

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR
PERMIT TO APPROPRIATE WATER NO. 95-
17896 IN THE NAME OF GORDON D SYLTE

AMENDED PRELIMINARY ORDER
APPROVING APPLICATION FOR PERMIT

BACKGROUND AND PROCEDURAL HISTORY

On October 24, 2019, Gordon Sylte (“Applicant” or “Sylte”) filed Application for Permit No. 95-17896 (“Application”) with the Idaho Department of Water Resources (“Department” or “IDWR”). The Department published a notice of the Application on November 7, 2019.

Paul Finman (“Finman”) and Twin Lakes Improvement Association (“TLIA”) protested the Application. The Applicant and protestants are collectively referred to here as the “Parties.”

On April 15, 2020, IDWR conducted a prehearing conference related to the Application, which resulted in a conditional settlement and withdrawal of protest from TLIA. TLIA conditionally withdrew its protest contingent on the Department issuing a permit including the conditions outlined in the *Stipulation for Withdrawal of Protest (TLIA) and Partial Withdrawal of Protest (Finman)* (“TLIA Stipulation”). TLIA Stipulation at 1. TLIA signed the TLIA Stipulation on June 8, 2020, and the Applicant signed on June 9, 2020. *Id* at 2.

The Applicant and Finman were unable to resolve the issues raised by Finman in his protest at the April 15, 2020, prehearing conference. As a result, Finman requested an administrative hearing. On October 15, 2020, IDWR held a hearing in Kootenai County to take testimony and evidence connected with the Application.¹ IDWR’s Deputy Director Mat Weaver served as the hearing officer for the Department.

All parties represented themselves at the hearing and introduced testimonial evidence or documentary evidence into the administrative record. At the hearing, the Applicant called himself to testify. Also at the hearing, Finman called Bob Haines (“Haines”), the Applicant, Susan Goodrich, and Doug Jones (“Jones”) to testify.

At the hearing, Finman explicitly limited his protest to the following two application review criteria from Idaho Code § 42-203A(5):

1. Whether the proposed use described in the Application will conflict with the local

¹ The hearing was digitally recorded and can be accessed on the Department’s website by searching for water right no. 95-17896 on the Water Right and Adjudication Search page, available at:

<https://idwr.idaho.gov/apps/ExtSearch/WRAJSearch/WRADJSearch.aspx>. The Hearing Recording was not transcribed or otherwise reproduced or altered.

public interest, as defined in Idaho Code § 42-202B; and

2. Whether the proposed use described in the Application is contrary to the conservation of water resources within the state of Idaho.

Finman entered Exhibits 200, 201, and 202 into the record at the hearing. The hearing officer took official notice of the Department's scanned file for the Application and the Department's Administrative Memoranda at the hearing.

Following the hearing, consistent with Rule 602 of the Department's Rules of Procedure (IDAPA 37.01.01.602), the hearing officer took official notice of the Department's water right proof reports for water right nos. 95-733, 95-734, 95-7630, 95-8858, 95-10876, and a parcel map depicting lands owned by Sylte, Finman, and others in and around the place of use proposed by the Application. The hearing officer notified the Parties of his decision to include additional water right documents into the official record on December 24, 2020, and gave them 21 days to object to their inclusion. No objections were filed with IDWR.

After carefully considering the evidence in the administrative record, the hearing officer finds, concludes, and orders as follows:

FINDINGS OF FACT

Applicant – Gordon D. Sylte

1. The Applicant owns land in the southwest quarter, northwest-southeast quarter-quarter, southeast-northwest quarter-quarter, and the northeast quarter of Section 30, Township 52 North, Range 4 West, Boise Meridian, Kootenai County, Idaho. *IDWR Parcel Exhibit Map*.
2. The Application proposes to divert 0.22 cubic feet per second ("cfs") of groundwater to storage, 0.22 cfs of groundwater for irrigation, 0.03 cfs of groundwater for stockwater, and 0.10 cfs of groundwater for domestic use. *Application* at 1. The Application proposes a total or combined appropriation of 0.33 cfs. *Id.*
3. The Application proposes the use of groundwater to store water in a 1.0 acre-foot reservoir, to irrigate a total of 11.2 acres, to water 100 head of mixed stock, and to serve potable water to four homes. *Application* at 1 and 2. The proposed points of diversion and places of use described on the Application are located on the Applicant's property. *Id.* at 2.
4. The Application proposes the diversion and use of water for the same purposes as water rights 95-8858 and 95-10876. *Application* at 10.
5. Decreed water right 95-733 is owned by the Sylte Ranch, LLC and authorizes the diversion of surface water from Rathdrum Creek for irrigation purposes. *Water Right Proof Report 95-733* at 1. Water right 95-733 is for the combined diversion of 1.23 cfs and authorizes the irrigation of 50 acres and the watering of 1000 head of stock. *Id.* Water right 95-733

has a priority date of May 1, 1950. *Id.* The place of use for water right 95-733 overlaps the Application's proposed place of use. *Id.*

