

**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

**ORDER ON MOTIONS FOR
SUMMARY JUDGMENT; ORDER
AMENDING INSTRUCTIONS;
ORDER VACATING HEARING
DATES AND SCHEDULE**

I. BACKGROUND

On February 16, 2017, Gordon Sylte, Susan Goodrich, John Sylte, and Sylte Ranch Limited Liability Company (collectively, "Sylte") filed with the Idaho Department of Water Resources ("Department") *Sylte's Petition for Declaratory Ruling* ("Petition") pursuant to Idaho Code § 67-5232 and Rule 400 of the Department's Rules of Procedure (IDAPA 37.01.01.400).

In the Petition, Sylte requests the Department issue an order "reversing and setting aside" the September 20, 2016, letter ("Instructions") the Department sent to the watermaster of Water District 95C ("WD95C"). *Petition* at 6. The Instructions require the watermaster to adhere to detailed directives contained therein for administering water rights pursuant to the *Final Decree*, In the Matter of the General Determination of the Rights to the Use of the Surface Waters of Twin Lakes, Including Tributaries and Outlets, Case No. 32572 (1st Jud. Dist. Ct. April 20, 1989) ("Decree"). Sylte asserts the Instructions "are contrary to the [Decree] and are not in accordance with the prior appropriation doctrine as required by Idaho Code Section 42-602." *Id.* at 1. Sylte also asserts the prior appropriation doctrine and Decree "require delivery of water to Sylte's water right no. 95-0734 on a continuous year-round basis irrespective of the amount of natural tributary inflow into Twin Lakes or the application of the futile call doctrine." *Id.* at 1-2.

On April 14, 2017, the Director of the Department (Director) issued the *Notice of Prehearing Conference; Order Setting Deadline for Petitions to Intervene and Appointing Hearing Officer* ("Notice"), scheduling the prehearing conference in this matter for May 22, 2017, and appointing Shelley Keen as the hearing officer. The Notice stated that "those seeking to intervene must be represented at the prehearing conference in person or by telephone." *Notice* at 2. The Department received over seventy petitions to intervene prior to the date set for the prehearing conference.

On May 22, 2017, the hearing officer held the prehearing conference.¹ On June 14, 2017, the hearing officer issued an *Order Authorizing Discovery; Scheduling Order; Notice of*

¹ Between May 26, 2017, and July 20, 2017, the hearing officer issued a series of orders regarding intervention, requiring submittal of information regarding the parties' intended level of participation and representation in the

Hearing; Order Requiring Notice Regarding Participation adopting a schedule including a July 28, 2017, deadline for dispositive motions and scheduling a hearing for October 23, 2017, through October 27, 2017, as necessary.

On June 26, 2017, the Department received *Sylte's Motion for Summary Judgment* ("Sylte's Motion") and *Sylte's Memorandum in Support of Motion for Summary Judgment* ("Sylte's Memorandum in Support") seeking the Department's ruling on the matter set forth in the Petition without a fact-finding hearing. On July 6, 2017, the Department received *Clark's Response to Sylte's Motion for Summary Judgment* ("Clark's Response") seeking denial of the Petition. On July 7, 2017, the Department received *Twin Lakes Improvement Association's Cross-Motion for Summary Judgment* ("TLIA's Cross-Motion") 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* seeking the Department's denial of the Petition and upholding of the Instructions without a fact-finding hearing. On July 13, 2017, the Department received *Sylte's Reply Memorandum in Support of Motion for Summary Judgment*. On July 20, 2017, the Department received *Sylte's Response to Twin Lakes Improvement Association's Cross-Motion for Summary Judgment*. On July 27, 2017, the Department received *Twin Lakes Improvement Association's ("TLIA") Reply in Support of Twin Lakes Improvement Association's Cross-Motion for Summary Judgment*. On July 28, 2017, the Department received *TLIA's Errata to Reply in Support of Twin Lakes Improvement Association's Cross-Motion for Summary Judgment*.

