

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

**IN THE MATTER OF THE
PETITIONS FILED WITH THE
DEPARTMENT REGARDING
APPOINTMENT OF GORDON SYLTE
AS A COMMISSIONER OF FLOOD
CONTROL DISTRICT NO. 17**

**CASE NO. P-FCD-2018-01
FINAL ORDER**

BACKGROUND

On November 28, 2018, the Director of the Idaho Department of Water Resources (“IDWR” or “Department”) reappointed Gordon Sylte (“Sylte”) as a commissioner of Flood Control District No. 17 (“FCD”).¹ The Department subsequently received numerous letters and emails opposing Sylte’s reappointment. The Director treated these submissions as requests for hearing pursuant to Idaho Code § 42-1701A(3) and issued a *Notice of Pre-hearing Conference* on February 7, 2019. The pre-hearing conference was held at Twin Lakes, Idaho, on March 21, 2019.

The following are parties/petitioners in this matter: John Andrews; Ronald Cater; John Dieckman; Susan Ellis; Jean and Harry Emerson; Paul Finman; Sheree Greenfield, Harold Greenfield Trust; Barbara Herr; Berne and Pamela Indahl; Amy & Adam Kremin; Clint Marvel; Pattie Marvel; Dave Nipp; Travis Roth; Linda Solan; and the Twin Lakes Improvement Association (“TLIA”).

Norman Semanko, attorney at law, represented the following petitioners: TLIA; Barbara Herr; Berne and Pamela Indahl; Clint and Patti Marvel; Harold Greenfield Trust; Travis Roth; and Linda Solan.

Gordon Sylte is automatically a respondent because the petitions challenged his reappointment as an FCD Commissioner, or, alternatively, sought his removal as an FCD Commissioner. In addition, Susan Goodrich, Sylte’s spouse, was granted intervener status and participated in the hearing.

The Director concludes that Commissioner Sylte will remain an FCD Commissioner for the remainder of his term.

¹ See Letter from Douglas Jones to Gordon Sylte, November 28, 2019, with attached Certificate of Appointment.

SCOPE OF EVIDENCE

The scope of the evidence was limited to the factors included in Idaho Code § 42-3109,² which states in pertinent part: “[t]he director may remove a commissioner for neglect of duty, misconduct or malfeasance or inability to perform the duties of a commissioner....”

The Director allowed parties to present evidence and argument related to Sylte’s purported conflicts of interest, specifically in relation to his performance as an FCD commissioner. The Director allowed parties to present evidence related to Sylte’s prior performance as FCD commissioner and also evidence related to his current appointment and term of service.

The petitioners seeking Sylte’s removal bore the burden of proof.

Based on the testimony and evidence in the record, the Director finds, concludes, and orders as follows:

FINDINGS OF FACT

1. The Upper and Lower Twin Lakes (hereafter referred to as “Twin Lakes”) are two natural lakes that receive water from Fish Creek and other tributaries discharging into the lakes. Water flows out of Twin Lakes into Rathdrum Creek.

2. Between 1905 and 1910, a dam was constructed on the outlet of Lower Twin Lake. When the gates of the dam are closed, the dam impounds water in both the Upper and Lower Twin Lakes. The original purpose of the impoundment was to deliver storage water out of the lakes in Rathdrum Creek to irrigate lands located near and down-stream of the City of Rathdrum. The existing East Green Acres Water District is the successor to the original entity seeking to store water for irrigation.

3. Sometime following the initial attempt to store water in Twin Lakes and deliver the storage water for irrigation, the United States Bureau of Reclamation (“BOR”) acquired the project because of difficulty in delivering water from Twin Lakes to the target acreage for irrigation. The BOR finally determined the surface water supply from Twin Lakes was unreliable and that ground water pumped from wells would more efficiently provide a water supply to the irrigated land. As a result, in the 1970’s, the BOR drilled wells and delivered ground water from the wells to the lands intended to be irrigated under the project.

² Idaho Code § 42-3101 et seq., governs the establishment, authority, duties, and operation of an FCD, including the appointment and removal of commissioners.

4. The FCD was created sometime after 1975. The FCD was created, in part, to hold Water Right No. 95-0973,³ which authorizes year-round storage of 3,730 AF of water in Twin Lakes for Recreation Storage and Wildlife Storage purposes. According to the Decree, Water Right No. 95-0973 allows the FCD to store water from 6.4 feet to 10.4 feet on the Twin Lakes staff gauge.

5. The FCD was also created to control flooding on Twin Lakes, Rathdrum Creek and tributaries to Twin Lakes and Rathdrum Creek.

6. Sylte was appointed as one of the original FCD commissioners and has served as an FCD commissioner since at least 1992, for approximately 27 years.

