Electronically Filed
10/23/2018 4:31 PM
Idaho Supreme Court
Karel Lehrman, Clerk of the Court
By: Brad Thies, Deputy Clerk

Docket No. 46062-2018

In the Supreme Court of the State of Idaho

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

GORDON SYLTE, AN INDIVIDUAL, SUSAN GOODRICH, AN INDIVIDUAL, JOHN SYLTE, AN INDIVIDUAL, AND SYLTE RANCH LIMITED LIABILITY COMPANY, AN IDAHO LIMITED LIABILITY COMPANY,

Petitioners/Appellants,

v.

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

Petitioners/Respondents,

v.

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, DAVE ZIUCHKOVSKI, PAUL FINMAN, AND TWIN LAKES FLOOD CONTROL DISTRICT NO. 17,

Intervenors/Respondents,

APPELLANT SYLTE'S OPENING BRIEF

Appeal from the District Court of the First Judicial District of
The State of Idaho, in and for the County of Kootenai,
Honorable Eric J. Wildman, Presiding

Michael P. Lawrence [ISB No. 7288]
Jack W. Relf [ISB No. 9762]
GIVENS PURSLEY LLP
601 W. Bannock St.
PO Box 2720
Boise, ID 83701-2720

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

Albert P. Barker [ISB No. 2867]
BARKER ROSHOLT & SIMPSON LLP
1010 W Jefferson St, Ste 102
PO Box 2139
Boise, ID 83701-2139

Attorneys for Twin Lakes Flood Control District No. 17

Lawrence G. Wasden
Attorney General,
Darrell G. Early
Deputy Attorney General
Chief, Natural Resources Division
Garrick L. Baxter [ISB No. 6301]
Kristina Fugate [ISB No. 9242]
Deputy Attorneys General
IDAHO DEPARTMENT OF WATER RESOURCES
PO Box 83720
Boise, Idaho 83720-0098

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

Norman M. Semanko [ISB No. 4761]
PARSONS BEHLE & LATIMER
800 West Main Street, Suite 1300
Boise, ID 83702

Attorneys for Twin Lakes Improvement Association, et al.t

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Regulations

Constitutional Provisions

STATEMENT OF THE CASE

I. NATURE OF THE CASE

This is the opening brief of Gordon Sylte, Susan Goodrich, John Sylte, and Sylte Ranch Limited Liability Company (collectively, "Sylte") in Appeal No. 46062-2018. On appeal, Sylte challenges the District Court's affirmation of the final agency action of the Idaho Department of Water Resources ("IDWR" or the "Department").

This case involves the administration of Sylte's water right no. 95-0734, whose 1875 priority date makes it the most senior water right in Water District 95C ("WD 95C"), the Twin Lakes-Rathdrum Creek water system in Kootenai County, Idaho. All of the water rights in WD 95C were conclusively determined in a general stream adjudication that ended in 1989.

In 2016, the Department issued guidance to the WD 95C Watermaster concerning administration of water rights in the district under the 1989 decree. This guidance (known as the "Instructions") effectively and improperly authorized the Watermaster to satisfy upstream junior water rights before Sylte's 1875 right.

Sylte challenged the Instructions before the Department and on judicial review to the District Court. In this appeal, Sylte asks this Court to reverse the Department's and District Court's affirmation of the Instructions.

The facts concerning the nature of water rights and the water system in WD 95C are set forth in extensive findings and conclusions made by the adjudication court in 1989. These are described in detail in Section III below.

In summary, when Sylte's right no. 95-0734 was appropriated in 1875, the source of the appropriation—Rathdrum Creek—was a year-round natural stream continuously supplied with water from the upstream natural lake formation then known as Fish Lakes (now known as Twin

Lakes). Around 1906, a dam was constructed at Twin Lakes' outlet to Rathdrum Creek—the lakes' only natural outlet. This dam did not raise the water elevation in Twin Lakes, but instead merely served to hold water in Twin Lakes longer during the summer than before it was built. In other words, Twin Lakes emptied faster into Rathdrum Creek in summer prior to 1906 than after. Put yet another way, in summers prior to 1906, water flowed out of Twin Lakes faster than it entered, thus resulting in receding water levels.

WD 95C was established after the general stream adjudication concluded in 1989. For many years, WD 95C operated without written guidance from the Department. Then, in September 2016, the Department issued its Instructions to the Watermaster. Among other things, the Instructions required that outflows to Rathdrum Creek from Twin Lakes to satisfy Sylte's 1875 right be limited to Twin Lakes' inflow. This requirement is contrary to how the water system naturally functioned in 1875, and it allows the satisfaction of upstream junior water rights ahead of Sylte's 1875 right by allowing junior water rights (including the 1906 storage water rights associated with Twin Lakes' dam) to reduce Twin Lakes' historical natural outflow to Rathdrum Creek.

Sylte now asks this Court to determine that the prior decree and Idaho's Prior Appropriation Doctrine protect Sylte's 1875 right from interference by junior upstream water rights.

II. COURSE OF PROCEEDINGS

A. Sylte's *Petition for Declaratory Ruling*

On February 16, 2017, Sylte filed its *Petition for Declaratory Ruling* ("*IDWR Petition*") with the Department pursuant to Idaho Code Section 67-5232 and IDAPA 37.01.01.400, asking the Department to: (1) set aside and reverse the *Instructions* on grounds that the *Instructions* are

contrary to a prior decree and are not in accordance with the Prior Appropriation Doctrine as required by Idaho Code Section 42-602; and (2) determine that the prior appropriation doctrine and the prior decree require that administration of Sylte's water right no. 95-0734, including the application of the futile call doctrine, are not limited by the amount of natural tributary inflow to Twin Lakes. (R. 317; A.R. 213-74).[1]

After Sylte filed its *IDWR Petition*, numerous individuals and entities—including Intervenors/Respondents Twin Lakes Flood Control District No. 17 ("FCD") and the Twin Lakes Improvement Association ("TLIA")—filed petitions to intervene. (A.R. 333-660).[2]

On June 26, 2017, Sylte filed a motion for summary judgment together with a supporting brief and affidavit. (A.R. 900-06 (*Sylte's Motion for Summary Judgment*), 907-35 (*Sylte's Memorandum in Support of Motion for Summary Judgment*), and 936-1190 (*Affidavit of Michael P. Lawrence*)). Sylte's summary judgment motion argued that because all facts material to the questions presented in the *IDWR Petition* were conclusively determined in the prior adjudication, there were no genuine disputes of material fact and that Sylte was entitled to judgment as a matter of law in its favor. (A.R. 908).

[1] The District Court Clerk's record on appeal (designated as "R." in this brief's citations) incorporates the Agency Record & Transcript (10-20-17) as lodged with the District Court which was provided on a separate CD in the record on appeal. R. 317. The Agency Record comprises documents labeled 000001-001475. To avoid confusion between the two records, this brief's citations to the Agency Record will be designated as "A.R." without further reference to R. 317. Following the "R." or "A.R.", citations include page numbers from each record with preceding zeros eliminated.

[2] A large number of individuals and entities (over 70) filed petitions to intervene in the *IDWR Petition* matter. Some were granted intervention and others were denied intervention or defaulted. (*See, e.g.*, A.R. 643-50; 811-17). Most parties designated TLIA and its attorney as their spokesperson in the proceeding. (*See e.g.*, A.R. 862-64).

Sylte's summary judgment motion was opposed by Intervenors Colby Clark and TLIA. (A.R. 1205, 1259-74). In addition, TLIA filed its own cross-motion for summary judgment. (A.R. 1255-58 (original cross-motion); 1277-80 (amended cross-motion).

On September 6, 2017, following additional briefing by Sylte (A.R. 1283-1307, 1325-36), the Department issued its *Order on Motions for Summary Judgment; Order Amending Instructions; Order Vacating Hearing Dates and Schedule* ("*IDWR Order*"). (A.R. 1390-1407).[3] Citing and quoting documents not in the record, the *IDWR Order* denied Sylte's motion for summary judgment, granted TLIA's cross-motion for summary judgment, and *sua sponte* amended the *Instructions* to include language authorizing the delivery of water to water right no. 95-0734 "unless or until the maximum annual diversion volume of 4.1 acre-feet has been delivered." (A.R. 1402).

On October 3, 2017, Sylte timely filed its *Petition for Judicial Review of Agency Action* ("*Judicial Review Petition*") of the Department's order in the District Court for the First Judicial District in Kootenai County. (A.R. 1437-47; R. 7-17).

[3] On September 7, 2017, the Department issued a letter ("*Letter*") identifying the *IDWR Order* as a "final action of the agency" instead of a preliminary order (as the *IDWR Order* was originally identified). (A.R. 1408-11.) On September 20, 2017, because of the ambiguity as to whether the *IDWR Order* was a final action or preliminary order, and in an effort to ensure exhaustion of administrative remedies, Sylte filed with the Director of IDWR *Sylte's Appeal, Exceptions, Request for Reconsideration and Clarification, and Request for Hearing* ("*Sylte's Exceptions*") (A.R. 1412-36). IDWR decided none of the matters raised in *Sylte's Exceptions*, including issues concerning whether the *Letter* properly designated the *IDWR Order* as a final agency action. The Department's counsel instead orally confirmed to Sylte's counsel that the Department considered the *IDWR Order* to be a final agency action which Sylte had properly and timely appealed to the District Court by filing a petition for judicial review.

B. Sylte's *Petition for Judicial Review*

On October 4, 2017, pursuant to the Idaho Supreme Court's December 9, 2009 Administrative Order, Sylte's *Judicial Review Petition* was reassigned to the presiding judge of the Snake River Basin Adjudication Court of the Fifth Judicial District. (R. 18-21).