If granting either Sylte's Motion or TLIA's Cross-Motion for summary judgment is appropriate, the Department must decide, without a fact-finding hearing, the two questions raised by Sylte about the Instructions for administration of water rights in WD95C. Those two questions are:

- Pursuant to the Prior Appropriation Doctrine and the Decree, is Water Right no. 95-0734 entitled to delivery on "a continuous year-round basis irrespective of the amount of natural tributary inflow into Twin Lakes"? *Sylte's Memorandum in Support* at 13; *Petition* at 18.
- Is the futile call doctrine with respect to Water Right no. 95-0734 dependent on the amount of natural tributary inflow to Twin Lakes?² *Sylte's Memorandum in Support* at 24.

contested case, and dismissing parties for failure to comply with such requirements. These orders are discussed in detail in the hearing officer's July 20, 2017, *Order Regarding Certificate of Service*.

² In Sylte's Petition, this question is broadly proffered as whether Water Right no. 95-0734 should be satisfied "irrespective . . . of the futile call doctrine." *Petition* at 18. Sylte's Memorandum in Support more narrowly frames the issue, asserting that "the futile call doctrine with respect to water right no. 95-0734 is not dependent on the amount of natural tributary inflow to Twin Lakes." *Sylte's Memorandum in Support* at 24.

Other parties – including TLIA and Colby Clark³ – assert the Instructions are correct and that Sylte cannot call for delivery of water stored in Twin Lakes to satisfy Water Right no. 95-0734.

II. SUMMARY JUDGMENT STANDARD

The Department's Rules of Procedure (IDAPA 37.01.01) do not explicitly authorize motions for summary judgment. The rules do, however, authorize the filing of pre-hearing motions, which would include motions for summary judgment. *See* IDAPA 37.01.01.565. Although the Idaho Rules of Civil Procedure generally do not apply to contested cases before the Department (*see* IDAPA 37.01.01.052), the Department relies on the standards set forth in Rule 56 of the Idaho Rules of Civil Procedure and the associated case law as a guide for addressing motions for summary judgment. A motion for summary judgment may be granted if a hearing officer determines that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *See* Rule 56, I.R.C.P. In this case, none of the parties identified any genuine issues of material fact that would prevent the hearing officer from issuing a decision on Sylte's Motion and TLIA's Cross-Motion.

III. IS WATER RIGHT NO. 95-0734 ENTITLED TO DELIVERY ON A CONTINUOUS YEAR-ROUND BASIS IRRESPECTIVE OF THE AMOUNT OF NATURAL TRIBUTARY INFLOW INTO TWIN LAKES?

The Twin Lakes – Rathdrum Creek Watershed

In general terms, the Twin Lakes – Rathdrum Creek watershed functions as follows:

1. The Twin Lakes - Rathdrum Creek watershed is dominated by two interconnected lakes, the Twin Lakes, situated north of the City of Rathdrum in Kootenai County in northern Idaho. Numerous small streams flow into Twin Lakes. The largest stream flowing into Twin Lakes is Fish Creek, which flows into the westernmost end of the upper (northernmost) of the Twin Lakes. The only surface outflow from the Twin Lakes is Rathdrum Creek, which flows from the lower (southernmost) of the Twin Lakes southward toward the City of Rathdrum, which is about three miles away.

2. The outflow from Twin Lakes passes through a man-made "dam and outlet structure" constructed around the turn of the century. The outlet control "enabled a portion of the water stored in Lower Twin Lake to be released downstream to Rathdrum Creek."

³ At the time Colby Clark asserted the Instructions are correct, he was a party. Since then, Sylte moved to dismiss Colby Clark and Kathy Clark as parties because they no longer own Water Right No. 95-876 and, therefore, no longer have a direct or substantial interest. On September 6, 2017, the Hearing Officer issued an *Order Dismissing Colby Clark and Kathy Clark as Parties and Denying Request to Strike Documents*.

Order on Exceptions Re: Amended Preliminary Order Removing a Watermaster (“Order on Exceptions”), Docket No. C-RWM-2016-001, pages 4-5 (April 24, 2017) (internal citations omitted).

The Water Rights

On January 14, 1985, the Director of the Department at that time filed a *Proposed Finding of Water Rights in the Twin Lakes - Rathdrum Creek Drainage Basin* (“Proposed Finding”). *Decree* at 1-2. The Proposed Finding includes, among other things, “general findings of fact and conclusions of law” and “a listing of water rights.” *Id.* at 2.