7. The FCD is divided into four separate geographical divisions, or sub-districts, as described below:

- A. Above the lakes;
- B. Within the lakes;
- C. Rathdrum Creek below the lakes; and
- D. The area near the city of Rathdrum.

8. A FCD commissioner is appointed from each of the divisions. Sylte is the FCD commissioner for the third division—Rathdrum Creek below the lakes but above the City of Rathdrum.

9. Water rights diverted from Rathdrum Creek, Twin Lakes, and other sources of water tributary to Rathdrum Creek and Twin Lakes were decreed by an Idaho district court in 1989. Following issuance of the Decree, IDWR created Water District 95-C for the administration of water rights in Rathdrum Creek, Twin Lakes, and tributaries. A watermaster for Water District 95-C delivers water to the holders of water rights in times of shortage according to the priority dates of the water rights.

10. Sylte's father moved to the Rathdrum area during the depression and homesteaded land along Rathdrum Creek. Sylte currently farms the original homestead. Sylte grows crops and raises cattle on the farm/ranch.

11. Sylte holds Water Right No. 95-0734, authorizing diversion of 0.07 cfs for stockwater from Rathdrum Creek. Water Right No. 95-0734 bears a May 1, 1875, priority date, and is the most senior water right in the Twin Lakes – Rathdrum Creek drainage.

12. Sylte, or other individuals or entities associated with Sylte, own other water rights authorizing diversion from Rathdrum Creek. The following is a summary of Sylte's water rights extracted from the Water District 95-C Watermaster's delivery list:

³ See *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 (151 Jud. Dist. Ct. April 20, 1989) ("Decree").

Basin	Sequence	Name	Basis	Priority	Flow Rate	Source
95	7604	SYLTE FAMILY RANCH	Decreed	4/14/1976	0.340	RATHDRUM CREEK
95	733	SYLTE RANCH LLC	Decreed	5/1/1950	1.230	RATHDRUM CREEK
95	734	SYLTE, EVELYN; SYLTE, JOHN	Decreed	5/1/1875	0.070	RATHDRUM CREEK
95	16498	SYLTE, GLENN A; SYLTE, MERRILEE E	License	7/25/2012	0.040	RATHDRUM CREEK
95	7630	SYLTE, GORDON D	License	5/24/1976	0.100	RATHDRUM CREEK
95	8858	SYLTE RANCH LLC	License	4/27/1994	0.430	RATHDRUM CREEK, UNNAMED STREAM

13. Other water rights authorize diversion of water from Rathdrum Creek below Twin Lakes. The following is a summary of these water rights, including Sylte's, extracted from the Water District 95-C Watermaster's delivery list:

Basin	Sequence	Name	Priority	Flow Rate	Source
95	893	ALKIRE, MARIE BRADBURY	6/1/1886	0.020	RATHDRUM CREEK
95	17336	COOPER, KAREN L; DERBY, SANDRA	7/11/2017	0.030	RATHDRUM CREEK
95	7617	FINMAN, LORNA C; FINMAN, PAUL F	4/30/1976	1.810	RATHDRUM CREEK
95	7114	FLEET, JERALDINE S; FLEET, JIMMIE D	6/3/1970	0.040	RATHDRUM CREEK
95	7253	GOELZER, ROBERT A	4/17/1973	0.200	RATHDRUM CREEK
95	7773	GOELZER, ROBERT A	8/17/1977	0.200	RATHDRUM CREEK
95	8990	GREENFIELD, HAROLD M	8/6/1998	0.030	RATHDRUM CREEK
95	7269	HOGAN, BETTY ROSE; HOGAN, JERRY E	3/29/1973	0.100	RATHDRUM CREEK
95	7615	HOGAN, BETTY ROSE; HOGAN, JERRY E	4/30/1976	0.130	RATHDRUM CREEK
95	922	LUND, PATRICIA A; LUND, RICHARD R	6/30/1960	0.180	RATHDRUM CREEK
95	961	LUND, PATRICIA A; LUND, RICHARD R	6/30/1960	0.090	RATHDRUM CREEK
95	10936	MILKS, LAURA; MILKS, RAY	7/31/2009	0.030	RATHDRUM CREEK
95	7742	MORIGEAU, JOANN L	7/16/1977	0.040	RATHDRUM CREEK
95	890	NAGEL, CARL; NAGEL, VIOLET F	11/1/1941	0.020	RATHDRUM CREEK
95	721	OLSON, VERA; OLSON, VERNON	5/15/1900	0.020	RATHDRUM CREEK
95	7727	PARK , CHESTER; PARK, DIANE	5/9/1977	0.100	RATHDRUM CREEK
95	8082	PARK , CHESTER; PARK, DIANE	7/10/1981	0.200	RATHDRUM CREEK
95	943	PARK, CHESTER	5/1/1945	0.030	RATHDRUM CREEK
95	2096	PARK, CHESTER; PARK, NAOMI	6/28/1952	0.070	RATHDRUM CREEK
95	8782	PARSONS, CAL	9/28/1992	0.200	RATHDRUM CREEK
95	7637	ROSCOE, FORREST L	6/10/1976	0.020	RATHDRUM CREEK
95	8388	STEVENS, ELIZABETH; STEVENS, MAC; STEVENS, RYAN	6/30/1983	0.040	RATHDRUM CREEK
95	7106	STOCKTON, CONNIE S; STOCKTON, JIMMY D	4/23/1970	0.100	RATHDRUM CREEK
95	7604	SYLTE FAMILY RANCH	4/14/1976	0.340	RATHDRUM CREEK
95	733	SYLTE RANCH LLC	5/1/1950	1.230	RATHDRUM CREEK
95	734	SYLTE, EVELYN; SYLTE, JOHN	5/1/1875	0.070	RATHDRUM CREEK
95	16498	SYLTE, GLENN A; SYLTE, MERRILEE E	7/25/2012	0.040	RATHDRUM CREEK
95	7630	SYLTE, GORDON D	5/24/1976	0.100	RATHDRUM CREEK
95	7771	WATSON, DAVID C; WATSON, SHIRLEY K	8/16/1977	0.020	RATHDRUM CREEK

