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,

Appellants-Petitioners,

v.

IDAHO DEPARTMENT OF WATER RESOURCES,

Respondent-Respondent,

and

TWIN LAKES IMPROVEMENT ASSOCIATION; MARY A. ALICE; MARY F. ANDERSON; MARY F. ANDERSON ET AL.; DEBRA ANDREWS; JOHN ANDREWS; MATTHEW A. BAFUS; CHARLES AND RUTH BENAGE; ARTHUR CHETLAIN JR.; CLARENCE & KURT GEIGER FAMILIES; MARY K. COLLINS/BOSCH PROPERTIES; SANDRA COZZETTO; WES CROSBY; JAMES CURB; MAUREEN DEVITIS; DON ELLIS; SUSAN ELLIS; SCOTT ERICKSON; JOAN FREIJE; AMBER HATROCK; BARBARA HERR; WENDY AND JAMES HILLIARD; PAT & DENISE HOGAN; STEVEN & ELIZABETH HOLMES; LEIF HOUKAM; 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 ECHO RESORT; UPPER TWIN LAKES, LLC; RICK & CORRINNE VAN ZANDT; GERALD J. WELLER; BRUCE & JAMIE WILSON; DAVE ZIUCHKOVSKI; PAUL FINMAN, and TWIN LAKES FLOOD CONTROL DISTRICT NO. 17,

Respondents-Intervenors.

RESPONSE BRIEF OF TWIN LAKES IMPROVEMENT ASSOCIATION ET AL.

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

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I. STATEMENT OF THE CASE

A. Nature of the Case

This is an appeal from the district court's decision of April 11, 2018 (hereinafter "*Judgment*" (R. at 222–23) and "*2018 Memorandum Decision"* (R. at 226–36)) affirming the final agency action of the Idaho Department of Water Resources ("IDWR"). As discussed in the Argument section below, the district court's decision upholding IDWR's decision properly interprets and applies the *1989 Decree* and appropriately sets forth the details for administration of the natural flow and storage water rights in Water District 95C.

B. Additional Statement of the Facts

Sylte's Statement of Facts and Course of Proceedings (*Appellant Sylte's Opening Brief* at 7–18) quotes at length from portions of the *1989 Memorandum Decision* issued by Judge Magnuson, as well as portions of IDWR's *Proposed Finding of Water Rights*, and the *1989 Decree*. However, Sylte's statement omits some key facts contained in these documents, which are set forth below.

"After the Director of the Department of Water Resources filed its report with the court, various individuals or groups filed their objections to such report, which were responded to by the Director of said department. These objections were four in number: 1. By John Sylte and Evelyn Sylte, husband and wife; Gordon Sylte and Judith Sylte, husband and wife; and Sylte Ranch, hereinafter referred to as the Syltes." *1989 Memorandum Decision* at 2–3 (R. at 174–75).

Immediately following the "Objectors Listing of Rights," including Sylte's claim no. 95-0734, the court noted: "None of these claims included storage as a purpose of the water rights. *1989 Memorandum Decision* at 5–6 (R. at 177–78).

"The points of diversion of all Objectors are located on Rathdrum Creek, which is downstream from the outlet of Lower Twin Lake." *1989 Memorandum Decision* at 7 (R. at 179).

"The Twin Lakes Improvement Association filed a notice of claim to a water right that included storage in Twin Lakes, which was recommended in the Proposed Findings at p. 21 as Water Right No. 95-0974." *1989 Memorandum Decision* at 7 (R. at 179).

"The U.S. Dept. of Interior, Bureau of Reclamation filed a notice of claim to a water right that included storage in Twin Lakes, which was recommended in the Proposed Finding at p. 21 as Water Right No. 95-0975." *1989 Memorandum Decision* at 7 (R. at 179). It is uncontested that the correct water right number for this Twin Lakes storage right is 95-0973 and that the right is now held by Respondent-Intervenor Twin Lakes Flood Control District No. 17.

"The Objectors have maintained there is no independent right to water storage, or to water stored for some future use, contending that water rights in Idaho are created by appropriations, and that appropriation requires diversion (except in certain instances).

"Storage of spring flows of water for later use is recognized in Idaho. Idaho Code Sec. 42-202. Storage water rights differ from direct flow rights in that water is impounded for later use, while waters, subject to direct flow rights, are diverted for immediate use." *1989 Memorandum Decision* at 14 (R. at 186).