On April 19, 1989, District Judge Richard G. Magnuson signed the Decree, incorporating by reference his February 22, 1989, *Memorandum Decision* (“Memorandum Decision”) in the case as findings of fact and conclusions of law. *Id.* at 2-3. Judge Magnuson also incorporated by reference the Proposed Finding with certain amendments and attached “the amended proposed findings and conclusions” (“Amended Proposed Finding”) to the Decree. *Id.* at 2-4.

Water Right no. 95-0734, which has the following elements, is among the water rights listed in the Proposed Finding:

Owner:	Sylte, John; Sylte, Evelyn
Source:	Rathdrum Creek tributary to Sinks
Priority Date:	05-01-1875
Purpose of Use:	Stockwater
Season of Use:	01-01 to 12-31
Diversion Rate:	.07 cfs
Diversion Volume:	4.10 AFA
Point of Diversion:	LT04 S30 T52N R04W
Place of Use:	LT04 S30 T52N R04W
Remarks:	For 300 head of stock. Natural flow appropriation.

Proposed Finding at 3.

The 1875 priority date for Water Right no. 95-0734 is the most senior priority date of the water rights confirmed in the Decree.

Judge Magnuson confirmed three “blocks” of storage water in Twin Lakes relative to the staff gauge on the outlet control structure:

- “The first block of storage is the natural lake storage located between the bottom of the lake and Staff Gauge height 0.0 feet. No water right has been developed for the use of this water because it provides a base for the overlying storage rights.” *Amended Proposed Finding* at xv.

- The “second block of storage,” is located between 0.0 feet and 6.4 feet on the staff gauge. The right to store and beneficially use this block of water was decreed as Water Right no. 95-0974, which authorizes the year-round storage of 5,360 acre-feet (“AF”) of water in Twin Lakes for Recreation Storage purposes. *Amended Proposed Finding* at xv; *Proposed Finding* at 21. Filling can occur from November 1 to March 31. *Proposed Finding* at 21; *Amended Proposed Finding* at xix (Conclusion of Law 12). Right no. 95-0974 has a priority date of March 23, 1906. *Proposed Finding* at 21. Twin Lakes Improvement Association owns Water Right no. 95-0974. *Order on Exceptions* at 5.
- The “third block of storage,” is located between 6.4 feet and 10.4 feet on the staff gauge. The right to store and beneficially use this block of water was decreed as Water Right no. 95-0973, which authorizes the year-round storage of 3,730 AF of water in Twin Lakes for Recreation Storage and Wildlife Storage purposes. *Amended Proposed Finding* at xvi; *Proposed Finding* at 21. Filling can occur from November 1 to March 31. *Proposed Finding* at 21; *Amended Proposed Finding* at xix (Conclusion of Law 12). Right no. 95-0973 has a priority date of March 23, 1906. *Proposed Finding* at 21. Twin Lakes Rathdrum Creek Flood Control District 17 owns Water Right no. 95-0974. *Order on Exceptions* at 5.

Water Right nos. 95-0973 and 95-0974 are the only two rights “entitled to store water and to make beneficial use of stored water in Twin Lakes.” *Amended Proposed Finding* at xix (Conclusion of Law 12).

The Instructions

The Instructions address the administration of Water Right no. 95-0734 in relation to the water in Twin Lakes as follows:

From April 1 to October 31 each year, when seepage and evaporation losses from Twin Lakes exceed the total natural tributary inflow to Twin Lakes (as determined by decreasing lake level), no water will be released from the lakes to satisfy Rathdrum Creek water rights, except for water right no. 95-734. When this occurs, all or a portion of the natural tributary inflow to Twin Lakes, as measured by the watermaster, can be released to satisfy delivery of water right no. 95-734 with 0.07 cfs at the legal point of diversion. If all of the natural inflow must be released to satisfy water right no. 95-734, the watermaster shall curtail all junior direct flow water rights. If only a portion of the inflow is released to satisfy water right no. 95-734, the watermaster shall satisfy water rights that divert from Twin Lakes and its tributaries using the remainder of the natural flow, on the basis of water right priority.

From April 1 to October 31 of each year, when seepage and evaporation losses from Twin Lakes do not exceed the total natural tributary inflow (as determined by steady or increasing lake level), the watermaster shall distribute the

total natural tributary inflow to water rights that divert from Twin Lakes and its tributaries and Rathdrum Creek on the basis of water right priority.