95	947	WATSON, ROY C; WATSON, SUSAN D	3/15/1970	0.020	RATHDRUM CREEK
95	8192	WATSON, SHIRLEY K	7/8/1982	0.020	RATHDRUM CREEK
95	8858	SYLTE RANCH LLC	4/27/1994	0.430	RATHDRUM CREEK,

14. The 1989 Decree contained two water rights authorizing storage in Twin Lakes; one to the FCD and one to TLIA. The following is the summary of the two decreed storage water rights and their limitations:

Basin	Sequence	Process	Basis	Priority Date	Rate	Source	Water Use	Current Owner	Acres	Volume
95	974	Recommendation	Decreed	03/23/1906		Twin Lakes	Recreation Storage	Twin Lakes Improvement Association		5360 af

Storage in Twin Lakes from 0 feet to 6.4 feet on a staff gauge set relative to bench marks cited in a 1969 decision of the District Court of the First Judicial District Court in Kootenai County, Case no. 18420.

Basin	Sequence	Process	Basis	Priority Date	Rate	Source	Water Use	Current Owner	Acres	Volume
95	973	Decreed	Decreed	03/23/1906		Twin Lakes	Wildlife & Recreation Storage	Flood Control District no. 17		3730 af

3,730 acre-feet is the volume of water necessary to raise the elevation of Twin Lakes from 2308.4 feet above mean sea level to 2312.4 feet above mean sea level. The elevations should approximate the gauge readings on the left hand staff gauge depicted on Kremin Exhibit 3.2, between 6.4 feet and 10.4 feet.

15. Testimony at the hearing established that IDWR, along with others, searched for an entity that could hold a water right for management of the upper four (4) feet of storage in Twin Lakes. Testimony at hearing established that the FCD was created for the purpose of managing the storage water, even though a flood control district is not a perfect organization for holding a water right for anything other than flood control.

16. Commissioners for the FCD were appointed under Title 42, Chapter 31, the Flood Control District Act, which governs the operations of flood control districts in Idaho.

17. Operation of a storage right for recreational and wildlife purposes is not one of the authorities granted to a flood control district. The FCD's ownership of a water right for a purpose outside the authority of the FCD contributed to the controversies of this contested case.

18. Ownership by TLIA of a storage water right to maintain storage within Twin Lakes for recreational purposes is squarely within the purposes for which the TLIA was created.

19. The FCD holding a water right for water stored on top of water stored pursuant to the TLIA storage water right, and the possibility that the FCD might manage the water for broader purposes other than the strict interests of TLIA, caused additional conflict.

20. For example, the FCD targets a lake elevation of 8 feet on the staff gauge in the spring, vacating storage space in Twin Lakes to store spring floodwaters, even though flood control is not an express purpose of Water Right No. 95-0973.

21. Water Right No. 95-0973 does not require the FCD to maintain lake levels at 10.4 feet.

22. The FCD cannot release storage authorized by Water Right No. 95-0973 for the purpose of delivering natural flow water rights, in particular, Sylte's Water Right No. 95-0734.

23. During its existence, the FCD has worked in the channel of Rathdrum Creek with mechanized equipment below the outlet of the lower lake. For many years, this mechanized work was conducted without a stream channel alteration permit from IDWR.

