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, AN IDAHO LIMITED LIABILITY COMPANY;

Petitioners,

vs.

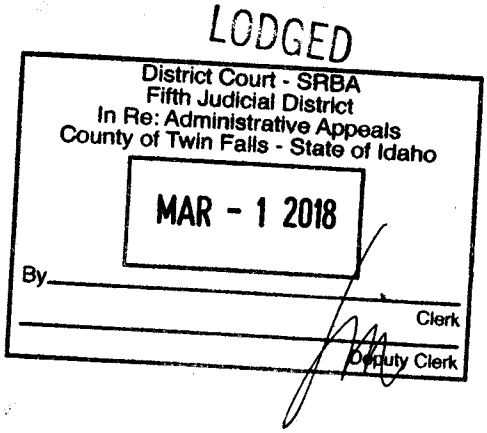
IDAHO DEPARTMENT OF WATER RESOURCES; AND GARY SPACKMAN, IN HIS CAPACITY AS THE DIRECTOR OF THE IDAHO DEPARTMENT OF WATER RESOURCES,

Respondents.

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, DONALD JAYNE, DOUGLAS I & BERTHA MARY JAYNE, TERRY KIEFER, MICHAEL KNOWLES, ADAM KREMIN, ROBERT KUHN, RENE LACROIX, JOAN LAKE-OMMEN, 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 SCHAFER, DARWIN R. SCHULTZ, MOLLY SEABURG, HAL SUNDAY, TCRV LLC, TWIN LAKES, LLC, RICK & CORRINNE VAN ZANDT, GERALD J. WELLER, BRUCE & JAMIE WILSON,

Case No. CV-2017-7491



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

PETITIONER SYLTE'S REPLY BRIEF

Appeal of final agency action by the Idaho Department of Water Resources

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INTRODUCTION

Petitioners Gordon Sylte, Susan Goodrich, John Sylte, and Sylte Ranch Limited Liability Company (collectively, "Sylte") submit this reply brief in support of its October 3, 2017 *Petition for Judicial Review of Agency Action* and in reply to the February 9, 2018 *Respondent's Brief* ("*IDWR Response*") filed by Respondent Idaho Department of Water Resources ("IDWR" or "Department"), the February 9, 2018 *Intervenors' Response Brief* ("*Intervenors' Response*")[1] filed by the intervenors other than Twin Lakes Flood Control District No. 17 (the "Intervenors"), and the February 9, 2018 *Twin Lakes Flood Control District No. 17's Response Brief* ("*District Response*") filed by intervenor Twin Lakes Flood Control District No. 17 (the "District"). The *IDWR Response*, *Intervenors' Response*, and the *District Response* are referred to herein collectively as the "*Response Briefs*," and the Department, the Intervenors, and the District are referred to collectively as "Respondents."

To reduce the burden on the Court, Sylte submits this single brief replying to all of the *Response Briefs* and incorporates the arguments set forth herein in reply to each of the *Response Briefs* individually. The detailed statement of the factual and procedural history of this case is set forth in *Petitioner Sylte's Opening Brief* filed December 22, 2017 ("*Sylte's Opening Brief*") at 6 to 16, and is incorporated herein by reference.[2]

The issues before the Court involve the meaning of the *1989 Decree*, and whether the Department's *Instructions* correctly direct the administration of water to Sylte's water right no.

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[1] The *Intervenors' Response* was modified by the *Errata and Amendment to Intervenors' Response Brief*, filed February 9, 2018 (the "*Errata*"). Any reference to *Intervenors' Response* incorporates the changes noted in the *Errata*.

[2] Unless otherwise indicated, defined terms used in this brief have the same meanings as in *Sylte's Opening Brief* which is hereby incorporated by reference.

95-0734 under the *1989 Decree* and Idaho's prior appropriation doctrine. Sylte contends the *Instructions* incorrectly limit the distribution of water to right no. 95-0734 by limiting the outflow of water from Twin Lakes into Rathdrum Creek to the lakes' tributary inflow. Sylte further contends that water right no. 95-0734—the most senior right on the system, with an 1875 priority date—is entitled to have the natural, pre-1906 dam outflow of Twin Lakes' natural lake storage made available to supply water right no. 95-0734 on a continuous year-round basis. Sylte's positions are based on Judge Magnuson's extensive findings and conclusions in the *1989 Decree* and, in particular, in his *Memorandum Decision*.

The *Response Briefs* contend, in a nutshell, that Sylte is entitled to have only the amount of Twin Lakes' tributary inflow made available to supply water right no. 95-0734 because, otherwise, Sylte would be using water stored under the junior priority 1906 Storage Rights. But this position ignores Idaho's longstanding law that junior water rights are not allowed to injure senior water rights. The Respondents' position also ignores Judge Magnuson's findings that the water artificially stored under the 1906 Storage Rights is the same natural lake storage that furnished water to Rathdrum Creek (and hence to water right no. 95-0734) prior to dam construction. Also, they ignore Judge Magnuson's finding that, prior to dam construction, Twin Lakes' natural lake storage flowed out of the lakes into Rathdrum Creek at all times and in sufficient quantities to satisfy water right no. 95-0734 on a continuous year-round basis. And they ignore Judge Magnuson's determination that Twin Lakes' water levels decreased faster throughout the summer prior to dam construction than after, which means that during these times the natural lake storage outflowed into Rathdrum Creek at rates that exceeded the lakes' natural inflow.