Instructions at 2 (internal citations omitted).

In short, the Instructions state that Sylte's Rathdrum Creek water right, 95-0734, may be satisfied by passing some or all of the natural tributary inflow into Twin Lakes through the outlet control structure and into Rathdrum Creek, regardless of whether seepage and evaporation losses from Twin Lakes exceed the total natural tributary inflow. The practical result of the Instructions is that as natural tributary inflow into Twin Lakes declines throughout the dry summer months, the water available to satisfy Water Right no. 95-0734 also declines, possibly to a point at which there is insufficient water to satisfy the right.

Sylte's Argument

Sylte asserts the Instructions are inconsistent with the Decree because they limit the delivery of water through the Twin Lakes outlet control structure for the satisfaction of Water Right no. 95-0734 to the amount of natural tributary inflow into Twin Lakes. Sylte asserts they "are entitled to the delivery of water to the water right [95-0734] on a continuous year-round basis irrespective of the amount of natural tributary inflow into Twin Lakes." *Sylte's Memorandum in Support* at 13. If Sylte's assertion were accepted, when the natural flow of water in Rathdrum Creek and the natural tributary inflow into Twin Lakes are not sufficient to satisfy Water Right no. 95-0734, water stored in Twin Lakes would have to augment the natural flow in an attempt to create sufficient flow in Rathdrum Creek to satisfy Water Right no. 95-0734.

Sylte raised this same argument in the proceeding before Judge Magnuson. *See Civil Case No. 32572 Objection to Proposed Findings of Water Rights* (March 20, 1985) at 4 (asserting Sylte is entitled to "a combined rate of flow to the lake plus stored water down to the 0.0 staff gauge level" and that, "[w]hen 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."). In addressing Sylte's argument, Judge Magnuson stated the following:

From conflicting evidence this Court finds it was more probably true than not that the outlet waters of Twin Lakes flowed over the top of the lip during periods of high water and through the natural pre-dam obstruction at all times, forming the source waters for Rathdrum Creek.

This Court finds at the time the John Sylte and Evelyn Sylte Water Right #95-0734 was created in 1875 there was sufficient direct flow water in Rathdrum Creek, in its then natural condition, furnished from the water of Twin (Fish) Lakes, to provide 0.07 cubic foot per second to the appropriator on a continuous year-round basis.

...

This Court finds the natural state of Rathdrum Creek in 1875 was definitely not the same as the natural state in 1906 or now, assuming no storage

facilities had ever been built. There have been changes in the area which affect the inflow into Twin Lakes area and the natural storage of water therein. These would include such factors as changes in the climate and changes in the timber canopy in this drainage basin because of logging operation. - - - In addition, the natural flow condition of 1875, regarding Water Right #95-0734, was changed as a result of the construction of the dam and the outlet structure.

...

While such natural condition of Rathdrum Creek is found to have existed in 1875, it is apparent that such condition has not existed on a year-round basis at all times since the dam and outlet structure were constructed in 1906.

Since 1906, evaporation and seepage from the impounded waters of Twin Lakes sometimes exceed natural tributary inflow to Twin Lakes. At such times, Twin Lakes is not a significant source of water to Rathdrum Creek, except for Water Right #95-0734. Therefore, when evaporation and seepage from the impounded waters of Twin Lakes exceed natural tributary inflow to Twin Lakes, the Rathdrum Creek appropriators, except for John and Evelyn Sylte, No. 95-0734, are not entitled to the release of water from Twin Lakes, and the direct flow appropriators upstream from the outlet at the lower end of Lower Twin Lakes are entitled to divert the natural tributary inflow to Twin Lakes in accordance with their priorities.

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

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

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

Memorandum Decision at 11-13.

Three key statements reflecting the explanation above fuel Sylte's argument. First, Judge Magnuson stated:

At the time Water Right No. 95-0734 was created in 1875 there was sufficient direct flow water in Rathdrum Creek, in its then natural condition, furnished from the water of Twin Lakes, to provide 0.07 cfs to the appropriator on a continuous year-round basis.