24. In 2016, Morgan Case, the Regional Manager of IDWR's Northern Region in Coeur d'Alene, informed the FCD it would need a stream channel alteration permit to work with mechanized equipment in the stream channel.

25. Prior to Ms. Case's instruction, the FCD had worked in the stream channel of Rathdrum Creek without a stream channel alteration permit as directed by a previous manager of IDWR's Northern Region, and according to its interpretation of Idaho Code § 42-3115(14).

26. Despite the instructions by Ms. Case, the FCD worked in Rathdrum Creek with mechanized equipment without a stream channel alteration permit. After some corrective persuasion by IDWR, the FCD sought and obtained stream channel alteration permits from IDWR authorizing FCD to work in Rathdrum Creek.

27. Parties requesting removal/non-appointment of Sylte asserted the FCD worked on the stream channel with FCD funds to improve the Rathdrum Creek channel for conveyance of Water Right No. 95-0734 to Sylte. However, evidence at hearing also showed the work was conducted with the consent of some of the landowners who are opposing Sylte's service as a commissioner, and that the stream channel work was for the primary purpose of increasing the capacity of Rathdrum Creek to convey flood waters.

28. Some evidence was presented at hearing that the FCD did not always strictly adhere to the statutory requirements of obtaining sealed competitive bids for water level sensing equipment with a purchase price in excess of \$1,000. *See* Idaho Code 42-3115(10).

29. In 2015 and 2016, weather conditions in the Twin Lakes area resulted in very low flows of water tributary to Twin Lakes, and very low flows in Rathdrum Creek below the lakes.

30. During 2016, Rathdrum Creek dried up because of regulation at the outlet of the lake. Landowners around the lake complained that the watermaster was not operating the lake to protect the lake levels. As a result, some landowners were unable to access, or had difficulty accessing, the lake from their docks.

31. As a result of these difficulties, IDWR conducted a hearing regarding the watermaster's performance of his duties. After the hearing, the hearing officer determined that the watermaster should be removed. The order removing the watermaster was issued in the spring of 2017. *See Order on Exceptions re: Amended Preliminary Order Removing a Watermaster*, Docket No. C-RWM-2016-001.

32. During the fall and winter of 2017, significant snow fell in the mountains above Twin Lakes, in and around Twin Lakes, and in the Rathdrum Creek area. In March of 2017, rain fell on the snow pack in the Twin Lakes area. As a result, the snow melted rapidly and inflows to the lake increased dramatically. The inflows to the lake filled the lake above the 10.4 feet elevation that is the maximum height described by the FCD's Water Right No. 95-0973.

33. During February and March of 2017, Sylte was wintering in Mexico and was not in the Rathdrum, Idaho area during the period of flooding. In addition, the regularly scheduled FCD meetings in February 2017 and March 2017 were not conducted because a quorum of commissioners could not be established. As a result, the problems created by the flooding were not discussed at an FCD meeting. The commission did not declare an emergency or flood fight, as authorized by statute.

34. Despite the lack of a monthly meeting of the FCD commissioners, Sylte regularly communicated with the dam operator, and FCD employee, Laurin Scarcello. Scarcello lives near the dam and sometimes checked the dam twice daily during the period of flooding in March 2017, often adjusting the outlet gates. Both Sylte and Scarcello testified at hearing that they were in frequent contact during this period.

35. The channel downstream from the dam and at least one structure downstream of the dam, limit the flow rate that can be released from Twin Lakes. The maximum amount of water that can be discharged through the City of Rathdrum is 165 cfs. In addition, a culvert located where Rathdrum Creek crosses Sturgeon Road will surcharge on the upstream side of the pipe if water is discharged from the lake outlet at a rate in excess of approximately 165 cfs.

36. During the spring of 2017, Scarcello released up to 320 cfs of water from Twin Lakes into Rathdrum Creek and found locations in between the dam outlet from Twin

Lakes and the City of Rathdrum to discharge some of the excess water. Scarcello worked very hard to reduce the additional surcharge of water in the lake above the level of 10.4 feet.

37. Photographs taken at the peak lake level on March 18, 2017, show a staff gage that reads approximately 11.05 in elevation (*see* the staff gauge depicted on the left side of Kremin Exhibit 3-2). This reading is approximately nine (9) inches above the maximum level established by the FCD water right.

38. During the 2017 flooding, several landowners could not access their property. In addition, there was minor flooding around the foundations of some homes and structures. Basements were flooded. Nevertheless, the maximum elevation rise during the flooding emergency was only nine (9) inches.