These points require that water right no. 95-0734 is entitled to have the natural, pre-dam outflow from Twin Lakes natural lake storage to furnish its water supply, not merely the amount of the tributary inflow. Unlike the Respondents' position, recognizing right no. 95-0734's entitlement to natural, pre-dam outflow from Twin Lakes gives force and effect to all of the *1989 Decree*.

Based on the arguments set forth below, and in *Sylte's Opening Brief*, the *Order* should be reversed and the *Instructions* should accordingly be set aside and reversed.

ARGUMENT

I. SYLTE IS ENTITLED TO THE NATURAL, PRE-DAM OUTFLOW OF TWIN LAKES' NATURAL LAKE STORAGE.

The Respondents' primary contention is that the water in Twin Lakes belongs to TLIA and the District under the 1906 Storage Rights, and that allowing more outflow than the amount of tributary inflow would provide Sylte with storage water to which it has no right. *See generally IDWR Response* at 10-16; *Intervenors' Response* at 9-12; *District Brief* at 9-11. The Court should reject these arguments, which are contrary to the *1989 Decree* and Idaho law.

A. Sylte's senior priority is entitled to protection from interference by juniors.

It cannot be stated enough: water right no. 95-0734, with its 1875 priority date, is the most senior right on the water system. Contrary to the Respondents' suggestions, Sylte recognizes that water right no. 95-0734 is a natural flow water right, with no storage component. Sylte does not claim it is entitled to water properly stored under the 1906 Storage Rights, or any other storage water right.[3] Rather, Sylte contends that water right no. 95-0734's senior priority

[3] The Respondents argue that Sylte does not have a storage water right (which is true) and that Sylte should have claimed one in the prior adjudication. *See, e.g., District Response* at 9 ("If Sylte wanted their source described

protects it from interference by juniors, and entitles it to the natural flow of water in Rathdrum Creek that existed when it was appropriated—what Sylte refers to as Twin Lakes' natural, pre-dam outflow.[4]

Sylte's Opening Brief described a long line of Idaho cases holding that downstream senior natural flow water users are protected from interference by upstream junior water users. *Sylte's Opening Brief* at 29-30 (discussing *Carey Lake Reservoir Co. v. Strunk*, 39 Idaho 332, 227 P. 591 (1924), *Arkoosh v. Big Wood Canal Co.*, 48 Idaho 383, 283 P. 522 (1929), *Weeks v. McKay*, 85 Idaho 617, 382 P.2d 788 (1963), and *Ward v. Kidd*, 87 Idaho 216, 392 P.2d 183 (1964)).

The Department attempts to discount the importance of these cases, *IDWR Response* at 16, but undermines itself in the following footnote:

> In *Carey*, the Idaho Supreme Court agreed with the downstream senior's argument that "by virtue of being prior appropriators, they had the right to have at least the quantity of water to which they were entitled flow down to them uninterrupted, and that if this flow were interfered with by respondent's dam, they had a right to themselves cut the dam . . . ." *Carey Lake Reservoir Co.*, 39 Idaho at 337, 227 P. at 593. In *Arkoosh*, the court held that junior upstream storage rights could only be exercised if downstream seniors "have at their headgates, during the irrigation season, the amount of water to which they are entitled under their appropriations as the same would have naturally flowed in the natural stream. . . ." *Arkoosh*, 48 Idaho at 396, 283 P. at 526-27. In *Weeks*, the Court held that one who changes a stream by building a dam must "take such

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as storage water they should have made that claim in the adjudication."). It is unclear, however, the basis upon which Sylte could have claimed a storage component for water right no. 95-0734, since it appears that no dam or diversion works was constructed at Twin Lakes' outlet when the right was appropriated in 1875. Rather, water right no. 95-0734 was appropriated, claimed, and decreed as a natural flow water right furnished by the natural, pre-dam outflow of Twin Lakes' natural lake storage.

[4] The "natural, pre-dam outflow" terminology paraphrases Judge Magnuson's finding that, prior to dam construction, "the outlet waters of Twin Lakes flowed over the top of the lip at periods of high water and through the natural pre-dam obstruction at all times, forming the source waters of Rathdrum Creek." *Memorandum Decision* at 11 (R. at 183) (underlining in original).

> precautions as to prevent injury to others." *Weeks*, 85 Idaho at 622, 382 P.2d at 791. In *Ward*, the court held that an upstream junior dam owners could not "obstruct the flow" when "the water, if unobstructed, would reach [the downstream senior's] land . . . ." *Ward*, 87 Idaho at 226, 392 P.2d at 189-90.

IDWR Response at 16 n.3 (underlining supplied).

As *Sylte's Opening Brief* and the Department's footnote demonstrate, these cases consistently uphold the principle enshrined in Idaho's Constitution and statutes that senior right holders are protected from injury and interference by juniors. IDAHO CONST. art. 15 § 3 ("Priority of appropriation shall give the better right as between those using the water."); I.C. § 42-106 ("As between appropriators, the first in time is first in right."). *See also Joyce Livestock Co. v. United States*, 144 Idaho 1, 8, 156 P.3d 502, 509 (2007) ("The rule in this state, both before and since the adoption of our constitution, is . . . that he who is first in time is first in right."); *Beecher v. Cassia Creek Irr. Co., Inc.*, 66 Idaho 1, 12, 154 P.2d 507, 510 (1944) ("Each junior appropriator is entitled to divert water only at such times as all prior appropriators are being supplied under their appropriations under conditions as they existed at the time the appropriation was made.").