6. Decreed water right 95-734 is owned by John and Evelyn Sylte and authorizes the diversion of surface water from Rathdrum Creek for stockwater purposes. *Water Right Proof Report 95-734* at 1. Water right 95-734 is for the combined diversion of 0.07 cfs and authorizes the watering of "300 head of cattle" in combination with 95-733, 95-944, 95-7604, and 95-8858. *Exhibit 202*. The water right has a priority date of May 1, 1875. *Id.* The place of use for water right 95-734 overlaps the Application's proposed place of use. *Id.*
7. Licensed water right 95-7630 is owned by the Applicant and authorizes the diversion of groundwater for irrigation purposes. *Water Right Proof Report 95-7630* at 1. The water right is for the diversion of 0.10 cfs and authorizes the irrigation of seven acres. *Id.* Water right 95-7630 has a priority date of May 24, 1976. *Id.* The place of use for water right 95-7630 overlaps the Application's proposed place of use. *Id.*
8. Licensed water right 95-8858 is owned by the Sylte Ranch, LLC and authorizes the diversion of surface water from Rathdrum Creek and an unnamed stream for purposes of irrigation, stockwater, recreation, and storage. *Water Right Proof Report 95-8858* at 1. Water right 95-8858 is for the combined diversion of 0.43 cfs and authorizes the irrigation of 33 acres, the watering of stock, and the use of water for recreational purposes. *Id.* Water right 95-8858 also authorizes the storage of 5.0 acre-feet for irrigation, stockwater, and recreational purposes. *Id.* Water right 95-8858 has a priority date of April 27, 1994. *Id.* The place of use for water right 95-8858 overlaps the Application's proposed place of use. *Id.*
9. Licensed water right 95-10876 is owned by the Sylte Ranch, LLC and authorizes the diversion of groundwater for irrigation and domestic purposes. *Water Right Proof Report 95-10876* at 1. Water right 95-10876 is for the combined diversion of 0.50 cfs and authorizes the irrigation of two acres and the use of groundwater for domestic purposes in four homes. *Id.* Water right 95-10876 has a priority date of July 21, 2009. *Id.* The place of use for water right 95-10876 overlaps the Application's proposed place of use. *Id.*
10. Rathdrum Creek flows across the Applicant's property, generally running from northeast to southwest. *IDWR Parcel Exhibit Map*.
11. The Applicant filed the Application partly in response to multiple public requests by Finman for the Applicant to "resolve the issues of the lake and the water rights on the lake" by drilling a well to divert groundwater for the same uses for which he currently diverts surface water. *Sylte Testimony*.
12. The Applicant drilled a well in 1993 to service three houses and water stock. The well yielded as much as 6 gallons per minute ("gpm"). *Sylte Testimony*. Approximately two years ago, the "well went dry." *Id.*

13. The Applicant recently drilled a second, new well to a depth greater than 300 feet, which will serve as the point of diversion for the Application. *Sylte Testimony*. The new well has been in service for less than a year. *Id.*
14. Haines is a professional engineer hired by Sylte to evaluate the yield of the new well. *Haines Testimony*. Haines attempted two pump tests on the new well to establish its yield. *Id.* The first pump test "never got going," and the second pump test "ran for five hours." *Id.* The second pump test ended prematurely because of equipment malfunction. *Id.*
15. In preparation for the pump tests, Haines researched wells "in the area" of the new well. *Haines Testimony*. Haines identified that the Applicant's first well was the closest well to the new well at approximately 600 feet away. *Id.* A well owned by Susan Smith at approximately 1,400 feet away was the next closest well. *Id.*
16. During Haines' second pump test, he measured drawdown in the Applicant's first well to determine the effect of pumping the new well on the first well. *Haines Testimony*. Haines measured a slight negative drawdown in the first well, indicating that the Applicant's new well had "no impact" on the first well during the pump test. *Id.*
17. Haines measured the new well's discharge at 50 gpm (0.11 cfs) at the start of the five-hour pump test and 43 gpm (0.10 cfs) at the end of the pump test. *Haines Testimony*. Because the second five-hour pump test ended before the well reached steady state, Haines did not determine a final yield. *Id.*
18. As a result, the Applicant is not sure the exact amount the new well yields and does not know if it will support all of the "irrigation" and "the pond" uses described in the Application. *Sylte Testimony*.
19. The Applicant testified that the well could serve "three houses," a "small feedlot," and if the source is sufficient, a small "irrigation system" consisting of a well, a sprinkler system, and a pond. *Sylte Testimony*.