39. Despite Sylte's absence from the Rathdrum area, and in spite of the lack of monthly meetings in February and March of 2017, Sylte regularly communicated with Scarcello, and Scarcello's efforts resulted in minimal excess water in the lake during an extraordinary flooding event.

40. While communication with TLIA and with landowners around the lake was either nonexistent or minimal, at best, the efforts exerted by the FCD to minimize the effects of flooding were extraordinary.

41. During an FCD meeting in August of 2016, the FCD commissioners discussed how to regulate discharges from Twin Lakes and the relationship between storage and flows in Rathdrum Creek. During that discussion, Susan Goodrich, Sylte's spouse, stated Sylte could use a couple of more weeks of water for irrigation. Following the discussions at the FCD meeting the commissioners decided to reduce the discharge from the lakes from 12 cfs to 10 cfs.

42. There was significant testimony regarding the conflict that might have arisen as a result of the statement by Susan Goodrich, and a purported unwillingness by Sylte to recuse himself from discussion or voting on how much water should discharge from the lake.

43. The Director finds, based on Sylte's direct testimony, that he, in his capacity as FCD commissioner, never instructed Scarcello to deliver water to him (Sylte) to satisfy Sylte's water rights.

44. There is no evidence in the record to conclude that Sylte acted in his own self-interest.

45. While there is evidence that the FCD may have been lackadaisical or not strictly in compliance or adherence in communicating with constituents, or to Idaho's Open Meetings Law, the FCD operated for almost two decades without significant oversight, dispute, or flooding. There is also substantial evidence in the record of both improvements

and benefits facilitated by Sylte, and the other FCD commissioners, during the existence of the FCD.

46. The Director finds that, for Sylte's approximately 27-year tenure as an FCD commissioner, Sylte has been a faithful public servant in an unpaid, voluntary, appointed position to minimize flooding on Twin Lakes and Rathdrum Creek, and reasonably attempted to maintain lake levels at levels that were acceptable to owners of the property around the lakes.

CONCLUSIONS OF LAW

1. FCD commissioners are appointed to a term of one to three years. Each year when a commissioner's term expires, the Director reappoints an incumbent commissioner or appoints a new commissioner to a three year term. Idaho Code § 42-3111.

2. Idaho Code § 42-3109 states, in pertinent part:

The director may remove a commissioner for neglect of duty, misconduct or malfeasance or inability to perform the duties of a commissioner, or if the commissioner is no longer a resident of the division from which appointed.

3. Therefore, the Director has discretion to decide whether or not to remove a flood control district commissioner. The word "may" in Idaho Code § 42-3109 connotes a duty the exercise of which is permissive, not mandatory. *Rife v. Long*, 127 Idaho 841, 849, 908 P.2d 143, 150 (1995).

4. There are no parallel standards to challenge the reappointment of a flood control district commissioner or the appointment of a new flood control district commissioner. The standards for determining: (a) whether a commissioner is unfit for reappointment; or (b) whether he is unfit and should be removed should be identical. As a result, the test for removal in Idaho Code § 42-3109 should be applied to determine the fitness of a candidate for appointment as a flood control commissioner.

5. The standards set forth in Idaho Code § 42-3109 will be applied in this case to determine whether Sylte should be retained as an FCD commissioner.

6. Duties of a flood control commissioner are set forth in Idaho Code § 42-3115. Petitioners alleged Sylte neglected his duty by: (a) failing to attend required meetings in February and March of 2017; (b) failing to declare a flood fight; (c) failing to recuse himself from FCD discussions and votes where delivery of his water rights was raised as an issue; (d) not strictly adhering to the statutory requirements of obtaining sealed competitive bids for water level sensing equipment with a purchase price in excess of \$1,000; and (e) creating a conflict of interest by bringing litigation against the FCD and IDWR.

7. Black's Law Dictionary defines neglect as ". . . to omit, fail, or forbear to do a thing . . . that is required to be done."

8. Black's Law Dictionary defines malfeasance as:

Evil doing; ill conduct. The commission of some act which is positively unlawful; the doing of an act which is wholly wrongful and unlawful; the doing of an act which person ought not to do at all

Malfeasance has its root in the word "mal" meaning "bad, wrongful or fraudulent."

9. Black's Law Dictionary defines misconduct as:

A transgression of some established and definite rule of action, a forbidden act, a dereliction from duty, unlawful behavior, willful in character improper or wrong behavior.

10. Inability is the lack of competence or lack of physical ability to complete necessary tasks.

11. In applying the tests set forth in Idaho Code § 42-3109, the Director will focus on the substantive activities and outcomes resulting from Sylte's efforts as an FCD commissioner in preventing flood damage. The Director will discount failures or shortcomings related to ministerial inefficiency or neglect, and matters that are ministerial or otherwise inconsequential to the reasonably construed responsibilities and duties Sylte had as an FCD commissioner.