On March 20, 2018, following briefing by Sylte (R. 63-112, 192-219), IDWR (R. 152-79), FCD (R. 181-91), and TLIA (R. 131-50), the District Court heard oral argument on Sylte's *Judicial Review Petition*. (R. 220-21). A copy of that hearing's transcript is included in the record on appeal.

On April 11, 2018, the District Court issued its *Judgment* (R. 222-25) and *Memorandum Decision* ("*Judicial Review Decision*") (R. 226-38) affirming the *IDWR Order*.

On May 2, 2018, Sylte timely filed with the District Court *Petitioner Sylte's Petition for Rehearing* (R. 239-43), and on May 16, 2018, Sylte timely filed its memorandum in support (R. 244-52) challenging the District Court's determination that Sylte's substantial rights were not prejudiced by the language added to the *Instructions* by the *IDWR Order*.

On May 23, 2018, Sylte timely filed with the District Court *Sylte's Notice of Appeal* (R. 253-77) of the District Court's *Judicial Review Decision*.

On June 5, 2018, the District Court issued its *Order Denying [Sylte's] Petition for Rehearing* ("*Rehearing Denial*"). (R. 278-81).

On July 16, 2018, Sylte timely filed with the District Court *Sylte's Amended Notice of Appeal* (R. 282-94) to include the District Court's *Rehearing Denial* in this appeal.

III. STATEMENT OF FACTS

A. The Twin Lakes-Rathdrum Creek adjudication

In 1975, a general stream adjudication commenced to determine rights to the use of the surface waters of Twin Lakes, including tributaries and outlets (i.e. Rathdrum Creek). (A.R. 196).

On January 14, 1985, after water users filed their various claims, the Department issued its *Proposed Finding of Water Rights in the Twin Lakes – Rathdrum Creek Drainage Basin* ("*Proposed Findings*"). (A.R. 1-172). Among other things, the *Proposed Findings* included proposed Findings of Fact and Conclusions of Law (A.R. 14-21) and a listing of proposed water rights (A.R. 22-115). A number of water users, including Sylte, filed objections to the *Proposed Findings*. (A.R. 174-75).

On February 22, 1989, following a court trial, First Judicial District Court Judge Richard Magnuson issued his *Memorandum Decision* ("*Memorandum Decision*") in the adjudication. (A.R. 173-95). Among other things, Judge Magnuson's *Memorandum Decision* made extensive findings of fact and conclusions of law concerning the nature of the water system and the development of water rights on the system—in particular, Sylte's 1875 right no. 95-0734 and the 1906 storage rights associated with Twin Lakes and the dam constructed at its outlet (which are described in more detail in the next subsection of this brief). *Memorandum Decision* at 9-21 (A.R. 181-93). Judge Magnuson ultimately determined that it was necessary to "amend the Director's [*Proposed Findings*] to reflect and effectuate this Court's determinations regarding No. 95-0734 [i.e. Sylte's 1875 right], as set forth in this memorandum decision." *Memorandum Decision* at 21 (A.R. 193). Accordingly, he instructed the Department to "prepare drafts of such proposed amendments." *Id.*

On April 19, 1989, Judge Magnuson issued his *Final Decree* (A.R. 196-209) ("*Final Decree*") in which he "adopted [the *Memorandum Decision*] as findings of fact and conclusions of law" and incorporated it by reference. *Final Decree* at 2-3 (A.R. 197-98). The *Final Decree* also adopted and incorporated the Department's *Proposed Findings* as amended by the *Memorandum Decision*. *Final Decree* at 3 (A.R. 198). He attached to the *Final Decree* a copy of the Department's amended portions of the *Proposed Findings'* Findings of Fact and Conclusions of Law (the "*Amended Proposed Findings*"), with insertions underlined and deletions struck through.[4]

Following the entry of the *1989 Decree*, on August 7, 1989, the Department issued an *Order Creating Water District* establishing WD 95C. (*See* A.R. 1166).

B. The Twin Lakes-Rathdrum Creek water system

In his *Memorandum Decision*, Judge Magnuson found that Twin Lakes originated as a natural body of water comprised of two lakes joined by a channel which flows from the upper lake to the lower lake, that it is fed by upstream tributaries, and that its only natural outlet was (and is) Rathdrum Creek.

> Twin Lakes, originally known as Fish Lakes, is a body of water comprised of two lakes joined by a channel which flows from the upper lake to the lower lake. Fish Creek is the major tributary feeding Twin Lakes, and there are a number of smaller tributaries which also feed the lakes, some of which flow into the Upper Lake and some of which flow into the Lower Lake. Rathdrum Creek is the only outlet from the lakes, and it begins at the lower end of Twin Lakes and flows southwesterly to Rathdrum Prairie.

Memorandum Decision at 9 (A.R. 181).

[4] In this brief, the term "*1989 Decree*" means the combination of the *Final Decree* (including its attached *Amended Proposed Findings*), together with the *Memorandum Decision* and *Proposed Findings* (as amended by the *Memorandum Decision*) which, as described in the main text, were incorporated into the *Final Decree*.

He also found that Rathdrum Creek historically furnished water to Rathdrum Creek in amounts sufficient to supply Sylte's 1875 water right on a continuous, year-round basis.

> This Court finds at the time the John Sylte and Evelyn Sylte Water Right #95-0734 was created in 1875 there was sufficient direct flow water in Rathdrum Creek, in its then natural condition, furnished from the water of Twin (Fish) Lakes, to provide .07 cubic foot per second to the appropriator on a continuous year-round basis.

Memorandum Decision at 11 (A.R. 183). Some distance past Sylte's diversion, Rathdrum Creek disappeared into a sink area. *Memorandum Decision* at 9 (A.R. 183).

Around 1900, Twin Lakes' natural features were altered and a dam was installed for the purpose of making water available for irrigation past Sylte's diversion in Rathdrum Prairie.

> Sometime around the turn of the century, the Spokane Valley Land & Water Company modified the natural features of the lakes for purposes of making water available for irrigation use in Rathdrum Prairie. The natural channel connecting the lakes was widened and deepened, and a dam and outlet structure was constructed at the lower end of Lower Twin Lake which enabled a portion of the water stored in Lower Twin Lake to be released downstream to Rathdrum Creek.

Memorandum Decision at 9 (A.R. 181). The dam and outlet structure initiated the appropriation of two 1906 storage rights in Twin Lakes, which are described further in the next subsection of this brief.

The dam did not result in the storage of any additional volume of water in Twin Lakes. Instead, it served to hold the water in Twin Lakes at a higher point longer during the summer months than had naturally occurred before the dam was installed.

> The 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. The primary result the dam had on the water level was to hold the water at a higher point longer through the summer months.

Memorandum Decision at 10 (A.R. 182). This was reflected in the amendments to the *Proposed Findings* attached to the *Final Decree* by changing Finding of Fact No. 10 to reflect that all three "blocks" of water in Twin Lakes were natural lake storage prior to dam construction, and striking language stating that the dam and outlet structure "provided the capability to raise the level of the lakes." *Final Decree* at xv-xvi (A.R. 201-02) (*Amended Proposed Findings'* Finding of Fact No. 10).[5]

Prior to the 1906 dam at Twin Lakes' outlet, water flowed over and through the lakes' natural obstruction into Rathdrum Creek:

> Rathdrum Creek is the only natural outlet to Twin Lakes; however, the parties were not in agreement as to whether the outflow of Lower Twin Lakes (pre-dam construction) went over the top of the lip of Lower Twin Lakes at its lowest point, or whether its outlet was under water, surfacing to the top of the land at [a] lower level to form Rathdrum Creek, or whether it flowed over the top of the lip during periods of high water only and continued for the rest of the time underground as a spring.
>
> In any event, before the dam was built the outflow water flowed in Rathdrum Creek for about four miles downstream to the John Sylte (#95-0734) place of diversion. Thereafter it flowed into a sink area and went back into the ground. . . .
>
> From conflicting evidence, this Court finds it was more probably true than not that the outlet waters of Twin Lakes flowed <u>over</u> the top of the lip at periods of high water and <u>through</u> the natural pre-dam obstruction at all times, forming the source waters of Rathdrum Creek.

Memorandum Decision at 10-11 (A.R. 182-83).

Based on these findings, Judge Magnuson found:

---

[5] Finding of Fact No. 10 in the *Amended Proposed Findings* describes three "blocks" of water in Twin Lakes. The first "block" of water, which has no associated water right, is "the natural lake storage located between the bottom of the lake and Staff Gauge height 0.0 feet . . . ." *Final Decree* at xv (R. at 201-02) (*Amended Proposed Findings'* Finding of Fact No. 10.a). The second and third "blocks" of water, which are located above 0.0 on the Staff Gauge and are associated with Twin Lakes' storage water rights (described in the next subsection), also were "at one time part of the natural lake storage, but [were] made available for appropriation by excavation of the outlet from Lower Twin Lakes." *Final Decree* at xv-xvi (R. at 201-02) (*Amended Proposed Findings'* Finding of Fact No. 10.b and 10.c).

> [A]t the time the John Sylte and Evelyn Sylte Water Right #95-0734 was created in 1875 there was sufficient direct flow water in Rathdrum Creek, in its then natural condition, furnished from the water of Twin (Fish) Lakes, to provide .07 cubic foot per second to the appropriator on a continuous year-round basis.

Memorandum Decision at 11 (A.R. 183). And he concluded:

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

Memorandum Decision at 13 (A.R. 185).

C. The Twin Lakes-Rathdrum Creek water rights

Judge Magnuson found that Sylte holds water right no. 95-0734—a 0.07 cfs year-round stockwater right diverted from Rathdrum Creek (tributary to Sinks) with a May 1, 1875 priority date. (A.R. 26).[6] It is not an instream stockwater right; rather it has a point of diversion located on Rathdrum Creek downstream from the outlet of Twin Lakes. *Id.* It is the most senior water right in WD 95C.