The Respondents cite no relevant contrary authority to support their positions. The Department and the District rely heavily on *Washington Cnty. Irr. Dist. v. Talboy*, 55 Idaho 382, 43 P.2d 943 (1935) ("*Talboy*"). *IDWR Response* at 10; *District Response* at 10. But *Talboy* does not involve the question presented in this matter and in the cases cited above—whether an upstream junior appropriator may interfere with the delivery of water to a downstream senior. *Talboy*, 55 Idaho at 384, 43 P.2d at 945. Rather, *Talboy* involved a dispute between cotenants in a reservoir, and their relative rights to use of the stored water. *See id.*

Thus, the fundamental principle that upstream junior appropriators may not interfere with the delivery of water to a downstream senior is not affected by the *Talboy* Court's determination that:

> 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) . . . . 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.

Talboy, 55 Idaho at 384, 43 P.2d at 945. Sylte is not seeking to appropriate the water stored under the 1906 Storage Rights for the simple reason that Sylte's 1875 appropriation pre-dates the 1906 Storage Rights. Idaho law requires that the 1906 Storage Rights (and all other junior rights) be exercised so as not to interfere with the delivery of water to right no. 95-0734.

B. The Respondents' fail to recognize that pre-dam natural lake storage supplied Rathdrum Creek and water right no. 95-0734.

Contrary to Idaho law, the Department asks this Court to allow junior water rights, including the 1906 Storage Rights, to interfere with water right no. 95-0734 because they assert that "besides natural tributary inflow to Twin Lakes, the only water that could possibly be delivered to augment natural flow in Rathdrum Creek to satisfy Sylte's water right 95-0734 is water that is already appropriated and stored in Twin Lakes pursuant to [the 1906 Storage Rights]." *IDWR Response* at 13 (emphasis added). In other words, the Department's position is that Sylte's senior right is not entitled to water because a junior right has "already appropriated" it. This position turns Idaho's law of prior appropriation on its head. *Joyce Livestock*, 144 Idaho at 8, 156 P.3d at 509 ("The rule in this state, both before and since the adoption of our constitution, is . . . that he who is first in time is first in right.").

The Department's position is based in part on its view that "there is no meaningful distinction between water 'artificially stored' in Twin Lakes and 'the natural pre-dam outflow.'" *IDWR Response* at 14.[5] But this cannot be reconciled with the *1989 Decree's* plain language.

In his *Memorandum Decision*, Judge Magnuson determined that the water artificially stored under the 1906 Storage Rights is the same as the "natural lake storage." *Amended Proposed Finding* at xv-xvi (R. at 201-02) (Finding of Fact No. 10).[6] He also determined that, prior to dam construction, Twin Lakes' natural lake storage "furnished" water to Rathdrum Creek "at all times" and to water right no. 95-0734 "on a continuous year-round basis." *Memorandum Decision* at 11 (R. at 183). And he also determined that the Twin Lakes' water levels were held "at a higher point longer through the summer months" after dam construction, *Memorandum Decision* at 10 (R. at 182),[7] which means that Twin Lakes' water levels decreased faster throughout the summer prior to dam construction, and therefore the natural lake storage outflowed into Rathdrum Creek at rates exceeding the lakes' natural inflow during those times.

If Twin Lakes' water level was held "at a higher point longer" because of the dam, the only logical conclusion is that the dam operated to reduce the outflow from Twin Lakes. Indeed,

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[5] Contrary to the Department's insinuation, Sylte did not invent the concept of "artificially stored" waters in Twin Lakes, Judge Magnuson did. *Memorandum Decision* at 21 ("there is a difference between storage rights and natural flow water rights and the Objectors have not established any rights in the artificially stored waters in Twin Lakes." (emphasis added)).

[6] The Intervenors argue that the only "natural storage in Twin Lakes" is the storage below 0.0 feet on the staff gage, for which "no water right exists." *Intervenors Response* at 9-10. This, of course, fails to recognize amended Finding of Fact No. 10.

[7] The Intervenors contend that Sylte mischaracterizes this quote from the *Memorandum Decision*. *Intervernors Response* at 10. But it is the Intervenors who mischaracterize this quote by saying it means "the impoundment of additional water to be held during the summer months." *Id.* (emphasis added). The Intervenors ignore Judge Magnuson's preceding sentence stating that "[t]he water level of Twin Lakes and the vegetation lines around the lakes were relatively the same, both before and after the construction of the dam." *Memorandum Decision* at 10.

it is difficult to believe the dam would have been built in the first place if it did not reduce outflows.

