

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI**

GORDON SYLTE, an individual; SUSAN
GOODRICH, an individual; JOHN
SYLTE, an individual; and SYLTE
RANCH LIMITED LIABILITY
COMPANY,

Petitioners,

vs.

IDAHO DEPARTMENT OF WATER
RESOURCES,

Respondent.

and

TWIN LAKES IMPROVEMENT
ASSOCIATION, MARY A. ALICE,
MARY F. ANDERSON, MARY F.
ANDERSON et al., DEBRA ANDREWS,
JOHN ANDREWS, MATTHEW A.
BAFUS, CHARLES AND RUTH
BENAGE, ARTHUR CHETLAIN JR.,
CLARENCE & KURT GEIGER
FAMILIES, MARY K. COLLINS/BOSCH
PROPERTIES, SANDRA COZZETTO,
WES CROSBY, JAMES CURB,
MAUREEN DEVITIS, DON ELLIS,
SUSAN ELLIS, SCOTT ERICKSON,
JOAN FREIJE, AMBER HATROCK,
BARBARA HERR, WENDY AND
JAMES HILLIARD, PAT & DENISE
HOGAN, STEVEN & ELIZABETH
HOLMES, LEIF HOUKAM, DONAL
JAYNE, DOUGLAS I. & BERTHA
MARY JAYNE, TERRY KIEFER,
MICHAEL KNOWLES, ADAM
KREMIN, ROBERT KUHN, RENE
LACROIX, JOAN LAKE-OMMEN,

Case No. CV-2017-7491

District Court - SRBA Fifth Judicial District In Re: Administrative Appeals County of Twin Falls - State of Idaho
FEB - 9 2018
By _____ Clerk
Deputy Clerk

LARRY D. & JANICE A. FARIS LIVING TRUST, TERRY LALIBERTE, PATRICK E. MILLER, WILLIAM H. MINATRE, ANGELA MURRAY, DAVID R. NIPP, JOHN NOONEY, STEVE & PAM RODGERS, KIMBERLI ROTH, DAVID & LORI SCHAFFER, DARWIN R. SCHULTZ, MOLLY SEABURG, HAL SUNDAY, TCRV LLC, TWIN ECHO RESORT, UPPER TWIN LAKES, LLC, RICK & CORRINNE VAN ZANDT, GERALD J. WELLER, BRUCE & JAMIE WILSON, DAVE ZIUCHKOVSKI, PAUL FINMAN, AND TWIN LAKES FLOOD CONTROL DISTRICT NO. 17,

Intervenors.

IN THE MATTER OF SYLTE'S
PETITION FOR DECLARATORY
RULING REGARDING DISTRIBUTION
OF WATER TO WATER RIGHT NO.
95-0734

TWIN LAKES FLOOD CONTROL DISTRICT NO. 17'S RESPONSE BRIEF

Appeal of Final Agency Action by the Idaho Department of Water Resources

Albert P. Barker, ISB #2867
BARKER ROSHOLT & SIMPSON LLP
1010 W. Jefferson St., Ste. 102
P.O. Box 2139
Boise, ID 83701-2139

*Attorneys for Twin Lakes Flood Control
District No. 17*

Michael P. Lawrence, ISB #7288
Jack W. Relf, ISB #9762
GIVENS PURSLEY LLP
601 W. Bannock St.
P.O. Box 2720
Boise, ID 83701-2720

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

Lawrence G. Wasden
Attorney General
Darrell G. Early
Deputy Attorney General
Chief, Natural Resources Division
Garrick L. Baxter, ISB #6301
Emmi L. Blades, ISB #8682
Idaho Department of Water Resources
P.O. Box 83720
Boise, ID 83720-0098

Norman M. Semanko, ISB #4761
PARSONS BEHLE & LATIMER
800 West Main Street, Ste. 1300
Boise, ID 83702

*Attorneys for the Idaho Department of Water
Resources and Director Gary Spackman*

*Attorneys for Twin Lakes Improvement
Association, et al.*

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES 5

I. STATEMENT OF THE CASE 6

II. NATURE OF THE CASE..... 6

III. STATEMENT OF FACTS AND COURSE OF PROCEEDINGS 7

 A. Statement of Facts..... 7

 B. Course of Proceedings..... 8

IV. ADDITIONAL ISSUES PRESENTED ON JUDICIAL REVIEW 8

V. STANDARD OF REVIEW 8

VI. ARGUMENT 9

 A. Sylte’s Claim for Delivery of Water Would Require Delivery of the District’s Private Storage Water Contrary to Idaho Law. 9