Judge Magnuson also confirmed a number of water rights in WD 95C that are junior to Sylte's 1875 water right, many of which are diverted upstream from Sylte's right. Two of these upstream junior water rights are storage rights associated with Twin Lakes: nos. 95-0973 and 95-0974 (together, the "1906 Storage Rights"), which are 1906 priority storage water rights currently held by Intervenors/Respondents Twin Lakes Flood Control District No. 17 ("FCD") and the Twin Lakes Improvement Association ("TLIA"), respectively. (A.R. 45).[7]

---

[6] Water right no. 95-0734 was decreed to John and Evelyn Sylte. *Proposed Findings* at 3 (A.R. 26). Their son, Gordon Sylte, is the manager of Sylte Ranch Limited Liability Company, the current claimant of water right no. 95-0734 in the Coeur d'Alene-Spokane River Basin Adjudication.

[7] At places in the *Memorandum Decision*, Judge Magnuson mistakenly referred to the 1906 Storage Rights as nos. 95-0974 and 95-0975 (instead of -973). *See, e.g.*, *Memorandum Decision* at 15

TLIA's right no. 95-0974 authorizes storage of up to 5,360 acre-feet in Twin Lakes at lake levels between 0.0 feet and 6.4 feet on a staff gauge. (A.R. 45). FCD's right no. 95-0973 authorizes storage of up to 3,730 acre-feet in Twin Lakes at lake levels between 6.4 feet and 10.4 feet on the staff gauge. (A.R. 45). These are two of the "blocks" of storage water described in *Amended Proposed Findings'* Finding of Fact No. 10, the third "block" being water below 0.0 feet on the staff gauge. *See supra* note 5. The 1906 Storage Rights are authorized to hold water in storage year-round, but they can only fill (i.e. capture water) between November 1 and March 31. (A.R. 45). These two storage water rights are the only storage rights on the Twin Lakes-Rathdrum Creek system. (A.R. 187).

D. The 2016 IDWR *Instructions*

For many years after WD 95C was created following the entry of the *Final Decree*, water rights in WD 95C were administered without written guidance from the Department. (A.R. 1177). Then, in 2016, following complaints by a WD 95C water user, the Department sent a letter (the "*Instructions*") to the WD 95C Watermaster "[t]o clarify [his] duties as watermaster and resolve any potential discrepancies between [his] regulation and the legal requirements of the Decree." *Instructions* at 1 (A.R. 210).[8] They stated that the Watermaster "must administer water rights according to these instructions, which are subject to further review and updates by

---

(A.R. 187). This apparently inadvertent error has been undisputed throughout these proceedings. The *Proposed Findings* clearly state that water rights nos. 95-0974 and 95-0973 were the storage rights in Twin Lakes decreed to TLIA and the U.S. Bureau or Reclamation ("Bureau"), respectively. *Proposed Findings* at 21 (A.R. 45). The Bureau subsequently conveyed its interest in water right no. 95-0973 to FCD. The *1989 Decree* determined water right no. 95-0975 to be disallowed. (A.R. 207).

[8] The *Instructions* were issued in response to a letter to IDWR from Mr. Colby Clark complaining about the Watermaster. *Instructions* at 1 (A.R. 210). Also because of Mr. Clark's letter, the Department initiated a proceeding to remove the Watermaster, which resulted in an order removing the Watermaster. (A.R. 1161-82).

the Department." *Instructions* at 3 (A.R. 212). The *Instructions* were the Department's first ever written guidance concerning the distribution of water in WD 95C. (A.R. 1177).

Among other things, the *Instructions* limit the outflow of water from Twin Lakes to Rathdrum Creek—and thus the amount of water capable of delivery to Sylte's 1875 water right no. 95-0734—to the total natural tributary inflow into Twin Lakes:

> 4) From April 1 to October 31 of each year, the watermaster will measure the total natural tributary inflow to Twin Lakes (weekly) and allow diversion of up to that amount by the direct flow water rights on the basis of water right priority. *See Decree* at Conclusion of Law 12.
>
> 5) From April 1 to October 31 each year, when seepage and evaporation losses from Twin Lakes exceed the total natural tributary inflow to Twin Lakes (as determined by decreasing lake level), no water will be released from the lakes to satisfy Rathdrum Creek water rights, except for water right no. 95-734. *Decree* at Conclusions of Law 12, 14; *Memorandum Decision* at 12-13. When this occurs, all or a portion of the total natural tributary inflow to Twin Lakes, as measured by the watermaster, can be released to satisfy delivery of water right no. 95-734 with 0.07 cfs at the legal point of diversion. If all of the natural inflow must be released to satisfy water right no. 95-734, the watermaster shall curtail all junior direct flow water rights. If only a portion of the inflow is released to satisfy water right no. 95-734, the watermaster shall satisfy water rights that divert from Twin Lakes and its tributaries using the remainder of the natural flow, on the basis of water right priority.
>
> 6) From April 1 to October 31 of each year, when seepage and evaporation losses from Twin Lakes do not exceed the total natural tributary inflow (as determined by steady or increasing lake level), the watermaster shall distribute the total natural tributary inflow to water rights that divert from Twin Lakes and its tributaries and Rathdrum Creek on the basis of water right priority. *See Decree* at Conclusions of Law 12, 14.

Instructions at 2 (A.R. 211) (underlining added).

In addition, the *Instructions* require a futile call determination if the release to Rathdrum Creek of Twin Lakes' natural tributary inflow does not satisfy Sylte's 1875 water right no. 95-0734:

> 7) If release of all of the natural tributary inflow does not satisfy delivery of water right no. 95-734 within a 48-hr period, the watermaster shall consult with the Department's Northern Regional Manager or designated

> Department representative, regarding determination of a futile call with respect to delivery of water right no. 95-734. The Department's Northern Regional Manager will issue written notice to the watermaster regarding the futile call determination. A futile call determination will result in non-delivery of water right no. 95-734.

Instructions at 2 (A.R. 211) (underlining added).

As already described, Sylte petitioned the Department to reverse the *Instructions'* requirement that only the amount of Twin Lakes' inflow can be released to Rathdrum Creek to satisfy Sylte's 1875 right.

ISSUES PRESENTED ON APPEAL

Sylte presents the following issues on appeal, followed by Sylte's proposed resolution in brackets:

a. Did the District Court err when it affirmed the *IDWR Order* approving and amending the *Instructions*? [Yes.]

b. Did the District Court err by failing to consider issues and arguments raised by Sylte on judicial review? [Yes.]

c. Did the District Court err by upholding the Department's determination that releases of water from Twin Lakes to satisfy Sylte's 1875 water right no. 95-0734 should be limited to the amount of inflow to Twin Lakes? [Yes.]

d. Did the District Court err by upholding the Department's review and citation to documents outside the agency record? [Yes.]

e. Did the District Court err by upholding the Department's *sua sponte* order in the *IDWR Order* directing the addition of language to the *Instructions* requiring the distribution of

water to Sylte's 1875 water right no. 95-0734 "unless or until the maximum annual diversion volume of 4.1 acre feet has been delivered"? [Yes.]

f. Did the District Court err by denying Sylte's *Petition for Rehearing* on grounds that Sylte's substantial rights were not prejudiced by the Department's addition of language to the *Instructions* described in preceding issue? [Yes.]

g. Is Sylte entitled to an award of attorney fees and costs in the proceedings below and on appeal? [Yes.]

ATTORNEY FEES

Sylte seeks an award of its attorney fees and costs, in full or in part, on this appeal pursuant to Idaho Code §§ 12-117(1) and 12-117(2) and Idaho Appellate Rules 35(a)(5), 40, and 41.

Idaho Code § 12-117(1) authorizes awards of attorney fees to the "prevailing party" in a proceeding involving as adverse parties a state agency and a person, when "the nonprevailing party acted without a reasonable basis in fact or law." This Court has recognized that Idaho Code § 12–117 authorizes fees to the prevailing party on appeal. *City of Osburn v. Randel*, 152 Idaho 906, 910, 277 P.3d 353, 357 (2012). "The Court employs a two-part test for I.C. § 12–117 on appeal: the party seeking fees must be the prevailing party and the losing party must have acted without a reasonable basis in fact or law." *Id.*

When those tests are met, the award is mandatory. *Fuchs v. Idaho State Police, Alcohol Beverage Control*, 153 Idaho 114, 117, 279 P.3d 100, 103 (2012). Idaho Code § 12-117(2) authorizes awards of attorney fees to the prevailing party "on a portion of the case" if the

nonprevailing party acted without a reasonable basis in fact or law with respect to that portion of the case.

Sylte is entitled to an award of attorney fees and costs to the extent they prevail on any issues because, as demonstrated below, the *IDWR Order* and *Instructions* are contrary to the *1989 Decree* and Idaho's Prior Appropriation Doctrine and they deprive Sylte's senior water right of the benefit of its priority. At all stages of these proceedings Sylte has maintained that the plain language of the *1989 Decree* does not limit the exercise of water right no. 95-0734 to Twin Lakes' tributary inflow. Sylte also has consistently argued that water right no. 95-0734's senior priority protects it from interference or injury by junior water rights—a simple and fundamental principle of Idaho water law. Nevertheless, despite Judge Magnuson's admonition that "[t]o accept the department's interpretation of the facts as they pertain to the 1875 Sylte water right (#95-0734), would be to deprive the holders of such water 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 (A.R. 186), the Department's *Order* and *Instructions* include provisions which would do exactly that. There is no basis in law or fact for the Department or the Intervenors to have taken the positions that have led to this litigation.

The Department and the Intervenors have ignored Sylte's arguments and the findings and conclusions of Judge Magnuson and, accordingly, have acted without foundation. Sylte respectfully requests an award of attorney fees and costs should it prevail in any part of this appeal.