"The Court concludes there are only two storage rights recognized as a result of this adjudication proceeding, to-wit: 1. Twin Lakes Improvement Association storage right between 0.0 to 6.4 feet on the staff gauge (95-0974); 2. Bureau of Reclamation's right between 6.4 to 10.4 feet on the staff gauge (95-0975) [again, this storage right is actually 95-0973 and now belongs to the Flood Control District]." *1989 Memorandum Decision* at 15 (R. at 187).

"Regarding the Rathdrum Creek Drainage Association ['a generic term encompassing all the individual Objectors' (R. at 180)] claim that they have a vested right in storage rights in Rathdrum Creek, it is noted such claimants were required to submit a notice of claim for each water right claimed on a claim form prepared by the Idaho Department of Water Resources, setting forth each element of the water right claimed. Such claims must be filed in a timely manner. The evidence herein does not disclose any claim to a water right for storage purposes was submitted by the Objectors. The time for filing such claims in this adjudication is past." *1989 Memorandum Decision* at 16–17 (R. at 188–89).

"Regarding the Objectors' objection to finding of fact no. 18 on the basis that the listing of water rights did not include all the water which had been diverted and applied to beneficial use on a historical basis by Syltes, this Court finds that all said claimed diversions were described in the listing of water rights." *1989 Memorandum Decision* at 20 (R. at 192).

"This Court concludes 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. They have not diverted or appropriated such water." *1989 Memorandum Decision* at 20–21 (R. at 192–93).

"Storage water rights utilize the storage capacity of the lake. Direct flow water rights utilize the flows passing through the lake and are established on a priority basis." *Proposed Finding of Water Rights* at xvi (Finding of Fact No. 12) (R. at 17).

"No water right exists for the natural storage below the level of 0.0 feet on the Staff Gauge located at the outlet of Lower Twin Lake." *Proposed Finding of Water Rights* at xix (Conclusions of Law No. 8) (R. at 20).

"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." *1989 Decree* at xix (amended/final Conclusions of Law No. 14) (underlining omitted) (R. at 205).

Sylte's water right no. 95-0734 is a "natural flow appropriation" from Rathdrum Creek "for 300 head of stock," with a "max amount" of 4.1 acre-feet and a "max rate" of .07 cfs. *Proposed Finding of Water Rights* at 3 (Listing of Rights) (R. at 26).

II. ADDITIONAL ISSUES PRESENTED ON APPEAL

A. Attorney Fees on Appeal.

Respondents-Intervenors Twin Lakes Improvement Association et al. seek an award of attorney fees in this appeal, pursuant to Idaho Code Sections 12-117(1) and 12-121, authorizing an award of attorney fees to the prevailing party when the nonprevailing party acts without a reasonable basis in fact or law.

Attorney fees are appropriate under section 12-117(1) "in any proceeding involving as adverse parties a state agency . . . and a person . . . if [the court] finds that the nonprevailing party acted without a reasonable basis in fact or law." *City of Blackfoot v. Spackman*, 162 Idaho 302, 310 (2017) (*quoting* I.C. Sec. 12-117(1)).

Just as in *City of Blackfoot*, Sylte "has asserted the same arguments on appeal as it did before the Director and the district court." *Id.* At 310–11. Sylte's argument "is not reasonably based in law." *Id*. at 311. And as in *City of Blackfoot*, "[t]he district court clearly articulated this in its decision." *Id.* The district court found that the provisions of the *1989 Decree* are "plain and unambiguous" and agreed with IDWR's finding that the Watermaster Instructions are consistent with the *1989 Decree*. R. at 231. Judge Wildman further concluded that the language of the instructions "accurately reflect the plain language of the *Decree*" and that Sylte's argument – the same argument being made in this appeal – "is contrary to the plain language of the *Decree*." R. at 232. Further, he ruled that principles of res judicata preclude Sylte from asserting otherwise. R. at 234–35. Continuing to make "the same arguments on appeal as it did before the Director and the district court" is without merit. *City of Blackfoot*, 162 Idaho at 310–11.