Protestant – Paul Finman

20. Finman owns land in the south half of Section 19, the southwest quarter of Section 20, and the north half of Section 30, Township 52 North, Range 4 West, Boise Meridian, Kootenai County, Idaho. *IDWR Parcel Exhibit Map*.
21. Finman shares a property line with the Applicant. *IDWR Parcel Exhibit Map*.
22. Rathdrum Creek flows across Finman's property, generally running from northeast to southwest. *IDWR Parcel Exhibit Map*. Finman's property is located upstream on Rathdrum Creek from the Applicant's property. *Id.*
23. Finman has two wells on his property. *Haines Testimony*. The well that is farthest north from the Applicant's new well is approximately 5,000 feet away. *Id.* Finman's northerly well has an approximate flow rate of 25 gpm (0.06 cfs). *Id.* Finman's second well is

approximately 4,400 feet away from the Applicant's new well. *Id.* Finman's southerly well is "shallower" than Finman's northerly well and, when constructed, "flowed at land surface" under artesian pressure with a reported flow rate of 200 gpm (0.45 cfs). *Id.*

TLIA

24. TLIA represents property owners who live on and around Twin Lakes. TLIA represents a "large community" of "over 450 water users" and "probably 500 to 600 families." *Sylte Testimony.*
25. IDWR conducted a prehearing conference related to the Application to resolve the protests. *Jones Testimony.* Based on the conference, the Department prepared a draft permit of the Application ("Draft Permit") and distributed the Draft Permit to the parties via letter on May 21, 2020. Jones, Doug, *Letter RE: Draft Permit 95-17896 – revised from Status Conference discussion at 3-5, May 21, 2020.* The Draft Permit addressed TLIA's concern that Sylte "was duplicating water rights" through the combined use limits. *Sylte Testimony.*
26. TLIA stipulated to the withdrawal of its protest contingent on the Department's grant of the Application "provided that any approval of the Application includes the revised Condition of Approval contained in the May 21, 2020 correspondence and [Draft Permit] from Douglas Jones... ." *TLIA Stipulation.*

Public Interest Issues

27. Finman testified at hearing that there is "so much conflict in the community" over water use on the "Sylte Ranch." *Finman Testimony.*
28. Stephen Neff is the current watermaster of Twin Lakes Water District 95C. *Sylte Testimony.* Before Mr. Neff, Laurin Scarcello ("Scarcello") was the watermaster of Water District 95C. *Id.*
29. Twin Lakes is upstream from the Sylte Ranch, and the lake and the ranch are connected by "[Rathdrum Creek], a stream that runs between the [lake and the ranch]." *Sylte Testimony.* An outlet dam on Twin Lakes controls flow out of the lake into Rathdrum Creek. *Id.* The stream reach between the dam and the Sylte Ranch is two and a half miles long. *Id.* The stream reach between the dam and the Sylte Ranch "loses ten cfs of water." *Id.*
30. Mr. Neff reported, "there are losses all along Rathdrum Creek, but they are most concentrated [in the] 300-yard section along the top of [Finman's] property" where the losses are "50% of dam outflow." *Exhibit 200 at 1.*
31. Two entities manage certain aspects of the surface water in the Rathdrum Creek drainage. *Sylte Testimony.* The Flood Control District manages "flooding and high water," and Water District 95C "deals with the water users." *Id.*

32. Water District 95C operates the outlet dam on Twin Lakes “during the summer” to deliver surface water to water users who divert from Rathdrum Creek downstream of the dam. *Sylte Testimony.*
33. For a time, former Water District 95C Watermaster Scarcello “wore two hats” as both the “gate master [of the outlet dam serving the Flood Control District] and the watermaster.” *Sylte Testimony.*
34. A hearing was conducted to remove Scarcello as watermaster of Water District 95C due to a controversy about his water delivery to the Applicant. The Applicant testified that Scarcello “was getting [Sylte] water [when he] didn’t deserve it.” *Sylte Testimony.* Watermaster Scarcello was removed as watermaster of District 95C by the Department due to facts brought to light at the hearing. *Id.*
35. Due to the controversy surrounding the delivery of water to the Applicant, a hearing was also conducted to remove the Applicant as a commissioner of the Twin Lake Flood Control District. *Sylte Testimony.* The Department chose to maintain the Applicant’s membership in the Flood Control District. *Id.*
36. During the 2020 water year, the Water District 95C Watermaster issued an order curtailing “all irrigation use, diversion, or storage of water from Fish Creek, Twin Lakes, Rathdrum Creek, and their tributaries” to “deliver water to the highest priority [i.e., most senior] user in [the] district.” *Exhibit 201.* The order also required “all check dams...be opened sufficiently to allow stored water to be released and natural flow to be restored.” *Id.* The Watermaster issued his curtailment order in person and by electronic mail on October 8, 2020. *Exhibit 200.*
37. The Applicant testified the Watermaster issued the October 8, 2020, order to shut off junior users “to see if he can’t get flow [in Rathdrum Creek] down to [the Sylte Ranch].” *Sylte Testimony.*
38. As a result of the water conditions on Rathdrum Creek in the fall of 2020, the Watermaster anticipates that he will have to place “water [use] restrictions” on all water users by late-July the summer of 2021. *Exhibit 200* at 2. The Watermaster believes future “water restrictions” will create a negative reaction from Twin Lakes and Rathdrum Creek water users. *Id.*
39. Finman testified that approval of the Application is in the public interest because the use of well water is “trouble-free,” and the use of “surface water, creek water” leads to “a lot of problems.” *Finman Testimony.*
40. Finman also testified that the Application is further in the public interest if it is conditioned, to require the Applicant to “preferentially” use “well water” before surface water. *Finman*