Amended Proposed Finding at xvii (Finding of Fact 20). Second, he stated:

An appropriator is entitled to maintenance of the stream conditions substantially as they were at the time the appropriator made his or her appropriation, if a change in the stream conditions would interfere with the proper exercise of the water right.

Id. at xix (Conclusion of Law 11). And third, he stated:

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

Memorandum Decision at 13.

Relying on the passages quoted above, Sylte summarizes their argument in five statements on pages 18-19 of Sylte's Memorandum in Support, as follows:

- (1) "[A]n appropriator is entitled to maintenance of stream conditions substantially as they existed at the time of their appropriation."
- (2) "[T]here was always water to serve water right no. 95-0734 on a continuous year-round basis when it was appropriated in 1875."
- (3) "[T]he holders of water right no. 95-0734 are entitled to water as against the holders of the 1906 Storage Rights (not to mention all other junior rights)."
- (4) "[W]ater rights administration must give effect to 95-0734's priority over the 1906 Storage Rights."
- (5) "[O]ther water rights (i.e., water rights other than 95-0734) are limited to the natural tributary inflows to Twin Lakes."

Sylte asserts these determinations "unambiguously exclude Sylte's water right no. 95-0734 from the natural tributary inflow limitation placed on other Rathdrum Creek appropriators." *Sylte's Memorandum in Support* at 14-15.

Analysis

The question at issue is whether Sylte's senior priority date entitles it to water from Twin Lakes in excess of the natural tributary inflow, which would require water stored in Twin Lakes to be passed through the outlet control structure, causing a decline in the volume of water stored in Twin Lakes.

To answer this question, it is useful to first briefly summarize Sylte's right to the natural tributary inflow to Twin Lakes. In short, there is no question that Water Right no. 95-0734 entitles Syltes to the natural tributary inflow into Twin Lakes, up to the decreed amount, regardless of evaporation and seepage losses, when the natural flow of Rathdrum Creek downstream from the Twin Lakes control structure is not sufficient to satisfy the right. Water Right no. 95-0734 has the most senior priority date in the Twin Lakes – Rathdrum Creek drainage. As Idaho Code § 42-106 states, "As between appropriators, the first in time is the first

in right.” Idaho Code § 42-106 directs the distribution of water within water districts to be “in accordance with the prior appropriation doctrine.” Because Water Right no. 95-0734 is the most senior right in the Twin Lakes – Rathdrum Creek drainage, Sylte is entitled to the passage of Twin Lakes’ natural tributary inflow through the outlet control structure to augment the flow of water in Rathdrum Creek for the satisfaction of Water Right no. 95-0734, regardless of evaporation and seepage losses from Twin Lakes. As Judge Magnuson stated it:

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.

Amended Proposed Finding at xix, Conclusion of Law 14 (underlining in original). To reinforce the point, it is worth noting that the *Notice of Entry of Final Decree* submitted by counsel for the Department in the case as ordered by Judge Magnuson on page four of the Decree states:

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.

Notice of Entry of Final Decree at 2. These statements further affirm that Water Right no. 95-0734 is entitled to divert the natural tributary inflow into Twin Lakes in priority regardless of evaporation and seepage losses.

As to whether Water Right no. 95-0734 entitles Syltes to draw from water stored in Twin Lakes when delivery of the flow of Rathdrum Creek combined with the natural tributary inflow into Twin Lakes will not result in the decreed amount, the hearing officer disagrees with Sylte’s assertion. While relying on some of Judge Magnuson’s statements about Water Right no. 95-0734, Sylte overlooks other key language employed by Judge Magnuson. The first is the qualifying phrase “from the source of their appropriation” in the quote:

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

Memorandum Decision at 13.

Unlike natural flow, which is delivered to water right holders according to the priority dates of their water rights, stored water is deemed appropriated and unavailable for redistribution by priority. See *Washington Cty. Irr. Dist. v. Talboy*, 55 Idaho 382, 43 P.2d 943, 945 (1935). As Judge Magnuson put it:

Once the appropriator lawfully diverts the water [from] its natural source to his diversion works, the appropriator does become the owner of the corpus of the water lawfully diverted.

Memorandum Decision at 14.

Because 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.”

