diversions do not injure the storage water rights in Twin Lakes.

known as 95-0973 and 95-0974 as storage water, are senior to the water rights of Syltes, number 95-0734. Sytles are entitled to their water rights based upon priority on a combined rate of flow to the lake plus stored water down to the 0.0 staff gauge level. The direct flow right of the Syltes has priority over the storage rights of 95-0973 and 95-0974.

As to paragraph 11, paragraph 2, Syltes do not understand what Conclusion of Law is being proposed as it affects the rights of Syltes and therefore object to the same.

3) As to Paragraph 13 [of the Proposed Finding's Conclusions of Law],[19] Syltes water rights are senior to any storage rights above the 0.0 level of Twin Lakes. When the level of water is 0.0 on the Staff Gauge, then at that time the downstream use may be restricted only after all junior water right holders, including homeowners on the lakes have been restricted as to their use.

Sylte Objection at 4. Thus, the thrust *Sylte's Objection* is clear: IDWR's *Proposed Finding* took the position that "direct flow water rights . . . are entitled to divert, on the basis of priority, a combined rate of flow equal to the inflow to the lakes" and that "direct flow water rights can be utilized to divert from Twin Lakes only if the diversions do not injure the storage water rights in Twin Lakes," and Sylte objected to that contention because their 1875 "direct flow right . . . has priority over the storage rights of 95-0973 and 95-0974" and "Syltes water rights are senior to any storage rights above the 0.0 level of Twin Lakes." As already discussed, Judge Magnuson agreed with Sylte. Indeed, he expressly rejected IDWR's contentions in favor of Sylte's. *Memorandum Decision* at 14 ("[t]o accept the [D]epartment's interpretation of the facts as they

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From November 1 of each year until March 31 of the next year, the two storage water rights enable Twin Lakes to be filled to the level of 10.4 feet on the Staff Gauge. From April 1 to October 31of each year, the rights to fill the lakes is superseded by the right of existing and future direct flow vater rights to divert natural inflows to the lakes. Thus from April 1 to October 31 of each year the level of Twin Lakes will decrease due to evaporation and seepage losses, during the periods when direct flow water rights divert the natural inflows.

[19] Paragraph 13 of the Proposed Finding's Conclusions of Law (which was later amended to be paragraph 14) stated:

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.

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.").

Concerning *IDWR's Notice*, it simply cannot be relied on to accurately reflect the meaning of Judge Magnuson's *Memorandum Decision* or *Decree*. *IDWR's Notice* was filed by IDWR after the entry of the *Memorandum Decision* and *Decree*. It is not a statement by Judge Magnuson, and therefore is has no bearing on the meaning of his *Memorandum Decision* or *Decree*. At most it is IDWR's self-serving, *post hoc* re-statement of the arguments rejected by Judge Magnuson. Its entire main text (excluding captions, signature lines, etc.) is as follows:

> TO: ALL CLAIMANTS OF RIGHTS TO SURFACE WATER FROM THE TWIN LAKES - RATHDRUM CREEK DRAINAGE BASIN
>
> YOU ARE HEREBY NOTIFIED THAT:
>
> A general adjudication of rights to the use of surface water from the Twin Lakes - Rathdrum Creek Drainage Basin was commenced by order of the District Court on January 10, 1975. The Director of the Idaho Department of Water Resources filed a Proposed Finding of Water Rights in the Twin Lakes - Rathdrum Creek Drainage Basin on January 14, 1985.
>
> The Proposed Finding was amended twice; first to delete one water right that was not properly included in the adjudication, and second to add a page entitled Claims Not Submitted. Four objections were filed to the Proposed Finding, and trial on the objections was held May 12-14, 1988. A Memorandum Decision was entered by the District Court on February 22, 1989. Pursuant to the Memorandum Decision, the Proposed Finding was amended to reflect the court's determination that, when seepage and evaporation from Twin Lakes exceed natural tributary inflow to Twin Lakes, Water Right No. 95-0734 is entitled to divert the natural tributary inflow to Twin Lakes on the basis of water right priority. A Final Decree dated April 19, 1989, was issued by the District Court that incorporated by reference the Proposed Finding as amended.
>
> A copy of the Final Decree (or any other documents filed in this adjudication) can be obtained from the Idaho Department of Water Resources or the District Court Clerk for Kootenai County, subject to payment of costs for mailing and/or copying.

When this occurs, water rights that divert from Twin Lakes and from the tributaries to Twin Lakes may divert the natural flow, but not stored waters, on the basis of water right priority.

The underlined portion of the above quote is the only portion quoted by the Hearing Officer. *See Order* at 9.