12. Serving as an FCD commissioner is a voluntary endeavor with limited, or no, compensation. *See* Idaho Code § 42-3114. Disqualifying an FCD commissioner for failure to strictly adhere to ministerial or inconsequential requirements of the job would likely result in the disqualification of many commissioners statewide who thanklessly serve their constituents but sometimes err in the conduct of their meetings or the manner in which issues are discussed.

13. Furthermore, the Director should grant commissioners a grace period to remedy deficiencies when actual deficiencies are shown. A willingness to correct deficiencies expressed by an FCD commissioner should be sufficient justification to grant the remedial grace period.

14. Finally, when constituents become aware of what they believe to be potential failures related to Idaho's Ethics in Government Act, or other potentially applicable statutes, they should first address these failures with the FCD directly to allow the FCD to address and, if necessary, correct, them, as allowed by and according to the law.

Malfeasance

15. Applying the quoted definition of malfeasance, the evidence submitted at the hearing does not establish evil doing, ill conduct, or the doing of something that is wholly wrong or unlawful. Malfeasance connotes an intent to do wrong or to be vindictive.

16. Although inherent conflicts were created by the coexistence of the water district and the flood control district, Sylte's avoidance of instructing Scarcello to deliver water pursuant to his personal water rights is evidence of the absence of malfeasance.

17. No evidence was presented showing that Sylte ordered delivery of his water rights with ill-intent, therefore, proof of the level of wrongdoing to establish malfeasance was not presented.

Misconduct

18. No evidence was presented showing that Sylte transgressed by acting willfully in "improper or wrong behavior."

Neglect of Duty

19. Neglect does not require the elevated level of wrongdoing or intentionality required for malfeasance or misconduct. Neglect is the omission or failure to do something that is required.

20. Strictly applied, the failure to conduct the statutorily required monthly flood control district meeting is a neglect of duty.

21. While the Director concludes that Sylte, and the FCD generally, showed a level of neglect by not holding regular meetings in February and March of 2017, this neglect is not sufficient to justify Sylte's removal according to Idaho Code § 42-3109.

22. First, the entire FCD Commission should be held responsible for this neglect, not just Sylte. The FCD commissioners, including Commissioner Sylte, should strive to always reasonably adhere to Idaho Code § 42-3113, as each took the same oath of office.

23. The fact that commissioners may spend significant portions of their time outside the Twin Lakes/Rathdrum Creek basin during the months when flooding might occur may also become problematic. While 2017 was an extraordinary water year, the FCD should always be prepared to meet, or to clearly communicate to constituents about meeting schedules and methods of participation, according to Idaho's Open Meeting Law and Idaho Code § 42-3101 et seq.

24. However, there was no evidence of substantive neglect related to flood prevention by Sylte, as a result of the missed meetings. To the contrary, the evidence established the following during the spring 2017 flooding:

(a) Sylte was personally engaged in dam operations during the flooding in March 2017, regularly coordinating with the outlet dam tender, Laurin Scarcello;

(b) Based on the interactions between Sylte and Scarcello, Scarcello: (i) observed and adjusted the outlet gates on the dam, sometimes twice daily; and (ii) delivered flood waters out of Rathdrum Creek to off-stream locations to maximize releases from Twin Lakes and minimize Twin Lakes and Rathdrum Creek flooding; and

(c) The very careful oversight of Twin Lakes Dam and Rathdrum Creek resulted in a remarkably small rise in the Twin Lakes water level of nine (9) inches above elevation 10.4 on the staff gauge. Even though homes and property were flooded with the additional water stored in the lakes, the evidence established that Sylte and Scarcello did all they could to protect all property owners within the FCD from flooding damage.

25. Next, Petitioners contend Sylte had a conflict because he was litigating IDWR's instructions to the watermaster regarding delivery of water Right No. 95-0734 at the same time he was deciding, as an FCD commissioner, how to beneficially use storage water pursuant to the FCD's Water Right No. 95-0973. Sylte's ownership of Water Right No. 95-0734 and his attempts to challenge IDWR's watermaster instructions do not automatically create a conflict.

26. Petitioners do not define or cite a definition of "conflict," nor does Idaho Code § 42-3109 include a definition. Therefore, the Director will apply the Transparent and Ethical Government Act to analyze Petitioner's arguments related to conflicts of interest.

27. Idaho's Ethics in Government Act defines a "conflict of interest" as any "official action or any decision or recommendation by a person acting in a capacity as a public official, the effect of which would be to the private pecuniary benefit of the person or a member of the person's household, or a business with which the person or a member of the person's household is associated." Idaho Code § 74-403(4).