Testimony. Finman testified that this “preferential use” implies well water must be used first, but if or when there is no well water, the Applicant can divert “creek water.” *Id.*

41. The Applicant testified that approval of the Application is in the public interest. *Sylte Testimony.*
42. The Applicant further testified that his understanding of Finman’s “preferential” use of groundwater diverted under the Application “is asking him to lose the creek.” *Sylte Testimony.* The Applicant also testified that agreeing to Finman’s “preferential use” condition “does not make sense” that he “need[s] the water out of the creek,” and if he accepted the condition he “would be cutting of [his] nose to spite [his] face.” *Id.*
43. Doug Jones, IDWR’s Northern Regional Manager, testified that community conflict over surface water use on Sylte’s property has confronted him since he started as the Regional Manager in 2018. *Jones Testimony.*
44. Jones testified that in the past, he has briefed IDWR’s Director in Boise about the on-going “community conflict [on Rathdrum Creek].” *Jones Testimony.*
45. Jones testified that approval of the Application is in the public interest and will “alleviate surface water conflict.” *Jones Testimony.*

Conservation of Water Resources

46. Haines testified that a “prudent person” diverting well water for stock consumption “would have a system set up such that it is not pumping into stock tanks and having it run on the ground” because you are paying the power bill. *Haines Testimony.*
47. Haines testified that water diverted under the Application for irrigation will be applied in a “very efficient” sprinkler system. *Haines Testimony.* He also testified that “there will be little loss of water” from the sprinkler system, and whatever losses there are “will go back into the aquifer... .”
48. In comparing the diversion of groundwater from the new well to the diversion of surface water from Rathdrum Creek, Haines testified that “a well is not going to leak” and “Rathdrum Creek from the dam to the sump is a losing...reach of stream.” *Haines Testimony.* Losses in the creek are from “seepage into the Rathdrum Prairie groundwater system” or “evaporation.” *Haines Testimony.*
49. In comparing the diversion of groundwater from a well to the diversion of surface water from Rathdrum Creek, Finman testified that there is “leakage and evaporation...from Twin Lakes” and “leakage from Rathdrum Creek.” *Finman Testimony.* He also testified that the surface water system has “so much more spent water...than occurs with a well.” *Id.*

GOVERNING LAW AND EVALUATION CRITERIA

Approving Applications for Permit

Idaho Code § 42-203A sets forth the criteria used to evaluate water right applications for permit.

Idaho Code § 42-203A(5) states, in pertinent part:

In all applications whether protested or not protested, where the proposed use is such: (a) that it will reduce the quantity of water under existing water rights, or (b) that the water supply itself is insufficient for the purpose for which it is sought to be appropriated, or (c) where it appears to the satisfaction of the director that such application is not made in good faith, is made for delay or speculative purposes, or (d) that the applicant has not sufficient financial resources with which to complete the work involved therein, or (e) that it will conflict with the local public interest as defined in section 42-202B, Idaho Code, or (f) that it is contrary to conservation of water resources within the state of Idaho, or (g) that it will adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates; the director of the department of water resources may reject such application and refuse issuance of a permit therefore, or may partially approve and grant a permit for a smaller quantity of water than applied for, or may grant a permit upon conditions.

Local Public Interest

Idaho Code § 42-202B(3) defines the local public interest:

“Local public interest” is defined as the interests that the people in the area directly affected by a proposed water use have in the effects of such use on the public water resource.

Burden(s) of Proof

The Applicant bears the ultimate burden of proof regarding all factors set forth in Idaho Code § 42-203A. IDAPA 37.03.08.40.04.b.

Substantial and Competent Evidence

Decisions herein must be made on substantial and competent evidence. *Jarvis v. Rexburg Nursing Ctr.*, 136 Idaho 579, 583, 38 P.3d 617, 621 (2001). “Substantial and competent evidence is relevant evidence that a reasonable mind might accept to support a conclusion.” *Id.* Substantial evidence does not need to be un-contradicted or lead to a certain conclusion. It need only be of such

sufficient quantity and probative value that reasonable minds could reach the same conclusion as the Department. *Mann v. Safeway Stores, Inc.*, 95 Idaho 732, 736, 518 P.2d 1194, 1198 (1974).