There simply was no reason for *IDWR's Notice* to include the underlined statements other than to place a stake in the ground should IDWR want to later re-argue the positions rejected by Judge Magnuson. Judge Magnuson made a number of findings and conclusions about a number of matters,[20] making it odd (to say the least) that IDWR would single out and offer further explanation about only water right no. 95-0734.

In short, the Hearing Officer should not have reviewed, cited, or quoted any documents outside the record, and should not have cherry-picked self-serving statements outside the four corners of the *Memorandum Decision* and *Decree*. Doing so was prejudicial to Sylte and must be reversed.

E. The Hearing Officer erred by *sua sponte* adding a volume limitation to the *Instructions.*

Without any party asking, and without it being an issue presented in this proceeding, the Hearing Officer improperly decided that he would add a volume limitation to the *Instructions*. *Order* at 11, 13. This must be reversed because it was outside his authority, outside the issues raised in this proceeding, and because it misapplies whatever volume limitation must be imposed on water right 95-0734.

No party raised the Hearing Officer's volume limitation at any point in this proceeding, which concerns whether the distribution of water to Sylte's water right no. 95-0734 is limited to

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[20] For example, Judge Magnuson made findings and conclusions about the nature of the natural lake storage prior to the dam and outlet construction, and also the nature of an unnamed stream that was tributary to Rathdrum Creek immediately below Twin Lakes' outlet prior to the dam and outlet construction. But *IDWR's Notice* makes no mention of such other findings.

Twin Lakes' natural tributary inflow. Accordingly, Sylte had no notice of this issue or any opportunity to address it, in violation of Sylte's due process rights.

Moreover, even if this was an appropriate issue to address in this proceeding, the Hearing Officer incorrectly determined how a volume limit should be administered. Sylte's water right no. 95-0734 is entitled to divert 4.10 acre-feet per year in priority (*i.e.,* not counting excess water diverted under so-called "free river" conditions), not merely to have that amount "delivered" at their point of diversion. *Order* at 13.

"Procedural due process is the aspect of due process relating to the minimal requirements of notice and a hearing if the deprivation of a significant life, liberty, or property interest may occur." *Bradbury v. Idaho Judicial Council*, 136 Idaho 63, 72, 28 P.3d 1006, 1015 (2001). With neither notice nor opportunity to be heard regarding the Hearing Officer's *sua sponte* addition of a volume limit to the *Instructions*, he deprived Sylte of a significant property right in violation of Sylte's due process rights.

III. Conclusion

For reasons set forth above, and in Sylte's summary judgment briefing, and based on the record in this case, Sylte requests the Director reverse and set aside the Hearing Officer's *Order* and issue a final order granting *Sylte's MSJ* and denying *TLIA's Amended MSJ.* Sylte also requests the Director to determine whether the *Order* is a preliminary order or a final order or final agency action. Sylte further requests a hearing before the Director pursuant to Idaho Code § 42-1701A(3), on the grounds described herein.

Respectfully submitted this 20th day of September, 2017.

GIVENS PURSLEY LLP

Michael P. Lawrence
Jack W. Relf
Attorneys for Gordon Sylte, Susan Goodrich, John Sylte, and Sylte Ranch Limited Liability Company

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of September, 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 following[21]:

DOCUMENT FILED:

Gary Spackman, Director, Idaho Department of Water Resources 322 East Front Street P.O. Box 83720 Boise, ID 83720-0098	☐ ☒ ☐ ☐ ☐	U. S. Mail Hand Delivered Overnight Mail Facsimile E-mail

DOCUMENT SERVED:

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(CONSENTED TO EMAIL SERVICE)

Representing or Spokesperson for:

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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

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

[21] The certificate of service is taken from the *Order Regarding Certificate of Service*, issued July 20, 2017, by the Hearing Officer. Mr. Semanko's address and information has been updated to reflect his *Notice of Firm Name and Address Change* dated August 16, 2017. Also, as requested by Mr. Michael C. Dempsey and as indicated on his June 22, 2017 *Form Required by May 26, 2017, Order,* email is included as a method of service for Estate of Carmela G. Dempsey and Curran D. Dempsey Disclaimer Trust. Also, it has been updated to reflect the dismissal of Colby and Kathy Clark on September 6, 2017.

Twin Lakes/Rathdrum Creek FDC #17
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(CONSENTED TO EMAIL SERVICE)

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COURTESY COPY:

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Boise, ID 83720-0098

- ☐ U. S. Mail
- ☒ Hand Delivered
- ☐ Overnight Mail
- ☐ Facsimile
- ☐ E-mail

Michael P. Lawrence