The District Court denied Sylte's request for attorney fees and costs under Idaho Code § 12-117 because Sylte did not prevail on judicial review. *Judicial Review Decision* at 11 (R. 236). "This Court reviews a trial court's determination of who is the prevailing party and award

of attorney fees below for abuse of discretion." *Bates v. Seldin*, 146 Idaho 772, 775, 203 P.3d 702, 705 (2009). Should this Court grant Sylte its requested relief, for the same reasons Sylte argues it is entitled to an award of attorney fees and costs on appeal, Sylte requests that this Court find that Sylte should be awarded attorney fees and costs in the District Court proceedings, and that this Court remand the case to the District Court for a determination of appropriate fees and costs to be awarded to Sylte.

ARGUMENT

Sylte initiated this proceeding because the Department's *Instructions* incorrectly require administration of Sylte's 1875 water right based on the amount of natural tributary inflow to Twin Lakes. To supply the 1875 right according to the plain language of the *1989 Decree,* Sylte is entitled to outflows from Twin Lakes to Rathdrum Creek in amounts up to the natural outflows that existed when the 1875 right was appropriated. As found by Judge Magnuson, prior to the construction the dam at Twin Lakes in 1906, outflows from Twin Lakes to Rathdrum Creek at times exceeded Twin Lakes inflows. Accordingly, this Court must reverse the *Instructions* and the Department's and District Court's decisions affirming the *Instructions*.

I. STANDARD OF REVIEW

In an appeal from a district court where the court was acting in its appellate capacity under the Idaho Administrative Procedure Act, this Court reviews the decision of the district court to determine whether it correctly decided the issues presented to it. *N. Snake Ground Water Dist. v. IDWR*, 160 Idaho 518, 522, 376 P.3d 722, 726 (2016). This Court reviews the agency record independently of the district court's decision. 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. Substantial evidence is relevant evidence that a reasonable mind might accept to support a conclusion. *Id.*

Idaho Code § 67-5279(3) provides that the district court must affirm the agency action 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. *N. Snake Ground Water Dist.*, 160 Idaho at 522, 376 P.3d at 726. Even if one of these conditions is met, an agency action shall be affirmed unless substantial rights of the petitioner have been prejudiced. If the agency action is not affirmed, it shall be set aside, in whole or in part, and remanded for further proceedings as necessary. *Id.*

II. THE *1989 DECREE* IS *RES JUDICATA* AND EACH OF ITS PROVISIONS MUST BE GIVEN FORCE AND EFFECT

The administration of water rights in WD 95C must adhere to the *1989 Decree*. However, the *Instructions*, the *IDWR Order*, and the *Judicial Review Order* improperly ignore many of the *1989 Decree's* express findings and conclusions.

The doctrine of *res judicata* applies to the *1989 Decree*.[9] A water rights decree is "conclusive proof of diversion of the water, and of application of the water to beneficial use, *i.e.*,

[9] "*Res judicata*, or claim preclusion, bars a subsequent action between the same parties upon the same claim or upon claims relating to the same cause of action." *Stoddard v. Hagadone Corp.*, 147 Idaho 186, 190, 207 P.3d 162, 166-167 (2009) (internal quotation marks omitted). "[I]n an action between the same parties upon the same claim or demand, the former adjudication concludes parties and privies not only as to every matter offered and received to sustain or defeat the claim but also as to every matter which might and should have been litigated in the first suit." *Magic Valley Radiology, P.A. v. Kolouch*,

the decree is *res judicata* as to the water rights at issue [in a subsequent proceeding]." *Crow v. Carlson*, 107 Idaho 461, 465, 690 P.2d 916, 920 (1984), quoted in *Mullinix v. Killgore's Salmon River Fruit Co.*, 158 Idaho 269, 277, 346 P.3d 286, 294 (2015). There is no exception to *res judicata* that would relieve the *1989 Decree* from its operation in this case.

Thus, the primary question in this appeal is: What does the *1989 Decree* mean? The answer to this question is in the *1989 Decree's* plain language, which must be read to give force and effect to all of it in its entirety.

In Idaho, water decrees are interpreted "using the same interpretation rules that apply to contracts." *Rangen, Inc. v. Idaho Dep't of Water Res.*, 159 Idaho 798, 807, 367 P.3d 193, 202 (2016). Consequently, the intent of a decree is to be ascertained from the language of the decree itself. *Hap Taylor & Sons, Inc. v. Summerwind Partners, LLC*, 157 Idaho 600, 610, 338 P.3d 1204, 1214 (2014).

A written instrument 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.

Only if a decree is ambiguous should a Court look outside of its four corners. "In the absence of ambiguity, a document must be construed by the meaning derived from the plain

---

123 Idaho 434, 437, 849 P.2d 107, 110 (1993). This Court has stated that "a valid and final judgment rendered in an action extinguishes all claims arising out of the same transaction or series of transactions out of which the cause of action arose." *Id.* at 437, 849 P.2d at 110.

wording of the instrument." *Brown v. Greenheart*, 157 Idaho 156, 166, 335 P.3d 1, 11 (2014); *see also Chavez v. Barrus*, 146 Idaho 212, 219, 192 P.3d 1036, 1043 (2008) ("In the absence of ambiguity, the document must be construed in its plain, ordinary and proper sense, according to the meaning derived from the plain wording of the instrument." (internal quotation marks omitted)).

Despite differing views as to what the *1989 Decree* means, no one in these proceedings has argued that the *1989 Decree* is ambiguous. And neither the Department nor the District Court found that it is. "In deciding whether a document is ambiguous, this Court must seek to determine whether it is 'reasonably subject to conflicting interpretation.'" *Id.* (quoting *Bondy v. Levy*, 121 Idaho 993, 997, 829 P.2d 1342, 1346 (1992)). "Ambiguity results when reasonable minds might differ or be uncertain as to its meaning, however ambiguity is not established merely because different possible interpretations are presented to a court." *McKay v. Boise Project Bd. of Control*, 141 Idaho 463, 469–70, 111 P.3d 148, 154–55 (2005). An ambiguity exists only "[i]f there are two different reasonable interpretations of the [decree's] language . . . ." *Hap Taylor & Sons, Inc.*, 157 Idaho at 610, 338 P.3d at 1214.

Because the intent behind the *1989 Decree* is clear from its language, the parties asked the Department and District Court to determine its meaning as a matter of law. *Farnsworth v. Dairymen's Creamery Ass'n*, 125 Idaho 866, 870, 876 P.2d 148, 152 (Ct. App. 1994) ("Thus, where the parties' intention is clear from the language of their contract, its interpretation and legal effect are to be resolved by the court as a matter of law."). In such cases, summary judgment is appropriate. *Id.*; *Hap Taylor & Sons, Inc.*, 157 Idaho at 610, 338 P.3d at 1214. It is only where a legal document cannot be understood from its own language that an issue of fact is

created and extrinsic evidence may be examined. *Farnsworth*, 125 Idaho at 870, 876 P.2d at 152.

III. SYLTE'S 1875 WATER RIGHT IS ENTITLED TO HAVE THE PRE-DAM OUTFLOW RELEASED FROM TWIN LAKES, WHICH IS NOT LIMITED TO TWIN LAKES' INFLOW.

Judge Magnuson's detailed findings and conclusions about the nature of the Twin Lakes-Rathdrum Creek water system and water right no. 95-0734 entitle Sylte to have the amount of Twin Lakes' natural, pre-dam outflow to Rathdrum Creek released from Twin Lakes to satisfy Sylte's 1875 water right. Judge Magnuson found that this pre-dam amount sometimes exceeded the inflow to Twin Lakes, which necessarily means that the *Instructions* are incorrect to administer Sylte's 1875 right based on Twin Lakes inflow. Contrary to the Department's and the District Court's decisions, Judge Magnuson did not conclude that water right no. 95-0734 is limited to Twin Lakes' natural tributary inflow.

A. Prior to 1906, Twin Lakes' outflows at times exceeded inflows.

Judge Magnuson found that the dam and outlet structure constructed around 1906 did not artificially store a greater volume of water in Twin Lakes than was naturally stored prior to 1906. *Memorandum Decision* at 10 (A.R. 182) ("The 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."). All the dam did was hold the same volume of water in Twin Lakes longer than it was held prior to dam construction. *Id.* ("The primary result the dam had on the water level was to hold the water at a higher point longer through the summer months.")

This was recognized in *Amended Proposed Findings'* Finding of Fact No. 10, which says that all three "blocks" of water in Twin Lakes were natural lake storage prior to dam construction, and striking language stating that the dam and outlet structure "provided the

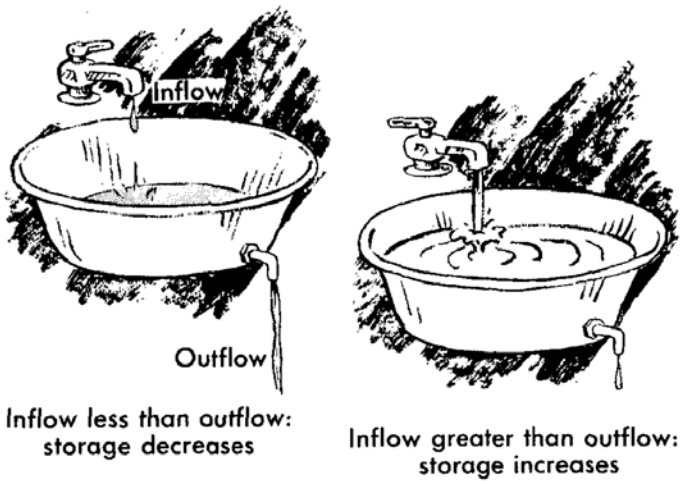
capability to raise the level of the lakes." *Final Decree* at xv-xvi (A.R. 201-02). *See also supra* note 5 (describing the "blocks" of water in Twin Lakes).