ANALYSIS

A. Injury to Existing Water Rights

Rule 45.01.a and a.i state:

Criteria for determining whether the proposed use will reduce the quantity of water under existing water rights. A proposed use will be determined to reduce the quantity of water under an existing water right (i.e., injure another water right) if:

The amount of water available under an existing water right will be reduced below the amount recorded by permit, license, decree or valid claim or the historical amount beneficially used by the water right holder under such recorded rights, whichever is less.

IDAPA 37.03.08.45.01.a and a.i.

The Applicant and Haines testified that the Applicant has two wells described above, the first well and the new well. The Applicant drilled the new well to deliver water for the uses proposed in the Application. The Applicant's first well is the closest well to the new well at approximately 600 feet away. The next closest well, in the name of Susan Smith, is located approximately 1,400 feet away.

Finman and Haines testified that Finman has two wells on his farm. Haines estimated that Finman's "furthest north" well was approximately 5,000 feet from the Applicant's new well. Haines also testified that Finman's second well, which "flows at land surface," is approximately 4,400 feet from the Applicant's new well.

Haines performed a five-hour pump test on the new well to determine the sustainable yield of the well. During the pump test, Haines took draw-down measurements at the new well and at the Applicant's first well, which served as an observation well. Haines did not observe drawdown in the observation well during the five-hour pump test. Again, the Applicant's first well is the closest well to the new well.

There is no evidence in the record showing the Applicant's proposed use would reduce the quantity of water or injure existing water rights.

B. Sufficiency of Water Supply

Rule 45.01.b of the Water Appropriation Rules states, in pertinent part:

The water supply will be determined to be insufficient for the proposed use if water is not available for an adequate time interval in quantities sufficient to make the project economically feasible (direct benefits to the applicant must exceed direct costs to applicant), unless there are noneconomic factors that justify application approval.

IDAPA 37.03.08.45.01.b.

There is testimony in the record from witnesses regarding five existing wells. Two of these wells belong to the Applicant. The Applicant testified that his older well has gone dry. The Applicant hired Haines to determine the yield of his new well. Haines testified that he measured a discharge rate of 0.10 cfs out of the Applicant's new well after five hours of pumping the well. Haines acknowledged that the pump test ended prematurely without establishing a final yield.

Again, Finman has two wells on his property. His northern well, which is the shallower of the two, is located farthest from the Applicant's new well and was reported to have a diversion rate of 0.06 cfs. Finman's southern well, which is deeper and closer to the Applicant's new well, was described as flowing at land surface with a rate of 0.45 cfs. The Applicant and Finman generally regarded the flow of Finman's southern well as very "good" and "reliable."

The Application proposes to divert 0.22 cfs for various uses, including storage of water in a pond. Existing wells in the area, including the Applicant's new well, which was drilled in a different location and to a different depth than his old well, suggest that the new well may be sufficient to meet some or all of the uses described in the Application.

The criteria related to evaluating the sufficiency of water supply focus on determining whether the quantity of water is sufficient to make the project economically feasible. The Applicant has already drilled the well and is currently diverting groundwater from it for domestic and stockwater purposes. Because the well is already constructed and the Applicant uses water from it, the water supply appears sufficient for some, and perhaps, ultimately, all of the proposed uses in the Application. In other words, there is sufficient evidence in the record to show sufficient water is available from the new well for adequate time intervals and in such quantities to make the project economically feasible. Evidence in the record is sufficient to show that the direct benefits of the already-drilled new well to the Applicant exceed the costs to the Applicant.

Both the Applicant and Haines testified that it is premature to know if the well will meet *all* of the uses described in the Application. However, when the Applicant files proof of beneficial use with the Department at the end of his development period, the Department will measure the well's yield. The Department may reduce the diversion rate at licensing depending upon its measurement of the well's capacity. Based on the evidence and testimony in the record, the hearing officer is persuaded there is sufficient water to justify granting the Application for its proposed uses.

C. Good Faith / Non-Speculative

Rule 45.01.c of the Water Appropriation Rules establishes the relevant criteria for determining whether the Application was made in good faith. Relevant here, Rule 45.01.c.i states, in pertinent part:

The applicant shall have legal access to the property necessary to construct and operate the proposed project, has the authority to exercise eminent domain authority to obtain such access, or in the instance of a project diverting water from or conveying water across land in state or federal ownership, has filed all applications for right-of-way.

IDAPA 37.03.08.45.01.c.i.

The Applicant owns all of the land described in the Application as the point of diversion and the places of use. The Applicant has already constructed the well and many of the improvements needed to beneficially use groundwater in conjunction with the Application. The Applicant has demonstrated that the Application is not for speculative purposes and was filed in good faith.

D. Sufficient Financial Resources

Rule 45.01.d. of the Water Appropriation Rules provide the relevant criteria for determining whether the Applicant has sufficient financial resources to complete the project. Rule 45.01.d.i states, in pertinent part:

An applicant will be found to have sufficient financial resources upon a showing that it is reasonably probable that funding is or will be available for project construction or upon a financial commitment letter acceptable to the Director.