VII. ATTORNEYS FEES..... 11

VIII. CONCLUSION 11

TABLE OF CASES AND AUTHORITIES

Cases

American Falls Reservoir Dist. No. 2 v. IDWR, 143 Idaho 862, 154 P.3d 433 (2007) 10

Barron v. IDWR, 135 Idaho 414, 18 P.3d 219 (2001) 9

Black Canyon Irr. Dist. v. State, Docket No. 44636 (January 2, 2018)..... 10, 11

In re: SRBA, Case No. 39576, Subcase 00-91017, 157 Idaho 385, 336 P.3d 792 (2014) 6

Payette River Property Owners Assn. v. Board of Comm’rs., 132 Idaho 552, 976 P.2d 477 (1999)
..... 9

Rabido v. Furey, 33 Idaho 56, 190 P. 73 (1920)..... 10

Rangen, Inc. v. IDWR, 159 Idaho 708, 367 P.3d 193 (2016) 8, 9, 10, 11

Rayl v. Salmon River Canal Co., 66 Idaho 199, 157 P.2d 76 (1945) 10

Washington County Irr. Dist. v. Talboy, 55 Idaho 382, 43 P.2d 943 (1935)..... 10, 11

Statutes

Idaho Code § 12-117(1)..... 11

Idaho Code § 12-117(2)..... 11

Idaho Code § 42-3115(14)..... 7

Idaho Code § 42-602..... 6

Idaho Code § 67-5277..... 8

Idaho Code § 67-5279(1)..... 8

Idaho Code § 67-5279(3)..... 9

Idaho Code § 67-5279(4)..... 9

COMES NOW, the Respondent, Twin Lakes Rathdrum Creek Flood Control District No. 17 (the "District"), by and through their attorneys or record, Barker Rosholt & Simpson LLC, and hereby submit this brief in response to Petitioner Sylte's Opening Brief.

I. STATEMENT OF THE CASE

This case involves an appeal by the holder of a natural flow water right, Petitioners Gordon, Susan, and John Sylte and Sylte Ranch Limited Liability Company ("Sylte"), from a decision of the Idaho Department of Water Resources ("Department" or "IDWR") upholding Instruction to the Water Master for Administration of Rights on Rathdrum Creek and amending one portion of the Instructions to limit Sylte's water right to the total annual diversion volume authorized by the Decree for this right issued in a 1989 adjudication of the Twin Lakes Basin (Case No. 32572). Sylte seeks a determination that their natural flow right entitles requires the Department to release water stored in the Twin Lakes over and above the natural inflow into Twin Lakes. Sylte's challenge would harm the storage rights of Twin Lakes Rathdrum Creek Flood Control District No. 17, Respondent herein.

II. NATURE OF THE CASE

This case involves Sylte's administrative challenge to a decision of the Director on how to administer water in the Twin Lakes Basin. The legislature has entrusted the Director with considerable discretion to distribute water from natural water courses. Idaho Code § 42-602. To be sure, that discretion must be exercised within the bounds of the law. *In re: SRBA, Case No. 39576, Subcase 00-91017*, 157 Idaho 385, 393, 336 P.3d 792, 801 (2014) (*Basin Wide 17*) ("he must follow the law"). In this case, Sylte does not allege that the Director has abused his discretion but contends the Department did not follow the law in the form of the prior decree when it issued the Instructions.

III. STATEMENT OF FACTS AND COURSE OF PROCEEDINGS

A. Statement of Facts.

The District relies on the other parties to the appeal to recite the facts relevant to this appeal. However, the District wishes to make clear to the Court its interest and how it would be impacted by Sylte's appeal. The District holds Water Right 95-0973. R. 001394. This right is what the Department and the 1989 Decree refers to as the "third block of storage." *Id.* That "third block of storage" occupies the space between elevations 6.4 and 10.4 on the staff gauge of the Twin Lakes outlet control structure. *Id.* Below that is the space held by Twin Lakes Improvement Association between elevation 0.0 and 6.4 feet on the staff gauge by Water Right 95-0974. *Id.* Beneath those two blocks of storage is the natural lake storage between the bottom of the lake and elevation 0.0 on the staff gauge. R. 001393.