In short, contrary to the Department's position, there is a distinction between the natural pre-dam outflow furnished from the natural lake storage in Twin Lakes and the "artificial storage" held under the 1906 Storage Rights. By virtue of its senior priority, Sylte is entitled to the natural pre-dam outflow. Sylte does not claim, or need, an entitlement to the artificial storage.[8]

C. Secondary sources relied on by the Intervenors do not support their positions.

The Intervenors' reliance on articles about Jackson Lake in the Upper Snake River is also misplaced. *See Intervenors' Response Brief* at 11 (citing Jerry R. Rigby, *The Development of Water Rights and Water Institutions in the Upper Snake River Valley*, THE ADVOCATE, Vol. 53, No. 11/12 (Nov./Dec. 2010) ("*Rigby Article*"), and R.A. Slaughter, *Institutional History of the Snake River 1850-2000*, University of Washington (2004) ("*Slaughter Article*")).

Simply put, Jackson Lake is not like Twin Lakes. Although both lakes involve dams constructed at the outlets of natural lakes, Jackson Lake's dam actually increased the amount of

[8] The Intervenors make the misleading argument that the "Sylte's objected to the Director's Report for water rights in the Twin Lakes Adjudication and argued that they were entitled to storage," and that "Judge Magnuson clearly disagreed." *Intervenors' Response* at 9 (citing *Memorandum Decision* at 16-17 (R. at 188-89)). First, as demonstrated by *Sylte's Objection* (which was improperly used by the Hearing Officer), Sylte objected on grounds that right no. 95-0734 "has priority over the storage rights of 95-0973 and 95-0974," not that Sylte owns a storage water right. *See Sylte's Opening Brief* at 43-44. Second. Judge Magnuson rejected arguments by the "Rathdrum Creek Drainage Association" (a "generic term encompassing all the individual Objectors," *Memorandum Decision* at 8 (R. at 180)) that they had "a vested right in storage rights in Rathdrum Creek" on grounds that no claim forms were filed for such storage rights. *Memorandum Decision* at 16-17 (R. at 188-89). This does not mean, as the Intervenors allege, that Judge Magnuson rejected a claim by Sylte that water right no. 95-0734 should have a storage component. As already explained, water right no. 95-0734 was appropriated, claimed, and decreed as a natural flow water right.

storage in the lake.[9] Here, however, as already discussed, Judge Magnuson found that the dam at Twin Lakes did not increase the amount of storage. *Memorandum Decision* at 10.

Thus, it makes sense that when the additional storage created in Jackson Lake was released to the storage right holders, Upper Snake senior natural flow water users "were ordered to close their headgates later in the season even though there was water in the river." *Rigby Article* at 53. That was because "[d]ue to releases from Jackson Dam, the water in the River was considered storage water . . . and not natural flow water . . . ." *Id.* In other words, the stored water that was released above and beyond the natural flow was not available to the senior natural flow users because it belonged to the storage water users. This, however, did not mean that the senior natural flow users were not entitled to their natural flow. *Id.* (describing the state's desire to "manage and shepherd the storage water down the rivers 'on top' of the river's surface water to the storage water's intended users"). Not surprisingly, the Upper Snake senior natural flow users and the junior storage users squabbled about "what amount of water flowing down the Snake below Jackson was storage water and what amount was natural flow water." *Id.*

The situation here is much less complicated. Judge Magnuson conclusively found that the dam constructed at Twin Lakes' outlet created no new storage, and that the natural, pre-dam outflow furnished from Twin Lakes' natural lake storage was always sufficient to satisfy water

[9] *See* Jackson Lake Dam Overview, available at the Bureau of Reclamation's website: https://www.usbr.gov/projects/index.php?id=162 ("Jackson Lake Dam, a temporary rockfilled crib dam was completed in 1907 by the Bureau of Reclamation at Jackson Lake to store 200,000 acre-feet for the Minidoka Project until the storage requirements could be determined. A portion of this dam failed in 1910, and in 1911 a concrete gravity structure with earth embankment wings was built at the site. The new dam increased storage capacity to 380,000 acre-feet. In 1916, further construction raised the dam 17 feet to a structural height of 65.5 feet, with a total storage capacity of 847,000 acre-feet (active 847,000 acre-feet).").

right no. 95-0734 on a continuous year-round basis. Sylte is entitled to this amount of outflow, which is the natural flow, not storage water.

The Intervenors also cite a paper by Tony Olenichak, IDWR's Program Manager in Water District 01. *See Intervenors' Response Brief* at 11 (citing TONY ONLENICHAK, CONCEPTS, PRACTICES, AND PROCEDURES USED TO DISTRIBUTE WATER WITHIN WATER DISTRICT #1 ("*Olenichak Paper*") at 28 (Mar. 2, 2015)). But this paper supports Sylte's position, not the Intervenors'. The paper states:

> The priority date of a water right indicates when the water right was first developed and its relative delivery sequence when compared to other water rights with different priority dates. The earliest (or senior) priority water right is delivered natural flow ahead of later (or junior) priority water rights when the natural flow is not sufficient to fill all water rights in a reach.

Onlenichak Paper at 28 (italics removed). It goes on to describe how "[n]atural flow delivery is limited to the amount of natural flow available in the reach containing the diversion." *Id.* (italics removed).

Again, Judge Magnuson conclusively found that the natural, pre-dam outflow furnished from Twin Lakes' natural lake storage "available in the reach" where water right no. 95-0734 is diverted always was sufficient to satisfy water right no. 95-0734 on a continuous year-round basis before the dam was constructed. Thus, Sylte is entitled to have its senior priority right satisfied by its historical, year-round natural flow without impairment by later priority rights such as the 1906 Storage Rights.