28. When a conflict exists, it must be disclosed according to Idaho Code § 74-404. Disclosure does not affect the public official's authority to be counted for the purpose of determining a quorum and to debate and to vote on the matter.

29. There is one relevant exception under this set of facts. No conflict exists if the pecuniary benefit received arises out of "[a]n interest of membership in a particular business, industry, occupation or class required by law as a prerequisite to the holding by the person of the office or position." Idaho Code § 74-403(4)(a).

30. In this case membership in a certain class is required by law as a prerequisite to holding the position of FCD commissioner. Upon sufficient petition for creation of an FCD, "[t]he director shall prepare a map of the proposed district and shall divide the proposed district into not less than three (3) . . . divisions so as to provide adequate representation to all of the interests within said districts." Idaho Code § 42-3106.

31. Commissioners who no longer reside in the division they were appointed to represent may be removed. *See* Idaho Code § 42-3109. Therefore, residency within the FCD is a statutory requirement to serve as an FCD Commissioner. In this case, Sylte is a member of the class of the FCD, and further, a member of the specific division of that district below Twin Lakes and above the City of Rathdrum. Sylte's duty is to "adequately represent this class" within the FCD and on the FCD commission.

32. In other words, no legal conflict of interest under the Transparent and Ethical Government Act can exist, because Sylte is a member of a class required by law as a prerequisite to his holding his position. *See also* Idaho Code 18-1359(1)(a). This makes

logical sense as finding available and willing FCD commissioners that do not hold any water rights in this particular basin would be a near impossibility.

33. Only if Sylte asserted authority to force delivery of Water Right No. 95-0734 in conflict with the watermaster instructions, as affirmed by the courts, in a way that would diminish Water Right No. 95-0973, would there be a general conflict of interest. Sylte's testimony established that he would follow the law as an FCD commissioner.

34. Furthermore, even if Sylte received an ancillary benefit of delivery of Water Right No. 95-0734 from stream channel work to improve the flood water carrying capacity of Rathdrum Creek, the work with FCD is not a conflict of interest, because it is the FCD's duty and responsibility to control flooding in and on the stream channel.

35. The FCD did not declare a flood fight during the extraordinary weather events of 2017. A "flood fight" means "the activities and operations authorized by the board in response to a flooding emergency." Idaho Code § 42-3103(9). FCD No. 17 has the authority to "[t]o declare a flooding emergency and fight floods."

36. While it is apparent from testimony at hearing that the FCD commission was lackadaisical in the way that it communicated how it was conducting its flood control activities, and apparently did not formally issue an order related to the flooding emergency, the FCD's physical intervention resulted in limited flooding to properties surrounding Twin Lakes and other properties within the FCD.

37. The FCD, including Sylte, was not substantively neglectful in fighting the 2017 flood.

38. Based on testimony from Scarcello and Sylte at hearing, the FCD exerted extraordinary and creative effort to prevent/minimize flooding.

39. The lake levels were always managed first for the benefit of Twin Lakes.

40. The FCD's stream channel alteration work without a stream channel alteration permit was the result of conflicting historical instructions about the necessity for a stream channel alteration permit. The FCD's subsequent acquisition of a stream channel alteration permit reasonably compensates for the initial deficiency of failing to obtain a stream channel alteration permit.

41. Failure to strictly comply with the competitive bid requirement is a ministerial duty and not cause for removal or non-appointment of Sylte. This ministerial oversight, if strictly enforced, would have resulted in the removal of the entire commission. The Director will not upset the entire governance of the FCD as a result of this oversight. FCD No. 17 should be encouraged to adhere to the requirements of the law.

Inability to Perform the Duties of a Commissioner

42. Finally, at the hearing, Sylte exhibited the necessary mental faculties, physical ability, and willingness to adhere to the law that establishes competence to fulfill his FCD responsibilities. There is no evidence showing a lack of fitness for continued service.

ORDER

IT IS HEREBY ORDERED that the petitions to remove/not appoint Gordon Sylte as a flood control commissioner for Flood Control District No. 17 are **DENIED**.

IT IS FURTHER ORDERED that Gordon Sylte shall continue to serve as a flood control commissioner for Flood Control District no. 17, as appointed by the Director of the Idaho Department of Water Resources on November 28, 2018.

Dated this 22nd day of October 2019.