Sylte has been attempting for decades to manipulate and control the storage in Twin Lakes for its own purposes. Judge Magnuson soundly rejected these attempts in the Twin Lakes Adjudication in 1989. Judge Wildman appropriately rejected Sylte's invitation to revisit and reverse Judge Magnuson's decision. Sylte offers nothing new here and has no basis in fact or law for its claims. Sylte is simply asking the Court to second-guess the district court, which was asked to second-guess IDWR, using the same arguments throughout. As a result, attorney fees should

be awarded to Respondents-Intervenors Twin Lakes Improvement Association et al. in this appeal. Accordingly, Sylte's request for attorney fees on appeal (*Appellant Sylte's Opening Brief* at 19–21) should be denied.

III. ARGUMENT

A. IDWR's Order Is Consistent with the Memorandum Decision, the 1989 Decree and Idaho Law.

Sylte claims that IDWR's Order and its Instructions to the Watermaster "incorrectly require administration of Sylte's 1875 water right based on the amount of natural inflow tributary to Twin Lakes." *Appellant Sylte's Opening Brief* at 21. Instead of being subject to such administration, Sylte claims that it 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." *Id*. In other words, as also asserted before the district court, Sylte believes that its water right "must be satisfied on a continuous, year-round basis." R. at 83. As the district court correctly concluded, Sylte's assertions stand in direct contrast to the *1989 Decree* and Idaho law.

Sylte claims that IDWR's Order and Instructions, and the district court's decision, "ignore" the *1989 Decree* and *1989 Memorandum Decision*. *Appellant Sylte's Opening Brief* at 22. IDWR and the district court did no such thing. To the contrary, IDWR exhaustively reviewed the *1989 Memorandum Decision*, *1989 Decree* and associated documents, citing from them at length in the summary judgment order, including the portions that Sylte relies upon. In doing so, the agency considered all of the relevant provisions of the documents, not just the selectively quoted – and creatively interpreted – provisions that Sylte favors. Far from reading anything out of these documents, IDWR carefully examined and analyzed the entirety of the documents, providing a

straightforward, plain-meaning interpretation of Judge Magnuson's decision. That same interpretation is reflected in the Instructions. The district court appropriately found this interpretation is based upon the "plain and unambiguous" language of the *1989 Decree*. R. at 231.

Idaho Code Section 42-602 "gives the Director a 'clear legal duty' to distribute water" and broad powers to direct and control distribution of water from all natural water sources within water districts." *In re SRBA (Basin Wide Issue 17)*, 157 Idaho 385, 393 (2014). "The Director cannot distribute water however he pleases at any time in any way; he must follow the law. . . . [T]he details of the performance of the duty," however, "are left to the director's discretion. . . . Details are left to the Director." *Id*.

The Instructions to the Watermaster are "details" properly left to the Director and IDWR. While Sylte obviously does not like IDWR's Instructions to the Watermaster, this does not give Sylte the right to substitute its judgment for that of the Director in how to administer decreed water rights within a water district. As the Court has stated, "we ordinarily must vest the findings of the [Director] with the presumption of correctness." *In re SRBA (Basin Wide Issue 17)*, 157 Idaho at 394. "The Legislature intended to place upon the shoulders of the [Director] the primary responsibility for a proper distribution of the waters of the state" and "recognized the need for the Director's expertise." *Id*.

The Court has historically "recognized the Director's discretion to direct and control the administration of water in accordance with the prior appropriation doctrine," and "more recently" the Court "further articulated the Director's discretion: 'Somewhere between the absolute right to use a decreed water right and an obligation not to waste it and to protect the public's interest in

this valuable commodity, lies an area for the exercise of discretion by the Director." *Id*. "Thus, the Director's clear duty to act means that the Director uses his information and discretion to provide each user the water it is decreed. And implicit in providing each user its decreed water would be determining when the decree is filled or satisfied." *Id.* at 393–94.

That is precisely what IDWR has done with the Instructions to the Watermaster, as upheld by the agency's order on summary judgment and the district court's decision on judicial review. Consistent with the plain language of the *1989 Decree* and the *1989 Memorandum Decision*, IDWR has determined that Sylte's water right is filled or satisfied by natural flow, without penalty for evaporation or seepage. IDWR has also determined that the right is not filled or satisfied by the delivery of storage water. As the district court correctly concluded, to decide otherwise would be directly contrary to the plain language of the *1989 Decree*. R. at 231–34.

B. Sylte's Water Right Is Limited to Natural Flow, and Sylte Has No Right to the Natural or Artificial Storage of Twin Lakes.