The Decree contains other statements consistent with the view that the water stored in Twin Lakes pursuant to a valid water right is not subject to re-appropriation.⁴ For example, the *Memorandum Decision* states, on page 17: “The Court concludes water stored by the holders of Water Rights Nos. 95-0974 and 95-0973 is not unappropriated water subject to appropriation by others.” Similarly, Conclusion of Law 12 from the Proposed Finding states: “Only two water rights identified herein, No. 95-0973 and 95-0974, are entitled to store water and to make beneficial use of stored water in Twin Lakes.” Finally, and completely contrary to Sylte’s argument, Judge Magnuson specified in the Amended Proposed Finding at Conclusion of Law 14 that:

When seepage and evaporation losses from Twin Lakes exceed the total natural tributary inflow to Twin Lakes, no water will be released from the lakes to satisfy downstream water rights, with the exception of Water Right No. 95-0734. When this occurs, Water Right No. 95-0734 and water rights that divert from Twin Lakes and from the tributaries to Twin Lakes may divert the natural flow, *but not the stored waters*, on the basis of water right priority.

Amended Proposed Finding at xix (underlining in original, italics added). The underlined language in this conclusion of law constitutes the amendment that Judge Magnuson ordered counsel for the Department to prepare to the Proposed Finding “for consideration by [the] Court” in order “to reflect and effectuate” the Judge’s “determinations regarding No. 95-0734, as set forth in” the *Memorandum Decision*. *Memorandum Decision* at 21. This language unambiguously demonstrates that to satisfy Water Right no. 95-0734 Sylte is entitled to divert the natural tributary inflow into Twin Lakes regardless of evaporation and seepage losses, *but not the water stored in Twin Lakes*. Sylte is incorrect to think that the stored waters comprise a portion of the “source of their appropriation.” Sylte’s argument that Water Right no. 95-0734 is entitled to delivery of water from Twin Lakes “irrespective of the amount of natural tributary inflow into Twin Lakes” is contrary to the plain language of the Decree and must be rejected.

⁴ Regarding the block of water “located between the bottom of the lake and Staff Gauge height 0.0 feet,” Judge Magnuson stated: “No water right has been developed for the use of this water because it provides a base for the overlying storage rights.” *Amended Proposed Findings* at xv. In the proceeding before Judge Magnuson, Sylte acknowledged they have no vested right to “the first block of storage in its natural state located between the bottom of the lake and the Staff Gauge height, 0.0 feet.” *Civil Case No. 32572 Objection to Proposed Findings of Water Rights* (March 20, 1985) at 3.

Ultimately, Water Right no. 95-0734 has a unique situation in WD95C, but it is not the unique situation Sylte asserts. The unique situation Judge Magnuson granted Water Right no. 95-0734 is not the ability to draw on water stored in Twin Lakes when the combined flow of Rathdrum Creek and the natural tributary inflow into Twin Lakes run short between April 1 and October 31. Rather, Water Right no. 95-0734 has the unique position of being the only Rathdrum Creek appropriation that may rely on the natural tributary inflows into Twin Lakes in priority over the two storage rights from November 1 through March 31 and also rely on the natural tributary inflows to Twin Lakes when seepage and evaporation from Twin Lakes exceed such inflows from April 1 to October 31. The Instructions to the watermaster of WD95C do not contradict this determination.

Annual Diversion Volume

Sylte seeks a determination that Water Right no. 95-0734 must be satisfied on a continuous year-round basis. *Sylte's Memorandum in Support* at 24. A continuous year-round diversion of 0.07 cfs, the maximum diversion rate for Water Right no. 95-0734, would result in the diversion of 50.7 acre feet of water from Rathdrum Creek. However, the maximum annual diversion volume decreed for the right is 4.10 AFA⁵ for stock watering purposes.⁶ *Proposed Finding* at 3. Thus, Water Right no. 95-0734 does not grant Sylte a continuous year-round diversion of 0.07 cfs. Idaho Code § 42-104 states: "The appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest ceases to use it for such purpose, the right ceases." Sylte is entitled to appropriate only the amount of water its cattle will beneficially use, up to a maximum of 4.10 acre feet per year. Furthermore, because Water Right no. 95-0734 does not contain a storage use and is, in fact, designated in remarks as a "[n]atural flow appropriation", Sylte is not authorized to store more than a 24-hour supply for their cattle.