D. The Respondents' positions do not give effect to all of the 1989 Decree.

As already discussed, the Respondents' positions make sense only if one ignores many of Judge Magnuson's findings and conclusions about the nature of water right no. 95-0734 and the

1906 Storage Rights. But Idaho courts do not take such an approach when reviewing decrees. Rather, a written instrument such as a decree must be read "as a whole and [to] give meaning to all of its terms to the extent possible." *Twin Lakes Vill. Prop. Ass'n, Inc. v. Crowley* ("*Twin Lakes*"), 124 Idaho 132, 138, 857 P.2d 611, 617 (1993) (citing *Magic Valley Radiology Assocs., P.A. v. Prof'l Bus. Servs., Inc.*, 119 Idaho 558, 565, 808 P.2d 1303, 1310 (1991)). "[V]arious provisions in a contract must be construed, if possible, so to give force and effect to every part thereof." *Twin Lakes*, 124 Idaho at 137, 857 P.2d at 616.

For example, the Intervenors argue that water right no. 95-0734 "cannot be authorized 'on a continuous year-round basis' at the rate of .07 cfs" because they allege the decreed volume limitation would be exceeded. *Intervenors Response* at 13; *see also IDWR Response* at 20-22 (arguing essentially the same). In other words, they contend that Judge Magnuson could not have actually meant "continuous year-round" when he determined that the natural lake storage existing prior to dam construction "form[ed] the source waters for Rathdrum Creek" and furnished "sufficient direct flow water in Rathdrum Creek, in its then natural condition . . . to provide .07 cubic feet per second to [Sylte] on a continuous year-round basis." *Memorandum Decision* at 11 (R. at 183) (emphasis added). Obviously, such an approach does not give meaning, force, or effect to all of the *1989 Decree's* terms.

The Department and the Intervenors urge the Court to focus on two sentences in the *Amended Proposed Finding*—Conclusion of Law No. 14, which states:

> When seepage and evaporation losses from Twin Lakes exceed the total natural tributary inflow to Twin Lakes, no water will be released from the lakes to satisfy downstream water rights, with the exception of Water Right No. 95-0734. When this occurs, Water Right No. 95-0734 and water rights that divert from

> Twin Lakes and from the tributaries to Twin Lakes may divert the natural flow, but not the stored waters, on the basis of water right priority.

Amended Proposed Finding at xix (R. at 205) (underlining in original). *See IDWR's Response* at 10, 12, 15; *Intervenors' Response* at 9. They argue that the first sentence means that right no. 95-0734 is included with the rights junior to the 1906 Storage Rights that are limited to the tributary inflow to Twin Lakes, and the second sentence means that right no. 95-0734 is not entitled to waters stored under the 1906 Storage Rights.

But, as explained in *Sylte's Opening Brief* at 35-36, the first sentence simply says that, unlike all other rights, the exercise of water right no. 95-0734 is not limited when Twin Lakes' seepage and evaporation losses exceed natural tributary inflow. It does not say that water right no. 95-0734 is otherwise limited to natural tributary inflow.

The second sentence says that, when that seepage and evaporation losses exceed natural tributary inflow to Twin Lakes, water right no. 95-0734 (and some other rights) may divert "natural flow, but not the stored waters, on the basis of priority." As already discussed, Sylte does not claim an entitlement to the artificially stored waters in Twin Lakes, but rather the natural pre-dam outflow from Twin Lakes' natural lake storage to which water right no. 95-0734 is entitled by virtue of its senior priority.

Sylte's reading of Conclusion of Law No. 14 makes sense from its plain language. It also makes sense when read with Judge Magnuson's detailed findings and conclusions about water right no. 95-0734 in the *Memorandum Decision*. The Department's and the Intervenors' reading, on the other hand, would render superfluous and meaningless Judge Magnuson's findings and conclusions about the pre-dam conditions under which water right no. 95-0734 was appropriated.

In short, the only reading of the *1989 Decree* which gives force and effect to all of its language is Sylte's: that the "stored waters" referenced in Conclusion of Law No. 14 mean the artificially stored waters of Twin Lakes pursuant to right Nos. 95-0974 and 95-0975, and that the "natural flow" which Sylte may divert includes the natural pre-dam outflow from Twin Lakes' natural lake storage to which Sylte is entitled based on right no. 95-0734's senior priority.

E. The Instructions' futile call process is improperly based on the natural tributary inflow.

To be clear, Sylte does not contend that water right no. 95-0734 is immune from the futile call doctrine. Rather, Sylte disputes how the *Instructions* and *Order* say it should be applied to water right no. 95-0734 because those documents premise the doctrine's application on the Department's improper natural tributary inflow limitation. This error is discussed at pages 38-41 of *Sylte's Opening Brief*, which is incorporated here by reference.