These findings mean that the volume of water that filled Twin Lakes after the 1906 dam construction was the same volume that naturally filled Twin Lakes prior to dam construction (i.e. when Sylte's 1875 right was established). They also mean that, prior to dam construction, outflows from Twin Lakes at times exceeded inflows, thus lowering lake levels faster than after the dam was constructed. Accordingly, contrary to the *Instructions*, the *1989 Decree* does not limit the exercise of Sylte's 1875 water right to Twin Lakes' inflows because the right was appropriated when Twin Lakes outflows to Rathdrum Creek at times exceeded Twin Lakes' inflows.

This relatively simple concept eluded the Department and the District Court. Basic hydrology dictates that storage decreases (i.e. water levels decline) if outflow exceeds inflow. Likewise, storage increases (i.e. water levels rise) if inflow exceeds outflow. In short, "the rate of change of storage is the difference between the rate of inflow and the rate of outflow." (R. 1306) (excerpt of Luna B. Leopold & Walter B. Langbein, A PRIMER ON WATER ("*A Primer on Water*"), US DEP'T OF INTERIOR GEOLOGICAL SURVEY, at 22 (1960)).[10]

This should be familiar to anyone with a sink or a bathtub: the water level rises when you plug the drain and turn on the faucet, and the water level goes down when you pull the plug and turn off the faucet. The following illustration from *A Primer on Water* depicts this fundamental principle:

[10] *A Primer on Water* is available online at https://pubs.usgs.gov/gip/7000045/report.pdf. An excerpt of its section on "River Channels and Floods" is in the Agency Record at A.R. 1306-07.



A Primer on Water at 22 (R. at 1306).

According to Judge Magnuson's findings, prior to 1906, Twin Lakes was like a bathtub with a leaky drain plug at the outlet that allowed water to flow "through the natural pre-dam obstruction at all times, forming the source waters of Rathdrum Creek." *Memorandum Decision* at 11 (A.R. 183) (underlining in original). And the 1906 dam was like a new leakproof drain plug that served to hold the water at a higher level longer. *Memorandum Decision* at 10 (A.R. 182) ("The primary result the dam had on the water level was to hold the water at a higher point longer through the summer months.").

Thus, Judge Magnuson's finding that Twin Lakes' water level dropped (*i.e.*, natural storage decreased) faster during the summer months before the dam was constructed in 1906 means that the natural outflow from Twin Lakes during those periods was greater than the natural inflow. The water levels dropped faster prior to 1906 because water that naturally filled Twin Lakes gradually drained out to Rathdrum Creek during the summer months in excess of the lakes' inflow. Although the record does not suggest that inflow to Twin Lakes ever completely ceased prior to 1906, it is reasonable to infer from Judge Magnuson's findings that, so long as

Twin Lakes had some water in it, Twin Lakes' outflow to Rathdrum Creek would have continued even if there had been no inflow at all. *Memorandum Decision* at 11 (A.R. 183) ("the outlet waters of Twin Lakes flowed . . . through the natural pre-dam obstruction at all times, forming the source waters of Rathdrum Creek" (underline in original)). *See also A Primer on Water* at 22 (R. at 1306) ("[T]he outflow does not stop at the same moment that the inflow ceases. . . . After the tributary inflow stops, that water which is in transit . . . gradually drains out.").

It may seem counterintuitive that a downstream senior could be entitled to have outflows released in greater amounts than an on-stream reservoir's inflows. But this simply is how the Twin Lakes-Rathdrum Creek water system worked prior to the 1906 dam, where a natural upstream reservoir existed when Sylte's 1875 right was appropriated.

The result would be different in the case of a dam constructed on a stream where no natural storage previously existed. In those cases, a new dam impounds all of the natural flow that previously continued downstream to senior water right holders. Idaho water law requires that such on-stream reservoirs bypass water to satisfy downstream senior water rights, but only up to the amount of natural flow coming into the reservoir since that is all of the water that would have flowed past the dam to the downstream senior had the dam not been constructed. Thus, in such cases, releases to downstream senior water rights are properly limited to the amount of natural tributary inflow into the reservoir.

But that is not the situation here. The natural conditions of Twin Lakes and Rathdrum Creek included the impoundment of water in Twin Lakes and constant gradual outflow of water to Rathdrum Creek in amounts sufficient to satisfy water right no. 95-0734 on a continuous year-round basis. *Memorandum Decision* at 11 (A.R. 183). That fact was conclusively found by

Judge Magnuson, and it cannot be disputed now. See *Rangen*, 159 Idaho at 805, 367 P.3d at 200 ("By statute, 'decree[s] entered in a general adjudication shall be conclusive as to the nature and extent of all water rights in the adjudicated water system.'" (quoting I.C. § 42-1420(1)). Sylte's water right no. 95-0734 was appropriated under such conditions, when it was "always" served by water in Rathdrum Creek "furnished from" Twin Lakes "on a continuous year-round basis." *Memorandum Decision* at 11-13 (A.R. 183-85).

In sum, Judge Magnuson's express findings about the nature of Twin Lakes' water level fluctuations prior to and after the construction of the dam in 1906 dictates a conclusion that the outflow from Twin Lakes at times exceeded the inflow to Twin Lakes. Accordingly, the *Instructions'* requirement that the distribution of water to Sylte's 1875 water right is limited by Twin Lakes' inflow is incorrect, and the *IDWR Order* and *Judicial Review Order* affirming the *Instructions* must be reversed.

B. The Department's and District Court's decisions improperly give junior water rights priority over Sylte's 1875 water right.

The Department's tributary inflow limitation on the exercise of Sylte's 1875 right, which was affirmed by the District Court, effectively and impermissibly puts junior water rights (including the 1906 Storage Rights) in priority ahead of the 1875 right. This is contrary to Judge Magnuson's express conclusions:

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

Memorandum Decision at 13 (A.R. 185). And it also is contrary to Idaho's Prior Appropriation Doctrine.

It is axiomatic that "[p]riority of appropriation shall give the better right as between those using the water." Idaho Const. art. 15 § 3; *see also* I.C. § 42-106 ("As between appropriators, the first in time is first in right."). This Court has repeatedly enforced this fundamental principle.

"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." *Joyce Livestock Co. v. United States*, 144 Idaho 1, 8, 156 P.3d 502, 509 (2007) (quoting *Brossard v. Morgan*, 7 Idaho 215, 219–20, 61 P. 1031, 1033 (1900)).

This principle protects seniors from injury caused by subsequent appropriators:

> This court has uniformly adhered to the principle, announced both in the Constitution and by the statute, that the first appropriator has the first right; and it would take more than a theory, and in fact clear and convincing evidence, in any given case, showing that the prior appropriator would not be injured or affected by the diversion of a subsequent appropriator, before we would depart from a rule so just and equitable in its application, and so generally and uniformly applied by the courts.

Silkey v. Tiegs, 54 Idaho 126, 28 P.2d 1037, 1038 (1934) (quoting *Moe v. Harger*, 10 Idaho 302, 77 P. 645, 647 (1904)).

Similarly, a junior water user may not interfere with or alter a water course if doing so prevents the natural flow of water from reaching a senior. "So soon as the prior appropriation and right of use is established, it is clear, as a proposition of law, that the claimant is entitled to have sufficient of the unappropriated waters flow down to his point of diversion to supply his right, and an injunction against interference therewith is proper protective relief to be granted." *Moe v. Harger*, 10 Idaho 302, 77 P. at 647.

In other words, Idaho law uniformly protects a senior from the acts of juniors that change the conditions under which the senior right was appropriated. "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." *Beecher v. Cassia Creek Irr. Co., Inc.*, 66 Idaho 1, 12, 154 P.2d 507, 510 (1944).

Judge Magnuson expressly recognized this principle in his *Memorandum Decision*:

> An appropriator is entitled to maintenance of stream conditions substantially as they were at the time the appropriators made their appropriation, if a change in stream conditions would result in interference with the proper exercise of the right. Bennett v. Nourse, 22 Ida. 249, 125 P. 1038 (1912). At the time the appropriation (No. 95-0734) was made in 1875, there was always water in Rathdrum Creek to serve said water right.
>
> The holders of water right #95-0734 are therefore entitled to waters from the source of their appropriation on a basis of priority over those storage rights Nos. 95-0974 and 95-0975. The waters of this basin are to be administered in such manner as to give effect to such priority.

Memorandum Decision at 13 (A.R. 185) (underlining in original).[11]

Judge Magnuson included the *Bennett v. Nourse* principle immediately before pronouncing that there was "always water in Rathdrum Creek" to serve water right no. 95-0734 when it was appropriated in 1875, that the water right is entitled to water "on a basis of priority" over the 1906 Storage Rights, and that water must be administered to give effect to Sylte's 1875 priority. *Memorandum Decision* at 13 (A.R. 185). The clear meaning behind these findings and conclusions in succession is that Judge Magnuson intended for water right no. 95-0734 to be protected from interference by changes in stream conditions caused by junior water rights such as the 1906 Storage Rights.

This conclusion is clear from Judge Magnuson's plain language, and it is consistent with nearly a century of this Court's precedent protecting downstream seniors from upstream juniors.

[11] Although *Bennett v. Nourse* involved a junior seeking protection from seniors, the principle in that case cited by Judge Magnuson also protects senior rights from interference by juniors. *See, e.g., Arkoosh v. Big Wood Canal Co.*, 48 Idaho 383, 283 P. 522, 526 (1929).

For example, in *Carey Lake Reservoir Co. v.* Strunk, 39 Idaho 332, 227 P. 591, 593 (1924)—a case cited by Judge Magnuson in the *Memorandum Decision* at 14-15 (A.R. 186-87)—this 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, to such an extent as to allow them to obtain their water . . . ."