IDAPA 37.03.08.45.01.d.i.

The Applicant has filed the Application to divert groundwater for existing beneficial uses currently supplied by surface water. As a result, the Applicant has already constructed much of the infrastructure needed to put groundwater to beneficial use under the Application. In addition, the Applicant has already constructed the well by which he will divert groundwater under the Application. The Applicant had demonstrated sufficient financial resources to complete the project.

E. Local Public Interest

Idaho Code § 42-202B(3) defines "local public interest" as "the interests that the people in the area directly affected by a proposed water use have in the effects of such water use on the public water resource." The current statutory definition of local public interest was adopted in 2003 and

superseded the evaluation criteria set forth in Rule 45.01.e of the Water Appropriation Rules, which dates from 1993.

The current definition of local public interest requires an analysis of the effects of the proposed use on the public water resource itself. The inquiry involves analyzing whether the proposed use will impact the local public water resource in a way that renders it unable to accomplish other compelling public needs.

In this case, the Applicant's proposed groundwater use will supplement or replace water supplies for uses currently met by the diversion of surface water from Rathdrum Creek and other unnamed streams tributary to Rathdrum Creek under water right nos. 95-733, 95-734, 95-7630, 95-8858, and 95-10876.

At hearing the Applicant, Finman, and Jones all testified the Application is in the public interest and its approval will alleviate some water user conflict on Rathdrum Creek. There is no testimony or evidence in the record that the Application is not in the public interest.

At multiple times during the hearing, Finman testified that he encouraged and supported the Application to divert groundwater because its use by the Applicant will alleviate water use conflict on Rathdrum Creek. As evidence of long-standing water use conflict, Finman testified about past disputes over the delivery of surface water to the Applicant that resulted in contentious legal hearings to remove a watermaster and to remove the Applicant as a commissioner from the Twin Lakes Flood Control District. Finman also submitted evidence of recent actions by the watermaster to curtail surface water users on Twin Lakes and Rathdrum Creek to deliver water to Sylte's senior water rights. These recent actions of the Watermaster were deemed controversial by Finman, and, according to Finman, by many in the Twin Lakes community. Finman posited that if the Applicant diverted groundwater instead of making controversial surface water delivery calls, which can result in the curtailment of users on Twin Lakes and Rathdrum Creek, many conflicts in the water user community could be avoided.

The hearing officer finds that the Application may reduce both conflict and delivery calls on Twin Lakes and Rathdrum Creek. This outcome is in the local public interest.

However, Finman's position also included a strong preference for certain conditional elements. Finman advocated that it was further in the public interest for Sylte to "preferentially" use groundwater over his existing senior water rights that divert from Rathdrum Creek and other surface water sources. Finman elaborated that "preferential use" means the Applicant should be *required* to use groundwater before using surface water, unless or until the groundwater is insufficient to meet the uses under the Application. In other words, Finman proposed that permit no. 95-17896 should be conditioned to require the Applicant's use of groundwater under the permit first and until groundwater is insufficient to meet the uses under the Application.

The Applicant did not support or agree with Finman's proposed "preferential use" condition. Instead, the Applicant argued he does not yet know if his new well will be sufficient to meet *all* of the uses described on the Application. He testified that he has one well that has already gone dry, and his new well could also go dry. Therefore, the Applicant refused to agree to any language that could be interpreted to limit his existing rights to use surface water. The Applicant also argued that at certain times of the irrigation season, there is sufficient surface water to meet his needs without calling for water. Furthermore, the Applicant testified that during periods of runoff, water is released out of Twin Lakes to prevent or alleviate flooding on the lake. In other words, there are times of the year when it would be illogical to force the Applicant to pump groundwater on a preferential basis when surface water is abundant.

On this point, the hearing officer agrees with the Applicant. From a practical perspective, the Applicant should not be forced to pay for electricity to pump groundwater during times of surface water abundance.

More critical to the analysis of Finman's proposed preferential use condition are issues of administration and legal authority. It is unclear how adopting the condition proposed by Finman may affect the Applicant's existing decreed and licensed water rights. These rights are not conditioned to limit their exercise preferentially to the use of groundwater. The Department, and through it the overlying Water District, are required to administer water rights in priority subject to the limits and conditions on the face of the water rights. The Idaho Supreme Court has concluded an adjudicated water right is a judicially decreed property right binding on the Department. *City of Blackfoot v. Spackman*, 162 Idaho 302, 309, 396 P.3d 1184, 1191 (2017). Because a water right is a property right that is binding upon IDWR, IDWR lacks the authority to amend the Applicant's previously decreed water rights. As a result, at least concerning the Applicant's existing decreed water rights, no condition placed on the Application can limit the Applicant's use of water under his existing decreed rights.