In *IDWR's Response*, the Department mischaracterizes Sylte's argument concerning the *Proposed Order* from the 1984 transfer proceeding. The Department's prior finding that "it is not in the interest of the local public to dry up the channel of Rathdrum Creek downstream of the [Twin Lakes dam] control structure," *Proposed Order* at 5, puts into context the *Order's* justifications of Director "discretion" and "balancing" when applying the futile call doctrine to water right no. 95-0734. *See Order* at 13 (the Director "is responsible for balancing the right to divert water against the obligation not to waste it"). Even if the Director has discretion to ignore the priority system and "balance" water users' rights to divert water (which he does not),[10] the

[10] "As a rule, the law of water rights in this state embodies a policy against the waste of irrigation water. Such policy is not to be construed, however, so as to permit an upstream junior appropriator to interfere with the water right of a downstream senior appropriator so long as the water flowing in its natural channels would reach the

finding in the *Proposed Order* demonstrates that the Director has already determined that it is not wasteful to allow water to flow from Twin Lakes down Rathdrum Creek.[11]

The Intervenors argue that seepage in Rathdrum Creek requires the application of the futile call doctrine. *Intervenors' Response* at 13-14. It is true that stream channel seepage and absorption are reasons why the futile call doctrine is applied. *Gilbert v. Smith*, 97 Idaho 735, 739, 552 P.2d 1220, 1224 (1976) (describing "seepage, evaporation, channel absorption or other conditions beyond the control of the appropriators" as reasons for the doctrine's application). However, a futile call does not exist simply because a senior right holder's point of diversion is downstream from a losing stream reach. The measure is whether, due to such a condition, "the water in the stream will not reach the point of the prior appropriator in sufficient quantity for him to apply it to a beneficial use." *Gilbert*, 97 Idaho at 739, 552 P.2d at 1224. In this case, Sylte is entitled to have the natural pre-dam outflow from Twin Lakes' natural lake storage continue in Rathdrum Creek's natural channel as it did in 1875, and to be subject to a futile call only if seepage, evaporation, channel absorption or other conditions beyond their control would cause such water to not reach water right no. 95-0734's point of diversion in sufficient quantities to apply to beneficial use.

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point of downstream diversion." *Gilbert v. Smith*, 97 Idaho 735, 739, 552 P.2d 1220, 1224 (1976) (emphasis added).

[11] The Department also argues that the 1984 *Proposed Order* "does not change that the 1989 Decree's plain language mandates that Sylte's water right no. 95-0734 is not entitled to delivery of waters stored in Twin Lakes when waters in Rathdrum Creek are not sufficient to satisfy the right." *IDWR Response* at 17. As already explained, Sylte is not entitled merely to "waters in Rathdrum Creek" to supply water right no. 95-0734, but the natural, pre-dam outflow from Twin Lakes' natural lake storage which Judge Magnuson said "furnished" the waters in Rathdrum Creek.

There is no reason to believe that the reach of Rathdrum Creek between Twin Lakes and water right no. 95-0734's headgate did not experience losses when the right was appropriated in 1875. Presumably, losses were the same or similar then as today—there is nothing in the record to suggest otherwise. Nevertheless, despite stream losses, Judge Magnuson determined that in 1875 "there was sufficient direct flow water in Rathdrum Creek, in its then natural condition, furnished from the water of Twin (Fish) Lakes, to provide .07 cubic foot per second to the appropriator on a continuous year-round basis . . . ." *Memorandum Decision* at 11(R. at 183). In short, the natural conditions existing when water right no. 95-0734 was appropriated presumably included stream losses, yet "there was always water in Rathdrum Creek to serve said water right." *Memorandum Decision* at 13(R. at 183). The mere fact that stream losses exist is not a basis for denying water to water right no. 95-0734.

Again, Sylte does not argue that water right no. 95-0734 is immune from the futile call doctrine. But it must be properly applied. It must be determined that "due to seepage, evaporation, channel absorption or other conditions beyond the control of the appropriators the water in the stream will not reach the point of the prior appropriator in sufficient quantity for him to apply it to beneficial use." *Gilbert*, 97 Idaho at 739, 552 P.2d at 1224. It only applies if the water "flowing in its natural channels would [not] reach the point of downstream diversion." *Id.* As already explained, the natural flow of water to which Sylte is entitled is the natural pre-dam outflow of Twin Lakes' natural lake storage, and not Twin Lakes' tributary inflow as directed by the *Instructions* and the *Order*.

II. THE *ORDER'S* VOLUME LIMITATION IS IMPROPER.

The Department and the Intervenors argue that the *Order* properly amended the *Instructions* by adding language directing the Watermaster to distribute water to water right no. 95-0734 based on a 4.1 acre-foot volume limitation. *IDWR Response* at 20-22; *Intervenors' Response* at 14. Sylte disagrees.

Contrary to their assertions, Sylte did not ask the Hearing Officer to "evaluate" the *Instructions* (*IDWR Response* at 20-21) or "revise" the *Instructions* (*Intervenors' Response* at 14). Rather, Sylte asked that the *Instructions* be "set aside and reversed." *Sylte's MSJ* at 1-2 (R. at 900-01); *Sylte's MSJ Brief* at 24 (R. at 930). At no point prior to the issuance of the *Order* in the proceeding below was any party aware that the *Instructions* might be modified or on what grounds. Therefore, Sylte had no notice or opportunity to respond to the addition of the volume limitation. For that reason alone, the *Order* must be reversed.