Similarly, in *Arkoosh*—a case involving a claim by senior natural flow water right holders against upstream junior storage right holders—this Court held that the junior upstream storage rights "may be exercised so long as [downstream senior right holders] 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 prior to the construction [of the junior's system]." *Arkoosh*, 48 Idaho 383, 283 P. at 526-27 (1929) (Baker, J., on rehearing).

And in *Weeks v. McKay*, 85 Idaho 617, 622, 382 P.2d 788, 791 (1963), this Court held that "[o]ne who undertakes to change the natural channel of a stream or by means of dams or otherwise increases or diminishes the flow of a stream must exercise care in so doing and take such precautions as to prevent injury to others." Similar to this case, the junior priority defendant in *Weeks* constructed a dam upstream of the senior priority plaintiff. The *Weeks* Court ordered that the junior defendant's dam was required "to permit the same amount of water to

escape from the lake and proceed down [the creek] to [plaintiff's] diversion point as would occur if its channel had remained unchanged." *Weeks*, 85 Idaho at 623-24, 382 P.2d at 791-92.[12]

Citing *Weeks*, this Court in *Ward v. Kidd*, 87 Idaho 216, 226, 392 P.2d 183, 189-90 (1964), held that an upstream junior dam owner could not "obstruct the flow" when "the water, if unobstructed, would reach [the downstream senior's] land . . . ." The *Ward* Court held that the downstream senior "was entitled to have it flow uninterrupted." *Id.* at 226, 392 P.2d at 189. The *Ward* Court also remarked that the senior's relatively small water rights "were valuable rights. The law cannot countenance the invasion of a right merely because it is small. The holder of such a right is entitled to its protection to the same extent as if it were of greater magnitude." *Id.* at 227, 392 P.2d at 190.

In short, Idaho law simply does not give an upstream junior water user the right to take or interfere with a downstream senior's natural flow.[13] Judge Magnuson recognized this, and his findings and conclusions are consistent with this. *Memorandum Decision* at 13 (A.R. 185) ("The holders of water right #95-0734 are therefore entitled to waters from the source of their appropriation on a basis of priority over those storage rights Nos. 95-0974 and 95-0975. The waters of this basin are to be administered in such manner as to give effect to such priority.") Thus, as between Sylte's 1875 water right and other water rights on the Twin Lakes-Rathdrum

[12] One significant difference between this case and *Weeks* is that *Weeks* involved a dam constructed on a stream where no impoundment previously existed. As discussed above in Section III.A, in this case a dam was built at the outlet of an existing natural lake formation.

[13] The District Court mischaracterized Sylte's argument as contending that the 1989 Decree is contrary to Idaho's prior appropriation doctrine. *Judicial Review Decision* at 9 (R. 234) ("principles of res judicata preclude the Petitioners from asserting the *Decree's* plain language is contrary to the doctrine of prior appropriation."). Sylte, in fact, contends (as it has throughout these proceedings) that the plain language of the *1989 Decree* protects Sylte's 1875 right from interference by juniors, consistent with Idaho's prior appropriation doctrine. It is the Department's *Instructions* and *IDWR Order* that Sylte contends are contrary to the *1989 Decree* and Idaho's prior appropriation doctrine.

Creek system (all of which are junior), Sylte's senior priority date guarantees that their 1875 right will be satisfied before any others.

To give effect to the 1875 right's senior priority, it must be satisfied ahead of the 1906 Storage Rights. This means that, when the 1906 Storage Rights are "filling" during their authorized period of November 1 to March 31, they must continue to bypass water (up to the amount of pre-dam natural outflow) sufficient to satisfy water right no. 95-0734. Likewise, during the rest of the year, sufficient water (up to the amount of pre-dam natural outflow) must continue to outflow into Rathdrum Creek to satisfy water right no. 95-0734. Only then will the 1875 right's priority be given effect, as required by Judge Magnuson's express findings and conclusions and Idaho law.

The 1906 Storage Right holders are allowed to keep water in Twin Lakes longer than it naturally was held prior to dam construction, but they are not entitled to retain water to the extent that, absent reservoir operations and diversions, it would have naturally flowed down Rathdrum Creek to satisfy right no. 95-0734. The contrary view, which is reflected in the Department's and District Court's decisions, improperly gives upstream junior water rights priority over water right no. 95-0734. 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 (A.R. 186).

C. Sylte is not asserting a claim to the artificially stored waters in Twin Lakes.

Sylte's argument that it is entitled to Twin Lakes' natural pre-dam outflow is not an argument that Sylte is entitled to the 1906 Storage Rights' stored waters, as wrongly suggested

by the Department and the District Court. (*See, e.g.* R. 233 ("the *Decree* did not award the Petitioners any right to divert the lakes' storage waters").

Sylte acknowledges the distinction between storage rights and natural (or "direct") flow water rights. In addition, Sylte recognizes that Judge Magnuson decreed only two storage rights on the system (the 1906 Storage Rights) and that the *1989 Decree* does not award Sylte any right to divert water stored under those storage rights. However, by virtue of the senior priority Sylte's 1875 right holds over those storage rights (and all other rights), and the fact that all of the water stored under the 1906 Storage Rights was natural lake storage prior to the dam's construction, Sylte is entitled to releases of what used to be natural lake storage in amounts up to what had naturally flowed out of Twin Lakes' when the right was appropriated in 1875. In other words, the water that naturally flowed out of Twin Lakes in 1875 necessarily is water that was naturally stored in Twin Lakes in 1875, and this water is legally (if not factually) distinguishable from the water that is artificially stored under the 1906 Storage Rights.

The Department's and the District Court's conclusions that the *1989 Decree* (in particular Conclusion of Law No. 14[14]) prohibits Sylte from requiring the release of "stored waters" in Twin Lakes fails to recognize that the "natural flow" to which Sylte's 1875 right is entitled

[14] The Department's and District Court's conclusions that Sylte is not entitled to Twin Lakes' "stored waters" focus on the second sentence in Conclusion of Law No. 14 of the *Amended Proposed Findings*, 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.

Final Decree at xix (A.R. 205) (underlining in original *Amended Proposed Findings* to depict IDWR's amendment to *Proposed Findings*).

includes the water that was naturally stored in Twin Lakes prior to dam construction. The Department's and District Court's positions disregard, and cannot be reconciled with, Judge Magnuson's many findings and conclusions about the pre-dam conditions in Twin Lakes and Rathdrum Creek:

- that all of the water stored under the 1906 Storage Rights was the "natural lake storage." *Final Decree* at xv-xvi (A.R. 201-02) (*Amended Proposed Findings'* Finding of Fact No. 10).
- that there was "always" sufficient water in Rathdrum Creek to serve Sylte's 1875 water right on a "continuous year-round basis" when it was appropriated. *Memorandum Decision* at 13 (A.R. 185).
- that such water was "furnished from" Twin Lakes. *Memorandum Decision* at 11 (A.R. 183).
- that appropriators (such as Sylte) are "entitled to maintenance of stream conditions as they were at the time" of their appropriation. *Memorandum Decision* at 13 (A.R. 185).
- that the holders of water right no. 95-0734 are entitled to water "on a basis of priority" over the 1906 Storage Rights. *Memorandum Decision* at 13 (A.R. 185).

and,

- that water rights administration must "give effect" to 95-0734's priority over the 1906 Storage Rights. *Memorandum Decision* at 13 (A.R. 185).

Sylte's reading of the *1989 Decree* gives force and effect to those findings and conclusions and can be reconciled with all other parts of the *1989 Decree*, including Conclusion of Law No. 14 whose "natural flow" language must be read to include Twin Lakes' pre-dam

natural outflow furnished by the pre-dam natural storage to which Sylte is entitled. *Twin Lakes*, 124 Idaho at 138, 857 P.2d at 617 (stating that a written instrument must be read "as a whole and [to] give meaning to all of its terms to the extent possible.") And its "stored waters" language must be read to mean the artificially stored waters under the 1906 Storage Rights. Reading Conclusion of Law No. 14 to prohibit Sylte to all of the natural flow that existed in 1875 (even if some of it was later appropriated by the 1906 Storage Rights) does not give force and effect to the entire *1989 Decree*.

Because the natural flow to which Sylte is entitled includes water naturally stored in Twin Lakes prior to dam construction (and not water stored under the 1906 Storage Rights), Sylte does not, as the District Court states, "argue that conclusion of law 12 opens the door or creates ambiguity as to whether water right 95-734 may divert storage water." *Judicial Review Decision* at 8 (R. 233). After acknowledging the 1906 Storage Rights are the only storage rights on the system, Conclusion of Law No. 12 states that "[a]ll other water rights with source of Twin Lakes Tributary to Rathdrum Creek are direct flow water rights and are entitled to divert , on the basis of priority, a combined rate of flow equal to the inflow to the lakes." *Final Decree* at xix (A.R. 205) (underlining added). By its terms, however, this provision does not apply to Sylte's 1875 water right, which has a source of Rathdrum Creek tributary to Sinks. The District Court improperly ignored this plain language and dismissed this distinction, despite ostensibly focusing its own analysis on the *1989 Decree's* "plain language." If plain language is the rule—and it is—there is no reason to believe Conclusion of Law No. 12 means anything other than what it says.

And, contrary to the District Court's reasoning that it "does not address water rights with a source of Rathdrum Creek because to do so would be unnecessary and redundant" (R. 233), it

only makes sense to conclude that the exclusion of Rathdrum Creek rights from this provision was intentional. Conclusion of Law No. 12 only addresses Twin Lakes sourced water rights—which are the vast majority of water rights on the system. *See Proposed Findings* at 19-85 (A.R. 43-109). There is no reason to think that Conclusion of Law No. 12 applies to natural flow rights with different sources, as suggested by the District Court.[15] In any case, Conclusion of Law No. 12's general language about "direct flow water rights" should not trump Judge Magnuson's specific and express findings about Sylte's 1875 water right. *Morgan v. Firestone Tire & Rubber Co.*, 68 Idaho 506, 518, 201 P.2d 976, 983 (1948) ("Special provisions will control over general ones where both relate to the same thing.").