IV. IS APPLICATION OF THE FUTILE CALL DOCTRINE WITH RESPECT TO WATER RIGHT NO. 95-0734 DEPENDENT ON THE AMOUNT OF NATURAL TRIBUTARY INFLOW TO TWIN LAKES?

Futile Call Definition

Futile call conditions occur when curtailing an upstream junior right provides insufficient water for beneficial use by a downstream senior right because the water seeps into the channel or evaporates before reaching the senior's point of diversion. *See Gilbert v. Smith*, 97 Idaho 735, 739, 552 P.2d 1220, 1224 (1976). When futile call conditions occur, the obligation to deliver water to a downstream senior water right can be waived in order to prevent wasting of the water resource. *See id.*

⁵ Acre Feet per Annum, meaning acre feet per year.

⁶ The Proposed Finding includes a remark among the elements of Water Right no. 95-0734 stating, "For 300 head of stock." *Proposed Finding* at 3. In the Amended Proposed Finding, Finding of Fact no. 5 states that the amount of water required for cows is 12 gallons per day per head. *Amended Proposed Finding* at xiii. Applying 12 gallons per day per head to 300 head for 365 days yields a beneficial use of 1,314,000 gallons, or 4.03 acre feet annually.

The Instructions

The Instructions state, on page 2:

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

Sylte's Argument

Sylte asserts the Instructions are incorrect because "the application of the futile call doctrine with respect to water right no. 95-0734 is not dependent on the amount of natural tributary inflow into Twin Lakes." *Sylte's Memorandum in Support* at 24. Sylte states on page 23 of Sylte's Memorandum in Support:

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

Analysis

As determined in the prior section of this order, Water Right no. 95-0734 is only entitled to the natural flow in the Twin Lakes – Rathdrum Creek drainage, up to the decreed amount. Application of the futile call doctrine with respect to Water Right no. 95-0734 is, therefore, dependent upon the amount of natural flow available to satisfy the right. Moreover, as with any natural flow water right, when delivering water to Sylte pursuant to Water Right no. 95-0734, the Director must sometimes exercise discretion, depending on the circumstances.

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 an area for the exercise of discretion by the Director. 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. And implicit in providing each user its decreed water would be determining when the decree is filled or satisfied.

In re SRBA, 157 Idaho 385, 393–94, 336 P.3d 792, 800–01 (2014) (citation and quotations omitted).

Because the Director is responsible for balancing the right to divert water against the obligation not to waste it, no water rights are automatically immune from a futile call determination. Rather, futile call is a judgment made by the Director on a case-by-case basis. Natural circumstances, such as evaporation rates and stream channel morphology, change over time. Consequently, the amount of water reasonably required to satisfy a water right at one moment in time may result in waste at another moment in time. The 48-hour standard in the Instructions is a reasonable implementation of the Director's discretion in applying the futile call doctrine.

V. CONCLUSIONS OF LAW

Based on the analysis above, the Department should deny *Sylte's Motion for Summary Judgment* because the requested changes to the Instructions are not warranted. Instead, the Department should grant *Twin Lakes Improvement Association's Cross Motion for Summary Judgment* and uphold the Instructions. The Department should also amend item (5) of the Instructions to advise the watermaster that Water Right no. 95-0734 is limited to a total annual diversion volume of 4.10 acre feet.

VI. ORDER

IT IS HEREBY ORDERED that *Sylte's Motion for Summary Judgment* is **DENIED**.

IT IS FURTHER ORDERED that *Twin Lakes Improvement Association's Cross Motion for Summary Judgment* is **GRANTED** and the Department's September 20, 2016, Instructions to the watermaster of WD95C are **UPHELD** with the following underlined amendment to item (5):

From April 1 to October 31 each year, when seepage and evaporation losses from Twin Lakes exceed the total natural tributary inflow to Twin Lakes (as determined by decreasing lake level), no water will be released from the lakes to satisfy Rathdrum Creek water rights, except for water right no. 95-734. Decree at Conclusion of Law 12, 14; Memorandum Decision at 12-13. When this occurs, all or a portion of the natural tributary inflow to Twin Lakes, as measured by the watermaster, can be released to satisfy delivery of water right no. 95-734 with 0.07 cfs at the legal point of diversion, unless or until the maximum annual diversion volume of 4.1 acre feet has been delivered. If all of the natural inflow must be released to satisfy water right no. 95-734, the watermaster shall curtail all junior direct flow water rights. If only a portion of the inflow is released to satisfy water right no. 95-734, the watermaster shall satisfy water rights that divert from Twin Lakes and its tributaries using the remainder of the natural flow, on the basis of water right priority.