The Department and Intervenors also contend that the *Order's* language properly amended the *Instructions*. *IDWR Brief* at 21-22; *Intervenors' Response* at 14. They are wrong. The *Order's* additional language allows the satisfaction of water right no. 95-0734 "unless or until the maximum annual diversion volume of 4.1 acre-feet has been delivered." *Order* at 13 (R. at 1402) (emphasis added). Sylte contends this misapplies the *1989 Decree* and Idaho law concerning the rights of appropriators because the decreed volume limitation is a measure of what Sylte diverts, not what is delivered.

First, the quantities described in the *1989 Decree* represent the amounts diverted and beneficially used, not delivered. *Amended Proposed Finding* at xx (R. at 206) ("Water has been diverted and applied to a beneficial use as described in the 'Listing of Water Rights.'"). This is

consistent with Idaho's water adjudication statutes. *See, e.g.*, I.C. § 42-1410(1) (instructing the Director to "commence an examination of the water system, the canals and ditches and other works, and the uses being made of water diverted from the water system for water rights acquired under state law."); I.C. § 42-1411(2)(c) (the Director's report shall describe "the quantity of water used describing the rate of water diversion or . . . annual volume of diversion of water . . . .").

Second, it is a well-settled tenet of Idaho's prior appropriation doctrine that a natural flow appropriator has the right to determine whether and when to divert water within the parameters of a water right:

> Priority of appropriation having been established, as well as the amount of the water appropriated, and the beneficial use thereof, it seems to us that the functions of the court under the statute have reached their limit. For the court to dictate the manner in which the appropriator shall use the water so appropriated, so long as it is adapted to a useful or beneficial purpose, is going beyond its province. . . We are of the opinion that, so long as the appropriator of water applies the same to a beneficial or useful purpose, he is the judge, within the limits of his appropriation, of the times when and the place where the same shall be used.

McGinnes v. Stanfield, 6 Idaho 372, 374-75, 55 P. 1020, 1021 (1898) (emphasis added). This is because water needs and the ability to use water (among other factors) are variable, making it unrealistic and inappropriate to require a natural flow water right holder to divert all flows that are "delivered" to its headgate:

> A water right is the right, in due order of priority and within the maximum appropriated, to use the amount of water which reasonably suffices for the owner's needs at any particular time. The factors variable, the amount is variable, not only season to season, but any day by day, even hour by hour. Consequently, it is obvious the court cannot justly prescribe any fixed schedule. It must be left to the honest judgment of the [water right] owner in application, subject to control

> by the court's watermaster, who interferes in any the owner's abuse, and prescribes limits for immediate use.

United States v. American Ditch Assoc., 2 F.Supp. 867, 869 (D. Idaho 1933) (emphasis added).

The Department contends that "Idaho's policy against waste and requiring that water must be put to beneficial use precludes" allowing water to reach Sylte's headgate "even if Sylte does not intend to divert the water." *IDWR Response* at 22. This is a troubling position that should concern every natural flow water user with a volume limitation. Taken at their word, the Department appears to believe that a natural flow water user with a volume limitation can be shut off as soon as that volume of natural flow has reached their headgate each year, regardless of whether the water user needed or has diverted all of that water. The cases quoted above demonstrate that, in Idaho, the when and where to divert and use water is within the good judgment of the natural flow appropriator, not the State.

As already discussed, the manner in which water is distributed to water right no. 95-0734 must reflect how it was appropriated in 1875. With respect to the volume limitation, it makes no sense to conclude that the right was supplied with "direct flow water in Rathdrum Creek, in its then natural condition, furnished from the water of Twin (Fish) Lakes, to provide .07 cubic foot per second to the appropriator on a continuous year-round basis," *Memorandum Decision* at 11 (R. at 183) (emphasis added), while at the same time concluding that all the water "delivered" to the headgate would count toward the 4.1 acre-foot limit. The Department's accounting of "delivered" water would nullify the year-round use found by Judge Magnuson.

In sum, to the extent the volumetric limit is administered, Sylte is entitled to divert water up to that limit at any time during the year it deems appropriate for its purposes. The *Order* and

Instructions improperly give the state control of when Sylte must divert and use the water to which it is entitled.

III. SYLTE IS ENTITLED TO ATTORNEY FEES, AND COSTS AND THE RESPONDENTS ARE NOT.

As set forth in *Sylte's Opening Brief* at 47-48, Sylte requests an award of attorney fees and costs in this judicial review. The Department opposes this request by simply re-asserting that its *Order* and *Instructions* are "consistent with the 1989 Decree's plain language and Idaho law." *IDWR Response* at 23. But, as discussed above, the Department's position does not have a reasonable basis in fact or law. In short, the Department ignores many of Judge Magnuson's express findings and conclusions, as well as fundamental prior appropriation principles, to support its conclusion that junior water rights can interfere with, and are entitled to water before, a senior water right.

The Department does not request attorney fees or costs should it prevail. But even if it had, it would not be entitled to an award if it prevailed because, as demonstrated above and in *Sylte's Opening Brief*, Sylte has acted with a reasonable basis in law and fact.