After considering the practical effects of forcing the Applicant to preferentially use groundwater over existing surface water rights, and in consideration of IDWR's legal authority over decreed water rights, the hearing officer declines to adopt Finman's proposed preferential use condition.

The hearing officer will, however, condition the permit using the conditions agreed upon by the Applicant and TLIA in the Draft Permit. The Application was originally protested by TLIA, an organization representing more than 450 water users on Twin Lakes. As happened in the fall of 2020, TLIA water users are impacted when their junior water rights are curtailed by the Watermaster, and water is released from the Twin Lakes to deliver water to the Applicant's downstream senior water rights. As regional manager, Jones hosted a prehearing conference with the Parties to resolve the protests filed against the Application. Following the prehearing conference, Jones prepared the Draft Permit that contained conditions limiting the combined irrigated acres, annual stockwater diversion volume, and daily stockwater diversion volume under the Application and the Applicant's existing water rights with overlapping places of use. The combined use limits were in response to discussion and comments from TLIA during the

prehearing conference. TLIA requested the conditions, in part to prevent the enlargement of water use by the Applicant as a result of stacking a groundwater right over the same places of use described by his existing surface water rights. The Draft Permit conditions also addressed concerns over the unnecessary duplication of water rights.

TLIA stipulated the withdrawal of its protest if the Application was granted with the conditions set forth on the Draft Permit. The Applicant stipulated to the Draft Permit conditions. Furthermore, the conditions set forth on the Draft Permit are similar to conditions imposed by the Department, where enlargement and the unnecessary duplication of stacked water rights are of concern.

The hearing officer finds adding the conditions set forth on the Draft Permit to the actual permit mitigates concerns about the Application by a large contingency of Twin Lakes water users, including certain concerns raised by Finman at the hearing. The hearing officer further finds the conditions are reasonable because the issues of enlargement and unnecessary duplication of stacked water rights are of concern. As a result of this finding, the hearing officer concludes adding the Draft Permit conditions to the preliminarily approved permit is in the public interest.

Based on sufficient and competent evidence in the record, the hearing officer concludes granting the Application is in the public interest. The hearing officer may not, however, condition the permit to require the "preferential use" of groundwater by the Applicant over his existing, decreed surface water rights. Even without the proposed preferential use condition, the permit will allow the Applicant to beneficially use available groundwater and simultaneously alleviate some of the water user conflicts on Twin Lakes and Rathdrum Creek. For the reasons described above, approving the Application is in the local public interest.

F. Conservation of Water Resources

In 1990 the Idaho Legislature implemented the conservation of water resources requirement for water appropriations. See Idaho Code § 42-203A(5)(f) ("In all applications whether protested or not protested, where the proposed use is such...(f) that it is contrary to the conservation of water resources within the state of Idaho..."). The Department's Application Processing Memorandum No. 48, which addresses the statutory conservation of water resources requirement, states:

The term "conservation" is not defined in the legislative intent or in the amendment... . Due to lack of stated legislative intent, the department will apply the criterion in terms of efficiency as is generally suggested by the term.

The Department has interpreted this requirement to require certain standards of water user efficiency so the proposed beneficial use is accomplished while conserving as much water as possible for other beneficial uses.

Haines testified at the hearing that the Applicant's new well would be connected to an irrigation delivery system consisting of a reservoir and sprinkler system. Haines testified the irrigation

system would be very efficient with very little loss, and with any losses that do occur infiltrating into the ground and returning to the source aquifer. Haines also testified that because groundwater is pumped out of the well, the Applicant must pay for the electricity to power the pump. As a result, it is in the Applicant's best interest to operate as efficient a groundwater use system as possible to reduce his power costs. The use of an efficient irrigation delivery system constitutes a conservative use of water when compared to other irrigation methods.

Testimony by Finman and Haines at the hearing also compared the conservation of surface water under the Applicant's current diversion of Rathdrum Creek water and the proposed diversion of groundwater under the Application to meet the same uses. Both Finman and Haines testified the delivery of surface water is less efficient than the delivery of groundwater due to the evaporative and seepage losses in Twin Lakes and Rathdrum Creek. The hearing officer agrees and concludes the Applicant's proposed groundwater uses are consistent with the conservation of water resources within Idaho.

G. Effect on the Local Economy

Idaho Code § 42-203A(5)(g) requires a showing the Application will not "adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates..." The Applicant is not proposing to divert and beneficially use water outside of the local watershed. As a result, this review criterion does not apply to the approval of the Application.

CONCLUSIONS OF LAW

The Applicant has satisfied the burden of proving the criteria of review set forth in the Idaho Code, § 42-203A(5). To ensure the Application is not contrary to the local public interest, the Department should permit the Application with the conditions set forth in the TLIA Stipulation.

ORDER

IT IS HEREBY ORDERED that Application No. 95-17896, in the name of Gordon D. Sylte, is **APPROVED**.