D. This case is not about increased evaporation and seepage, it is about decreased seepage.

Citing Conclusion of Law No. 14's first sentence, the District Court agreed with the Department that the *1989 Decree* gave Sylte's 1875 right "a unique administrative status relative to other natural flow rights on the system located downstream from Twin Lakes." *Judicial Review Decision* at 6 (R. 231). That is, the District Court found that "increased seepage and evaporation is not counted against the natural tributary inflow the right is entitled to divert." *Id.* In the view of the Department and the District Court, this exemption from Twin Lakes' evaporation and seepage is Sylte's sole benefit of being senior. They are only half right, at most.

First, for the reasons already explained, any additional evaporation and seepage in Twin Lakes resulting from the dam's impoundment of water must not be "counted against" Sylte's 1875 right because Sylte's appropriation pre-dates the dam and therefore is protected from

[15] For example, Conclusion of Law No. 12 would make no sense if applied to water right no. 95-0966 (R. 37), whose source is Spring Branch Creek tributary to Rathdrum Creek, and which obviously is located downstream from Twin Lakes outlet and is uninfluenced by Twin Lake's inflows or outflows.

interference by the dam. *See e.g., Weeks*, 85 Idaho at 622, 382 P.2d at 791 ("[o]ne who undertakes to change the natural channel of a stream or by means of dams or otherwise increases or diminishes the flow of a stream must exercise care in so doing and take such precautions as to prevent injury to others.").[16] The District Court and the Department got this part right.

What they failed to recognize is that Sylte's 1875 right also must not be impacted from decreased seepage that resulted from the 1906 dam—that is, the seepage that historically furnished water to Rathdrum Creek. Judge Magnuson's finding that water flowed "through the natural pre-dam obstruction at all times, forming the source waters for Rathdrum Creek " *Memorandum Decision* at 11 (A.R. 183) (underline in original), essentially recognized that water seeped out of Twin Lakes into Rathdrum Creek. And Judge Magnuson further recognized that the 1906 dam reduced this seepage and held the water "at a higher point longer through the summer months." *Memorandum Decision* at 10 (A.R. 182).

As already discussed, the *1989 Decree* protects Sylte from this reduction in seepage from Twin Lakes. *Memorandum Decision* at 13 (A.R. 185) ("The holders of water right #95-0734 are therefore entitled to waters from the source of their appropriation on a basis of priority over those storage rights Nos. 95-0974 and 95-0975. The waters of this basin are to be administered in such manner as to give effect to such priority."). This is consistent with Idaho law. *Weeks*, 85 Idaho at 623-24, 382 P.2d at 791-92 (a junior dam must "permit the same amount of water to escape

[16] Although one might wonder about Twin Lakes' evaporation and seepage conditions when Sylte's 1875 right was appropriated, there is no need to determine those here. The only question to answer in That answer depends only on whether, in 1875, Twin Lakes' outflows at times exceeded its inflows. As already discussed, Judge Magnuson's express findings indicate that they did. Whatever evaporation and seepage conditions might have existed in 1875 are irrelevant to that question.

from the lake and proceed down [the creek] to [the senior's] diversion point as would occur if its channel had remained unchanged").

To be clear, Sylte must accept whatever evaporation and seepage conditions existed when Sylte's 1875 right was appropriated. But the *1989 Decree* and Idaho law protect Sylte from increased evaporation and seepage as well as decreased Twin Lakes' seepage that benefitted Sylte's 1875 right—that is, decreases to the outflow that fed Rathdrum Creek at all times through the natural pre-dam obstruction.

E. The futile call doctrine's application to water right no. 95-0734 is not dependent on Twin Lakes' tributary inflow.

Sylte challenged the *Instructions'* futile call procedure, which requires a futile call determination "[i]f release of all the natural tributary inflow does not satisfy delivery of water right no. 95-734 within a 48-hr period." *Instructions* at 2 ¶ 7 (R. at 211). Sylte contended this procedure violates the *1989 Decree* because, as already discussed, the delivery of water to water right no. 95-0734 is not limited by the amount of natural tributary inflow to Twin Lakes.

The Department and District Court upheld this part of the *Instructions*, each one stating that no right is "immune" from the doctrine. *IDWR Order* at 13 (A.R. 1402); *Judicial Review Decision* at 10 (R. 235).[17]

[17] The *IDWR Order* contained an analysis which was not addressed by the District Court, but is worth mentioning here so this Court understands why it is wrong. Citing this Court's decision in SRBA Basin Wide Issue 17, *In re SRBA*, 157 Idaho 385, 336 P.3d 792 (2014) ("*BW 17*"), the *IDWR Order* improperly relied on the Director's "discretion" in "balancing" the administration of water rights to justify the *Instructions'* futile call procedure. *IDWR Order* at 12-13 (A.R. 1401-02). But the Department ignored the *BW 17* Court's admonition that the Director's discretion to choose accounting methodologies is constrained by water right decrees and Idaho's priority system. *BW 17*, 157 Idaho at 393, 336 P.3d at 800 ("the Director cannot distribute water however he pleases at any time in any way; he must follow the law. . . . "[A]s long as the Director distributes water in accordance with prior appropriation, he meets his clear legal duty."); *id.* at 394; 336 P.3d at 801 ("[T]he Director's duty to administer water according to technical expertise is governed by water right decrees. The decrees give the Director a quantity he must provide to each water user in priority."). The Director simply does not have discretion to pick a junior

Sylte does not contend that the futile call doctrine is inapplicable to its 1875 right. Rather, as it has throughout these proceedings, Sylte contends that the *Instructions* misapply the doctrine to Sylte's 1875 right by using the improper inflow limitation already discussed. If, as Sylte argues above, its 1875 right is entitled to have the pre-dam natural outflow released from Twin Lakes rather than merely the inflow, the inescapable conclusion is that the Department cannot apply the futile call doctrine based on whether the release of inflow will reach Sylte's diversion.

The Idaho Supreme Court has described the futile call doctrine this way:

> 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 point of downstream diversion. We agree that if 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, then a junior appropriator whose diversion point is higher on the stream may divert the water.

Gilbert v. Smith, 97 Idaho 735, 739, 552 P.2d 1220, 1224 (1976) (internal citations omitted).

Applying the *Gilbert* Court's analysis here, the state's policy against waste must not be construed to permit upstream junior water rights to interfere with the delivery of water to Sylte's

---

water right over a senior water right. *Gilbert v. Smith*, 97 Idaho 735, 739, 552 P.2d 1220, 1224 (1976) (the state's policy against waste "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 point of downstream diversion.").

In any case, any suggestion that delivering water to water right no. 95-0734 is wasteful cannot be reconciled with the Department's prior determination 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 Memorandum Decision and Order* at 5, *In the Matter of Application for Transfer No. 2745 of Water Right No. 95-0973 and 95-2059 filed by the United States of America, acting through the Regional Director, Bureau of Reclamation* (Jun. 26, 1984) (R. at 1189).

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

Accordingly, because releases of water from Twin Lakes to satisfy Sylte's 1875 right are not limited by the amount of inflow to Twin Lakes, the futile call procedures set forth in the *Instructions* and upheld by the *IDWR Order* and *Judicial Review Decision* must be rejected.

IV. THE DEPARTMENT'S IMPROPER PROCEDURES PREJUDICED SYLTE'S SUBSTANTIAL RIGHTS.

In addition to the matters addressed above, the Department erred when, in determining Sylte's *Petition for Declaratory Ruling*, it (1) relied on documents not in the record, and (2) *sua sponte* added a volume limitation provision to the *Instructions.* The District Court did not address whether these actions were proper, instead deciding that Sylte was not entitled to relief because its substantial rights were not prejudiced. *Judicial Review Decision* at 10-11 (R. 235-36). In the next two subsections, Sylte addresses why the Department and the District Court were wrong.

A. The Department's improper reliance on documents outside the record violated Sylte's substantial rights.

A "substantial right" includes both substantive rights as well as procedural due process rights. *917 Lusk, LLC v. City of Boise*, 158 Idaho 12, 18-19, 343 P.3d 41, 47-48 (2015) (substantial rights include harm to property); *Eddins v. City of Lewiston*, 150 Idaho 30, 36, 244

P.3d 174, 180 (2010) ("due process rights are substantial rights"). The *IDWR Order* improperly cited and quoted documents not in the agency record. Doing so violated Sylte's due process right to notice and a meaningful opportunity to respond, as well as the Department's Rules of Procedure.

First, the Department quoted Sylte's predecessor-in-interest's *Objection to Proposed Findings of Water Rights* ("*Sylte's Objection*"), filed March 20, 1985, in the proceedings before Judge Magnuson. *IDWR Order* at 6 (A.R. 1395).[18] Second, the Department cited and quoted the Department's own *Notice of Entry of Final Decree* ("*IDWR's Notice*") filed after Judge Magnuson's *Final Decree* was entered. *IDWR Order* at 9 (A.R. 1398). The Department had no legal basis to cite, quote, or rely upon either of these documents which were not in the agency record below (and are not in the record on appeal).

The Department did not find any ambiguity in the *1989 Decree* that would justify looking outside its four corners. "In the absence of ambiguity, a document must be construed by the meaning derived from the plain wording of the instrument." *Brown v. Greenheart*, 157 Idaho 156, 166, 335 P.3d 1, 11 (2014). Indeed, the *IDWR Order's* only comment as to whether the *1989 Decree* might be ambiguous was with respect to Conclusion of Law No. 14, which the *IDWR Order* determines is "unambiguous." *IDWR Order* at 10 (A.R. 1399).