The main tributary to the lake is Fish Creek. R. 001392. The main outlet is Rathdrum Creek. *Id.* Water released from the outlet structure flows down Rathdrum Creek. *Id.* Sylte has a natural flow right for stockwater from Rathdrum Creek at the rate of 0.07 cfs and with a volume of 4.10 AFA. R. 001393. Critically, Sylte has no storage right. R. 001394.

The District has the right and duty to provide for the protection from floods and conservation of water by doing, among other things, repair of the banks of the Creek. Idaho Code § 42-3115(14). Rathdrum Creek is not in good shape – there are a number of known leaks. The 1989 Decree recognized that conditions had substantially changed in Rathdrum Creek in the prior century. R. 001395-96.

Sylte argues that the Department's Instructions are in error because they do not authorize release of water from storage in excess of the natural inflow to the Twin Lakes. The consequence of this argument would require the Water Master to deliver water previously stored for the

benefit of the District under Water Right 95-0973 and the right of Twin Lakes Improvement District, Water Right 95-0974.

B. Course of Proceedings.

The District will rely on the other parties to the appeal to provide the appropriate detail on the course of proceedings as the District was not highly active in those proceedings.

IV. ADDITIONAL ISSUES PRESENTED ON JUDICIAL REVIEW

Whether Sylte's argument that they are entitled to administration of a constant flow would require a release of water stored by the District which is private water not subject to appropriation?

V. STANDARD OF REVIEW

Judicial review of a final decision of the Director of IDWR is governed by the Idaho Administrative Procedure Act ("IDAPA"). Under IDAPA, the court reviews an appeal from an agency decision based upon the record created before the agency. Idaho Code § 67-5277. The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. Idaho Code § 67-5279(1).

A reviewing court "defers to the agency's findings of fact unless they are clearly erroneous," and "the agency's factual determinations are binding on the reviewing court, even when there is conflicting evidence before the agency, so long as the determinations are supported by substantial competent evidence in the record." *A&B Irrigation Dist. v. Idaho Dep't of Water Res.*, 153 Idaho 500, 505-06, 284 P.3d 225, 230-31 (2012). Substantial evidence is "relevant evidence that a reasonable mind might accept to support a conclusion." *In re Idaho Dep't of Water Res. Amended Final Order Creating Water Dist. No. 170*, 148 Idaho 200, 212, 220 P.3d 318, 330 (2009) (quoting *Pearl v. Bd. Of Prof'l Discipline of Idaho State Bd. Of Med.*, 137 Idaho 107, 112, 44 P.3d 1162, 1167 (2002)). The Court is bound by an agency's factual determinations "even where there is conflicting evidence before the agency, so long as the determinations are supported by substantial competent evidence in the record." *Eddins v. City of Lewiston*, 150 Idaho 30, 33, 244 P.3d 174, 177 (2010).

Rangen, Inc. v. IDWR, 159 Idaho 708, 367 P.3d 193 (2016).

The court shall affirm the agency decision unless it finds that the agency's findings, inferences, conclusions or decisions are: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) not supported by substantial evidence on the record as a whole; or (e) arbitrary, capricious or an abuse of discretion. Idaho Code § 67-5279(3); *Rangen, supra*. Further, the petitioner must show that one of its substantial rights has been prejudiced. Idaho Code § 67-5279(4); *Rangen, supra*. Even if evidence in the record is conflicting, the court shall not overturn an agency's decision that is based on substantial competent evidence in the record. *Barron v. IDWR*, 135 Idaho 414, 417, 18 P.3d 219, 222 (2001). The petitioner bears the burden of documenting and proving that there was not substantial evidence in the record to support the agency's decision. *Payette River Property Owners Assn. v. Board of Comm'rs.*, 132 Idaho 552, 976 P.2d 477 (1999).

VI. ARGUMENT

A. Sylte's Claim for Delivery of Water Would Require Delivery of the District's Private Storage Water Contrary to Idaho Law.

It is important to understand that Sylte is asking this Court to require the Department to deliver more water to their Water Right 95-0734 than there is natural flow water available. The Department's Instructions require delivery of all the natural flow entering the Twin Lakes necessary to provide Sylte's stockwater right and no more. The Department correctly recognized that the 1989 Decree determined that Sylte's water source was natural flow, not storage water. R. 001393 and 00199. The 1989 Decree did not award Sylte any storage. R. 001399. As a consequence, Sylte can only have that water which derives from the decreed source and no other. *Rangen, Inc. v. IDWR*, 159 Idaho 708, 367 P.3d 193 (2016) (right limited to Martin-Curren Tunnel and does not extend to other springs not described in the decree). If Sylte had wanted their source described as storage water they should have made that claim in the adjudication. *Id.*

at 806, 367 P.3d at 201; *Black Canyon Irr. Dist. v. State*, Docket No. 44636 (January 2, 2018).