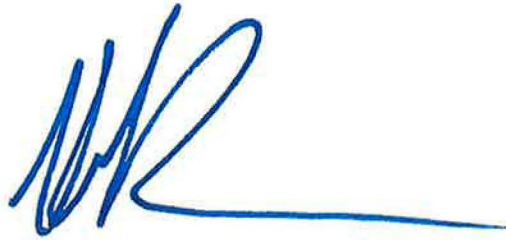
IT IS FURTHER ORDERED that permit No. 95-17896 is subject to the following conditions.

1. Proof of application of water to beneficial use shall be submitted on or before February 1, 2026.
2. Subject to all prior water rights.
3. Project construction shall commence within one year from the date of permit issuance and shall proceed diligently to completion unless it can be shown to the satisfaction of the

Director of the Department of Water Resources that delays were due to circumstances over which the permit holder had no control.

4. Right holder shall comply with the drilling permit requirements of Idaho Code § 42-235 and applicable Well Construction Rules of the Department.
5. After specific notification by the Department, the right holder shall install a suitable measuring device or shall enter into an agreement with the Department to use power records to determine the amount of water diverted and shall annually report the information to the Department.
6. Domestic use is for four (4) homes. Irrigation of lawn, garden and landscaping associated with the home is authorized under the irrigation component of this right.
7. Stockwater use is for 100 head of mixed stock.
8. Stockwater use under rights 95-733, 95-734, 95-944, 95-7604, 95-8858 and 95-17896 is for a combined 300 head of cattle.
9. This right, when combined with all other rights, shall provide no more than 0.02 cubic feet per second per acre nor more than 3.0 acre-feet/annum per acre at the field headgate for irrigation of the place of use.
10. Rights 95-4731, 95-10876, and 95-17896, when combined, shall not exceed the domestic use for four (4) homes.
11. The right holder shall install and maintain an impermeable liner in the pond to eliminate seepage losses.
12. Right 95-17896 authorizes the storage of an annual total of 36.3 acre-feet, comprised of 1.0 acre-feet to be used for the initial filling of the pond, 0.3 are-feet for the replacement of losses due to evaporation, and up to 35.0 acre-feet for additional refills for irrigation and stockwater from storage use.
13. The pond established by the storage of water under this right shall not exceed a total capacity of 1.0 acre-feet or a total surface area of 0.2 acres.
14. This right does not grant any right-of-way or easement across the land of another.
15. Right nos. 95-733, 95-944, 95-7604, 95-8858 and 95-17896 are limited to the irrigation of a combined total of 113.4 acres in a single irrigation season.
16. Right nos. 95-733, 95-734, 95-944, 95-8858 and 95-17896 are limited to a total combined annual diversion volume of 4.10 acre-feet for stockwater use.
17. The quantity of water under right nos. 95-733, 95-734, 95-944, 95-8858 and 95-17896 for stockwater use shall not exceed 13,000 gallons per day.
18. Right Nos. 95-8858, 95-10876 and 95-17896 are limited to the irrigation of a combined total of 36.4 acres in a single irrigation season.

Dated this 22nd day of January 2021.

A handwritten signature in blue ink, consisting of stylized initials 'MW' followed by a long horizontal line.

Mat Weaver
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of January 2021, true and correct copies of the documents described below were served by email and by placing a copy of the same with the United States Postal Service, postage prepaid and properly addressed to the following:

Document Served: *Amended Preliminary Order Approving Application for Permit*

GORDON SYLTE
8626 W SYLTE RANCH RD
RATHDRUM, ID 83858
gordonsylte@icloud.com

PAUL FINMAN
764 CLEARWATER LOOP
POST FALLS, ID 83854
pfinman@lcfamps.com

TWIN LAKES IMPROVEMENT ASSOCIATION
C/O PARSONS BEHLE & LATIMER
800 W MAIN ST STE 1300
BOISE, ID 83702-5948
nsemanko@parsonsbehle.com

TWIN LAKES IMPROVEMENT ASSOCIATION
PO BOX 620
RATHDRUM, ID 83858
twlia@hotmail.com



Kimberle English

EXPLANATORY INFORMATION TO ACCOMPANY A PRELIMINARY ORDER

(To be used in connection with actions when a hearing was held)

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

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a preliminary order with the hearing officer within fourteen (14) days of the service date of the order as shown on the certificate of service. **Note: the petition must be received by the Department within this fourteen (14) day period.** The hearing officer 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 to the Director. Otherwise, this preliminary order will become a final order of the agency.

If any party appeals or takes exceptions to this preliminary order, opposing parties shall have fourteen (14) days to respond to any party's appeal. Written briefs in support of or taking exceptions to the preliminary order shall be filed with the Director. The Director retains the right to review the preliminary order on his own motion.

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, request 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 Rules of Procedure 302 and 303.

FINAL ORDER

The Department 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.