No party put these documents in this agency record, the Department did not take official notice of either under Rule of Procedure 602 (IDAPA 37.01.01.602), and no party received notice of them or was given an opportunity to contest or rebut them before the issuance of the *IDWR Order*. Notice and an opportunity to contest or rebut officially noticed evidence is

[18] Sylte's predecessor-in-interest that filed the objection included John and Evelyn Sylte, Gordon and Judith Sylte, and Sylte Ranch, Inc.

required under IDWR's rules. IDAPA 37.01.01.602. And IDWR may only base its decision on the official agency record. IDAPA 37.01.01.650 ("The agency shall maintain an official record for each contested case and (unless statute provides otherwise) base its decision in a contested case on the official record for the case."); 37.01.01.712.01 ("Findings of fact must be based exclusively on the evidence in the record of the contested case and on matters officially noticed in that proceeding."). Accordingly, it was error for the Department to review and quote from off-record documents in the *IDWR Order's* findings and conclusions. The Department's review and quotation of (and apparent reliance on) these documents violated Idaho law, the Department's Rules of Procedure, and Sylte's due process right to notice and a meaningful opportunity to respond.

This was prejudicial to Sylte because the documents actually do not support the conclusions reached by the IDWR. Had they been properly put in the record, Sylte could have had an opportunity to explain their meaning including, if necessary, by introducing other evidence into the record. The Department's failure to provide Sylte with notice that the Department would review and cite the documents deprived Sylte of this opportunity, and this prejudiced Sylte's substantial rights.

To avoid any appearance that Sylte is attempting to hide the contents of *Sylte's Objection* and *IDWR's Notice*, they are quoted length in the record. (R. 105-07 (*Sylte's Objection*); A.R. 1431 (*IDWR's Notice*)). Sylte will not quote them again here, but invites this Court to read those

document's text and Sylte's full explanation of that text.[19] In an nutshell, neither document supports IDWR's conclusions in the *IDWR Order*.

The Department mischaracterized *Sylte's Objection* by selectively quoting from it, and implying (if not asserting outright) that Judge Magnuson rejected the same arguments Sylte is making in this proceeding. *IDWR Order* at 6-8 (A.R. 1395-97). However, contrary to the Department's view, Judge Magnuson agreed with Sylte and expressly rejected the Department's contentions in favor of Sylte's. *Memorandum Decision* at 14 (A.R. 186) ("[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.").

Concerning *IDWR's Notice*, it simply cannot be relied on to accurately reflect the meaning of the *1989 Decree*. *IDWR's Notice* was filed by the Department after the entry of the *Memorandum Decision* and *Final Decree*. It is not a statement by Judge Magnuson, and therefore it has no bearing on the meaning of the *1989 Decree*. At most, it is a self-serving, *post hoc* restatement of the Department's own arguments that were rejected by Judge Magnuson. Indeed, there was no reason for *IDWR's Notice* to include the statements cited by the *IDWR Order* other than to place a stake in the ground should the Department want to later re-assert the positions rejected by Judge Magnuson. Judge Magnuson made a number of findings and

[19] In offering argument concerning *Sylte's Objection* and *IDWR's Notice*, Sylte in no way admits that additional documents are needed to interpret the *1989 Decree*. The *1989 Decree's* plain language unambiguously supports Sylte's arguments, and there is no reason to look outside its four corners.

conclusions about a number of matters, making it odd (to say the least) that IDWR would single out and offer its further explanation concerning only water right no. 95-0734.[20]

In short, the *IDWR Order* should not have cited, quoted, or relied on any documents not in the record, and certainly should not have cherry-picked self-serving statements outside the four corners of the *1989 Decree*. Contrary to the District Court's determination, doing so was prejudicial to Sylte's substantial rights and must be reversed.

B. The Department erred by *sua sponte* adding an incorrect volume limitation provision to the *Instructions.*

Sylte challenged the *IDWR Order* because, without any party asking and without it being an issue presented in this proceeding, the Department improperly added to the *Instructions* a volume limitation provision concerning water right no. 95-0734. *IDWR Order* at 11, 13 (A.R. 1400, 1402). The District Court found that this did not prejudice Sylte's substantial rights. *Judicial Review Decision* at 10 (R. 235). Sylte requested rehearing by the District Court on this single issue, which was denied. (R. 239-52, 278-81). This was error because adding the volume limitation was outside the issues raised in this proceeding and because it mischaracterized whatever volume limitation must be imposed on water right 95-0734.

No party raised the issue of water right no. 95-0734's volume limitation at any point in this proceeding. As already discussed, this proceeding was brought by Sylte to challenge the *Instructions'* provisions limiting the exercise of water right no. 95-0734 to Twin Lakes' natural

[20] For example, Judge Magnuson made findings and conclusions about the nature of the natural lake storage prior to the dam and outlet construction, and also the nature of an unnamed stream that was tributary to Rathdrum Creek immediately below Twin Lakes' outlet prior to the dam and outlet construction. But *IDWR's Notice* makes no mention of such other findings.

tributary inflow. Sylte had no notice of that IDWR would add the volume limitation language to the *Instructions* or any opportunity to address it.[21]

Moreover, even if this was an appropriate issue to address in this proceeding, the Department incorrectly determined how a volume limit should be administered. According to the *1989 Decree*, Sylte's water right no. 95-0734 is entitled to divert 4.10 acre-feet per year in priority. (R .at 26). The *IDWR Order*, on the other hand, limits the exercise of water right no. 95-0734 to "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's water right no. 95-0734 is entitled to divert 4.10 acre-feet per year in priority (*i.e.*, not counting excess water diverted under so-called "free river" conditions), not merely to have that amount delivered to their point of diversion. Sylte is entitled to have water delivered to water right no. 95-0734's point of diversion on a continuous year-round basis, only to be curtailed when the right has diverted the volume limit in priority.[22]

"Procedural due process is the aspect of due process relating to the minimal requirements of notice and a hearing if the deprivation of a significant life, liberty, or property interest may

[21] On rehearing, the District Court stated that Sylte had "both notice and an opportunity to he heard on the issue of a 4.1 acre-foot volume limitation in the prior adjudication." *Rehearing Denial* at 2 (unnumbered) (R. 279). But Sylte is not in this case challenging the volume limitation in the *1989 Decree*, they are challenging the *sua sponte* imposition of the volume limitation by the Department in the agency proceedings underlying this appeal.

[22] On rehearing, the District Court decided that "diverted" versus "delivered" is a "distinction without a difference under the circumstances" because, at oral argument, the Department's counsel confirmed that, despite the "delivered" language in the *Instructions*, the Department did not intend to administer Sylte's water right based on the amount of water that flows to and/or past Sylte's headgate. *Rehearing Denial* at 3 (unnumbered) (R. 280); Tr. 34-35 ("it's not the amount delivered to the point of—or that flows past the point of diversion, but simply the amount diverted, delivered to the place of use, and put to beneficial use."). While this provides Sylte with some solace, it does not change the fact the *Instructions* still contain the "delivered" language when that language does not accurately describe how Sylte's 1875 right should be administered.

occur." *Bradbury v. Idaho Judicial Council*, 136 Idaho 63, 72, 28 P.3d 1006, 1015 (2001). With neither notice nor opportunity to be heard regarding the Department's *sua sponte* addition of a volume limit to the *Instructions*, the Department's *Order* deprived Sylte of a significant property right in violation of Sylte's due process rights.

CONCLUSION

For the reasons set forth above, Sylte respectfully requests that this Court: (1) reverse and set aside the District Court's *Judicial Review Order*, the *IDWR Order*, and the Department's *Instructions*; (2) hold that Sylte is entitled to releases of water from Twin Lakes in the amount of Twin Lakes' pre-dam natural outflow rather than the amount of natural tributary inflow entering Twin Lakes; (3) determine that the Department prejudiced Sylte's substantial rights by reviewing and citing documents outside the agency record and by *sua sponte* adding a volume limitation to the *Instructions*; and (4) awarding Sylte its attorney fees and costs on appeal and in the proceedings below.

Respectfully submitted on October 23, 2018.

GIVENS PURSLEY LLP

By */s/ Michael P. Lawrence*
Michael P. Lawrence

By */s/ Jack W. Relf*
Jack W. Relf
Attorneys for Petitioners Gordon Sylte, Susan Goodrich, John Sylte, and Sylte Ranch Limited Liability Company

CERTIFICATE OF SERVICE

I hereby certify that on this October 23, 2018, I caused to be filed and served true and correct copies of the foregoing document to the person(s) listed below by the method indicated:

DOCUMENT FILED:

Clerk of the Court IDAHO SUPREME COURT 451 W State St Boise, ID 83702	☐ ☐ ☐ ☐ ☒	U. S. Mail Hand Delivered Overnight Mail Facsimile E-mail/iCourt

DOCUMENT SERVED:

Kristina Fugate Garrick L. Baxter Idaho Department of Water Resources 322 East Front Street P.O. Box 83720 Boise, ID 83720-0098 Email: garrick.baxter@idwr.idaho.gov kristina.fugate@ag.idaho.gov	☐ ☐ ☐ ☐ ☒	U. S. Mail Hand Delivered Overnight Mail Facsimile E-mail
Norman M. Semanko Parsons Behle & Latimer 800 W. Main Street, Suite 1300 Boise, ID 83702 Email: NSemanko@parsonsbehle.com ecf@parsonsbehle.com	☐ ☐ ☐ ☐ ☒	U. S. Mail Hand Delivered Overnight Mail Facsimile E-mail
Albert P. Barker, Barker Rosholt & Simpson LLP 1010 W. Jefferson St., Ste. 102 P.O. Box 2139 Boise, ID 83701-2139 Email: apb@idahowaters.com	☐ ☐ ☐ ☐ ☒	U. S. Mail Hand Delivered Overnight Mail Facsimile E-mail

/s/ Michael P. Lawrence
Michael P. Lawrence