They did not.

A storage right is a water right that entitles the right holder to hold water in a reservoir to meet the decreed needs. *American Falls Reservoir Dist. No. 2 v. IDWR*, 143 Idaho 862, 878, 154 P.3d 433, 449 (2007). A storage right is a vested property interest. *Id.* This vested right is entitled to protection by the Department. The Instructions appropriately recognize that to require release of something other than natural flow would impair the storage rights. R. 001399.

The District believes this case is controlled by the decision of the Supreme Court in *Washington County Irr. Dist. v. Talboy*, 55 Idaho 382, 43 P.2d 943 (1935). *Talboy* involved a dispute over the rights to water stored in Crane Creek Reservoir. In resolving that dispute, the Court clearly laid down the rule of law with respect to water stored in a reservoir. The court explained:

After the water was diverted from the natural stream and stored in the reservoir, it was no longer “public water” subject to diversion and appropriation under the provisions of the Constitution (article 15, § 3). It then became water “appropriated for sale, rental or distribution” in accordance with the provisions of sections 1, 2, and 3, art. 15, of the Constitution. The waters so impounded then became the property of the appropriators and owners of the reservoir, impressed with the public trust to apply it to a beneficial use.

...

No one can make an appropriation from a reservoir or canal for the obvious reason that the waters so stored or conveyed are already diverted and appropriated and are no longer “public waters.” *Rabido v. Furey*, 33 Idaho 56, 190 P. 73 [1920].

55 Idaho at 389-90, 43 P.2d at 945-46; *Accord Rayl v. Salmon River Canal Co.*, 66 Idaho 199, 208, 157 P.2d 76, 80 (1945) (“stored water having been diverted from and taken out of the natural stream is no longer public water.”)

Sylte's demand to release water from the "block of storage" above the natural inflow violates the principles of *Talboy*. Those stored waters are the property of the storage right holders. Sylte's attempt to expand their source of water beyond natural flow to include stored water that was not described in the prior decree violates *Rangen* and *Black Canyon*. Their petition should be denied.

VII. ATTORNEYS FEES

The District requests an award of attorneys fees and costs under Idaho Code § 12-117(1) and (2). Sylte's position that it is entitled to release of storage water to satisfy the natural flow rights violates well established Idaho law, particularly *Talboy, supra* and *Rangen, supra*. Hence, the District is entitled to attorneys fees. *See Rangen, Inc. v. IDWR*, 159 Idaho 798, 812, 367 P.3d 193, 207 (2016).

VIII. CONCLUSION

Sylte's Petition should be denied. The Instructions and Order approving the Instructions should be affirmed. The District should be awarded its costs and fees.

DATED this 9th day of February, 2018.

BARKER ROSHOLT & SIMPSON LLP



Albert P. Barker
Attorneys for Twin Lakes Flood Control District
No. 17

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 9th day of February, 2018, I caused a true and correct copy of the foregoing to be filed and copies delivered by the method indicated below, and addressed to the following:

Clerk of the District Court
Snake River Basin Adjudication
253 Third Avenue North
Twin Falls, ID 83303-2707

Hand Delivery
 U.S. Mail, postage prepaid
 Facsimile
 Overnight Mail
 Email

Michael P. Lawrence
Jack W. Relf
Givens Pursley, LLP
601 West Bannock Street
P.O. Box 2720
Boise, ID 83701-2720
mpl@givenspursley.com
jackrelf@givenspursley.com


Hand Delivery
 U.S. Mail, postage prepaid
 Facsimile
 Overnight Mail
 Email

Garrick Baxter
Emmi Blades
Idaho Department of Water Resources
322 East Front Street
P.O. Box 83720
Boise, ID 83720-0098
Garrick.baxter@idwr.idaho.gov
Emmi.blades@idwr.idaho.gov

Hand Delivery
 U.S. Mail, postage prepaid
 Facsimile
 Overnight Mail
 Email

Norman M. Semanko
Parsons Behle & Latimer
800 West Main Street, Suite 1300
Boise, ID 83702
NSemanko@parsonsbehle.com

Hand Delivery
 U.S. Mail, postage prepaid
 Facsimile
 Overnight Mail
 Email



Albert P. Barker