Gary Spackman
Director

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 22nd day of October, 2019, true and correct copies of the document described below were served by placing a copy of the same with the United States Postal Service, and properly addressed to the following:

Susan Goodrich 8626 W. Sylte Ranch Rd. Rathdrum, ID 83858 Sgood5350@frontier.com	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
Gordon D. Sylte 8626 W. Sylte Ranch Rd. Rathdrum, ID 83858-6820 gordonsylte@icloud.com	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input checked="" type="checkbox"/> Email
John L. Andrews P.O. Box 384 Rathdrum, ID 83858 Finder4@aol.com	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input checked="" type="checkbox"/> Email
Ronald Cater 628 W. 22nd Ave. Spokane, WA 99203 rcater@peoplepc.com	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input checked="" type="checkbox"/> Email
John Dieckman 5617 South Thor Street Spokane WA 99223 Dieck3512@gmail.com	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input checked="" type="checkbox"/> Email
Susan Ellis P. O. Box 804 N. 21867 Dellar Beach Lane Rathdrum, ID 83858 susan_elizabeth_ellis@hotmail.com	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input checked="" type="checkbox"/> Email
Jean & Henry Emerson 9814 West Lindgren Ave Sun City, AZ. 85373 Jean.emerson922@gmail.com	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input checked="" type="checkbox"/> Email

Paul Finman Finman Farm 764 S. Clearwater Loop Post Falls, ID 83854 pfinman@lcfamps.com	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input checked="" type="checkbox"/> Email
Barbara Herr 21737 Dellar Bleach Lane Twin Lakes, ID 83858 haspedis@mindspring.com	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input checked="" type="checkbox"/> Email
Berne & Pamela Indahl 4203 E. 17th Avenue Spokane, WA 99223 berneindahl@aol.com ; indahlaw@aol.com	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input checked="" type="checkbox"/> Email
Amy & Adam Kremin 22921 Covey LN Rathdrum, ID 83858 butterscotchkids@yahoo.com akremin90@gmail.com	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input checked="" type="checkbox"/> Email
Clint & Patti Marvel 23335 N. Lakeview Blvd. Twin Lakes, ID 83858 clintandpatti@comcast.net Patti.Marvel@northwestfcs.com	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input checked="" type="checkbox"/> Email
Harold Greenfield Trust c/o Cindy Mathisen, Sheree Greenfield & Lori Snider 938 S. Ridgewood Ave. Tacoma, WA 98405 Cindymathisen59@gmail.com	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input checked="" type="checkbox"/> Email
Dave Nipp 2700 E Seltice Ste 2 Post Falls, Id. 83854 dnipp@farmersagent.com	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input checked="" type="checkbox"/> Email
Travis Roth 20969 N. Cochran Ln Rathdrum, ID 83858 travis.l.roth@gmail.com	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input checked="" type="checkbox"/> Email

Linda Solan 4721 E 41st Ct. Spokane, WA 99223 lindaapplesolan@gmail.com	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input checked="" type="checkbox"/> Email
Norm Semanko for Twin Lakes Improvement Association Parsons Behle & Latimer 800 West Main St. Ste. 1300 Boise, ID 83702 NSemanko@parsonsbehle.com	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input checked="" type="checkbox"/> Email


Kimberle English

EXPLANATORY INFORMATION TO ACCOMPANY A FINAL ORDER

(Required by Rule of Procedure 740.02)

The accompanying order is a "Final Order" issued by the department pursuant to section 67-5246 or 67-5247, Idaho Code.

Section 67-5246 provides as follows:

- (1) If the presiding officer is the agency head, the presiding officer shall issue a final order.
- (2) If the presiding officer issued a recommended order, the agency head shall issue a final order following review of that recommended order.
- (3) If the presiding officer issued a preliminary order, that order becomes a final order unless it is reviewed as required in section 67-5245, Idaho Code. If the preliminary order is reviewed, the agency head shall issue a final order.
- (4) Unless otherwise provided by statute or rule, any party may file a petition for reconsideration of any order issued by the agency head within fourteen (14) days of the service date of that order. The agency head shall issue a written order disposing of the petition. The petition is deemed denied if the agency head does not dispose of it within twenty-one (21) days after the filing of the petition.
- (5) 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.
- (6) A party may not be required to comply with a final order unless the party has been served with or has actual knowledge of the order. If the order is mailed to the last known address of a party, the service is deemed to be sufficient.
- (7) A non-party shall not be required to comply with a final order unless the agency has made the order available for public inspection or the nonparty has actual knowledge of the order.

(8) The provisions of this section do not preclude an agency from taking immediate action to protect the public interest in accordance with the provisions of section 67-5247, Idaho Code.

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a final order within fourteen (14) days of the service date of this order as shown on the certificate of service. **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 67-5246(4) Idaho Code.

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by a final order or orders previously issued in a matter before the department may appeal the final order and all previously issued orders in the matter 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: a) of the service date of the final order, b) the service date of an order denying petition for reconsideration, or c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. See section 67-5273, Idaho Code. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.