IT IS FURTHER ORDERED that the dates scheduled for the hearing and the schedule adopted in the June 14, 2017, *Order Authorizing Discovery; Scheduling Order; Notice of Hearing; Order Requiring Notice Regarding Participation* are VACATED.

DATED this 6th day of September 2017.



SHELLEY W. KEEN
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of September 2017, I served a true and correct copy of the foregoing document on the parties listed below by their designated method of service as indicated.

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Anderson, Mary F et al
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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
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Ellis, Susan
Erickson, Scott

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Hatrock, Amber
Herr, Barbara
Hilliard, Wendy & James
Hogan, Pat & Denise
Holmes, Steven & Elizabeth
Houkam, Leif
Jayne, Donald
Jayne, Douglas I & Bertha Mary
Kiefer, Terry
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Twin Echo Resort
Twin Lakes Improvement Assoc.
Upper Twin Lakes, LLC
Van Zandt, Rick & Corrinne
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Jean Hersley

EXPLANATORY INFORMATION TO ACCOMPANY A PRELIMINARY ORDER

(To be used in connection with actions when a hearing was **not** held)

(Required by Rule of Procedure 730.02)

The accompanying order or approved document is a "**Preliminary Order**" issued by the department pursuant to section 67-5243, Idaho Code. **It can and will become a final order without further action of the Department of Water Resources ("department") unless a party petitions for reconsideration, files an exception and brief, or requests a hearing as further described below:**

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a preliminary order with the department within fourteen (14) days of the service date of this order. **Note: the petition must be received by the department within this fourteen (14) day period.** The department will act on a 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.

EXCEPTIONS AND BRIEFS

Within fourteen (14) days after: (a) the service date of a preliminary order, (b) the service date of a denial of a petition for reconsideration from this preliminary order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this preliminary order, any party may in writing support or take exceptions to any part of a preliminary order and may file briefs in support of the party's position on any issue in the proceeding with the Director. Otherwise, this preliminary order will become a final order of the agency.

REQUEST FOR HEARING

Unless a right to a hearing before the Department or the Water Resource Board is otherwise provided by statute, any person aggrieved by any final decision, determination, order or action of the Director of the Department and who has not previously been afforded an opportunity for a hearing on the matter may request a hearing pursuant to section 42-1701A(3), Idaho Code. A written petition contesting the action of the Director and requesting a hearing shall be filed within fifteen (15) days after receipt of the denial or conditional approval.

ORAL ARGUMENT

If the Director grants a petition to review the preliminary order, the Director shall allow all parties an opportunity to file briefs in support of or taking exceptions to the preliminary order and may schedule oral argument in the matter before issuing a final order. If oral arguments are to be heard, the Director will within a reasonable time period notify each party of the place, date and hour for the argument of the case. Unless the Director orders otherwise, all oral arguments will be heard in Boise, Idaho.

CERTIFICATE OF SERVICE

All exceptions, briefs, requests for oral argument and any other matters filed with the Director in connection with the preliminary order shall be served on all other parties to the proceedings in accordance with IDAPA Rules 37.01.01302 and 37.01.01303 (Rules of Procedure 302 and 303).

FINAL ORDER

The Director will issue a final order within fifty-six (56) days of receipt of the written briefs, oral argument or response to briefs, whichever is later, unless waived by the parties or for good cause shown. The Director may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order. The department will serve a copy of the final order on all parties of record.

Section 67-5246(5), Idaho Code, provides as follows:

Unless a different date is stated in a final order, the order is effective fourteen (14) days after its service date if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:

- (a) The petition for reconsideration is disposed of; or
- (b) The petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, if this preliminary order becomes final, any party aggrieved by the final order or orders previously issued in this case may appeal the final order and all previously issued orders in this case to district court by filing a petition in the district court of the county in which:

- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or
- iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days of this preliminary order becoming final. See section 67-5273, Idaho Code. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.