The District requests an award of attorney fees and costs under Idaho Code § 12-117(1) and (2). *District Response* at 11. But the District could not obtain an award because the cited statute does not apply to the District. Rather, the statute provides for awards of fees and costs to the prevailing party "in any proceeding involving as adverse parties a state agency . . . and a person." I.C. § 12-117(1). In other words, the statute provides for awards of fees and costs to

the state agency or the adverse "person," depending on who prevails.[12] In this case, the District is not adverse to the Department, and therefore is not entitled to fees under Section 12-117. But even if the District could obtain an award under the statute, it would not be entitled to an award if it prevailed because, as demonstrated above and in *Sylte's Opening Brief*, Sylte has acted with a reasonable basis in law and fact.

The Intervenors assert that they are entitled to an award of attorney fees pursuant to Idaho Code Section § 12-121. *Intervenors Response* at 6.[13] But they cannot obtain an award under that statute because it applies only to "civil action[s]," and this judicial review proceeding is not a "civil action." *Krempasky v. Nez Perce Cty. Planning & Zoning*, 150 Idaho 231, 239, 245 P.3d 983, 991 (2010) ("A party can only be awarded attorney fees under I.C. § 12-121 in a 'civil action.' This is a petition for judicial review from an administrative decision and thus is not a civil action. Thus, no attorney fees will be awarded . . . ." (internal citations omitted)).

But even if the Intervenors could obtain an award under Section 12-121 (which they cannot), and even if the Intervenor's prevailed (which they should not), this Court should exercise its discretion to not award attorney fees to the Intervenors because, as demonstrated

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[12] As explained in the Statement of Purpose for the 2000 amendment to section 12-117:

> Idaho law presently allows for the recovery of attorney fees against public agencies in cases where the public agency frivolously pursues or defends the administrative action or civil judicial proceeding. There is no general provision for an award of attorney fees in favor of the public agency where the other party to the action frivolously pursues or defends the administrative or civil action. This legislation amends Idaho Code 12-117 to provide that attorney fees may be awarded to state agencies as well as to other public entities where the public entity is the prevailing party and where the party against whom the judgment is rendered has acted without a reasonable basis in fact or law.

Statement of Purpose, R.S. 09456, which became, S.B. 1333, 200 Idaho Sess. Laws, ch. 241.

[13] The initial *Intervenors' Brief* cites Idaho Code § 12-117, but this is corrected to Section 12-121 by the *Errata*.

above and in *Sylte's Opening Brief*, Sylte brought and pursued this matter with a reasonable basis in law and fact.[14]

The Intervenors contend that Sylte has acted without a reasonable basis in fact or law because they "offer nothing new" when compared to the arguments raised in the prior adjudication. *Intervenors' Response* at 6. This is simply not true.

The issues Sylte raises in this matter stem from the Department's issuance of the *Instructions* in late 2016—an action taken nearly three decades after the *1989 Decree* was issued. The *Instructions* provided the WD 95C Watermaster with the Department's first ever written guidance concerning the distribution of water in WD 95C. *See Watermaster Removal Order* at 17 (April 24, 2017) (R. at 1177). Sylte was compelled to challenge the *Instructions* because they departed from the *1989 Decree's* findings and conclusions that water right no. 95-0734 is entitled to water on a continuous year-round basis from the pre-dam outflow of natural lake storage in Twin Lakes.

Contrary to the Intervenors' assertions that Judge Magnuson rejected the same arguments Sylte makes here, the *1989 Decree* demonstrates that Judge Magnuson agreed with Sylte that its 1875 water right is entitled to "waters from the source of their appropriation on a basis of priority over those storage right nos. 95-0974 and 95-0975." *Memorandum Decision* at 13. Indeed, he held that "[t]he waters of this basin are to be administered in such manner as to give effect to such priority." *Id.* The *Instructions* and the *Order* are not consistent with these directives, and

[14] Section 12-121 provides that "[i]n any civil action, the judge may award reasonable attorney's fees to the prevailing party or parties when the judge finds that the case was brought, pursued or defended frivolously, unreasonably or without foundation." I.C. § 12-121 (emphasis supplied). Thus, unlike the mandatory "shall" language in Section 12-117(1) and (2), Section 12-121 gives the Court discretion to award attorney fees to the prevailing party.

that is why Sylte is challenging them. As Judge Magnuson put it, "[t]o accept the [D]epartment's interpretation of the facts as they pertain to the 1875 Sylte water right (#95-0734), would be to deprive the holders of such right of the use of the water to which they are entitled and to which use they have a prior right to those possessing the storage rights." *Memorandum Decision* at 14.

In sum, Sylte is entitled to an award of attorney fees and costs under Idaho Code Section 12-117(1) and (2) if it prevails in whole or in part. If Sylte does not prevail, there is no basis for the Court to award fees or costs to another party.

CONCLUSION

For the reasons discussed above and in *Sylte's Opening Brief*, the Department's *Order* is in violation of constitutional and statutory provisions, is in excess of the statutory authority of the agency, is made upon unlawful procedure, is not supported by substantial evidence on the record as a whole, and is arbitrary, capricious, or an abuse of discretion. The Respondents' arguments do not support a contrary conclusion. Sylte respectfully requests that the *Order* be reversed and the *Instructions* should be set aside and reversed.

DATED this 28th day of February, 2018.

Respectfully submitted,

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By _____
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CERTIFICATE OF SERVICE

I hereby certify that on this 28th 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:

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