Sylte objected to the Director's Report for water rights in the Twin Lakes Adjudication and argued that it was entitled to storage. Judge Magnuson clearly disagreed. *1989 Memorandum Decision* at 16–17 (R. at 188–89). The court also found that storage rights are different from natural flow water rights. *1989 Memorandum Decision* at 20–21 (R. at 191–92); *see also*, *American Falls Reservoir Dist. No. 2*, 143 Idaho 862, 880 (2007) (noting that there is a "fundamental difference" between water rights for direct diversion and use and water rights for storage). While under direct diversion water rights, the water must be put to immediate use, "the very purpose of storage is to retain and hold for subsequent use . . . hence retention is not of itself

illegal and does not deprive the user of the right to continue to hold." *Rayl v. Salmon River Canal Co.*, 66 Idaho 199, 208 (1945). As a result, Judge Magnuson specifically concluded that Sylte's water right could be satisfied by natural flow, but not with storage. *1989 Decree* at xix (amended/final Conclusions of Law No. 14) (R. at 205). The district court correctly noted that this portion of Judge Magnuson's decision served to defeat Sylte's argument. R. at 232–34.

The district court was also correct in concluding that principles of res judicata preclude Sylte from asserting that the plain language of the *1989 Decree* is contrary to the doctrine of prior appropriation. R. at 234–35. "Such issues were raised, or should have been raised, in the prior adjudication and are precluded from being raised in this proceeding by principles of res judicata." R. at 235. Sylte – despite being precluded by res judicata – is again arguing that it is entitled to storage water.

The *1989 Decree* and *1989 Memorandum Decision* specifically found that there is no water right to the natural storage in Twin Lakes. *Proposed Finding of Water Rights* at xix (Conclusions of Law No. 8) (R. at 20). Sylte characterizes the additional water that it seeks as being part of the natural storage of the lake – something Sylte calls "natural, pre-dam outflow" (*Appellant Sylte's Opening Brief* at 25, 34), a term which does not appear in the *1989 Decree* or the *1989 Memorandum Decision* – and therefore not really "storage." This bizarre argument turns the 1989 decision and Idaho law on their heads.

Regarding the distinction between natural flow water rights (like Sylte's) and storage water rights (like TLIA's and the Flood Control District's), Judge Magnuson noted: "Storage water rights differ from direct flow rights in the water is impounded and stored for later use, while waters,

subject to direct flow rights, are diverted for immediate use. *1989 Memorandum Decision* at 14 (R. at 186). "Direct flow water rights utilize the flows passing through the lake." *Proposed Finding of Water Rights* at xvi (Finding of Fact No. 12) (R. at 17). "No water right exists for the natural storage below the level of 0.0 on the Staff Gauge located at the outlet of Lower Twin Lake." *Proposed Finding of Water Rights* at xix (Conclusions of Law No. 8) (R. at 20). Of course, this serves to entirely defeat Sylte's claim to this water as "natural, pre-dam outflow." It is "natural storage," to which Sylte has no right. The district court correctly concluded that Sylte has no right to storage water, but rather is limited to natural flow. R. at 232–34.

Sylte's assertion that the 1906 dam "did not artificially store a greater volume of water" (*Appellant Sylte's Opening Brief* at 25) is a gross mischaracterization of the *1989 Memorandum Decision*. The result of the dam "was to hold the water at a higher point longer through the summer months." *1989 Memorandum Decision* at 10 (R. at 182). By definition, that is the artificial storage of a greater volume of water during the summer months. That additional water is the storage owned by TLIA and the Flood Control District. Sylte has no right to that storage water, as previously determined by Judge Magnuson and confirmed by IDWR and the district court.

Sylte argues that the 1906 storage water rights are not like other storage water rights and that somehow Sylte should not be limited to natural flow. *Appellant Sylte's Opening Brief* at 28. While recognizing that this "may seem counterintuitive" (*Id.*), no authority is provided for this supposition. Moreover, this argument flies in the face of one of Idaho's most well-documented examples of natural flow water right holders not being allowed to utilize storage water rights.

A century ago, senior natural flow water right holders in eastern Idaho challenged the notion that a storage right with a junior priority date to their natural flow rights could be delivered past their headgates. "Although the earliest rights on the Snake were held by water users in the Idaho Falls area, they were ordered to close their headgates late in the season even though there was water in the river. Due to releases from Jackson Dam, the water in the river was considered storage water for those who had subscribed for the water in the Minidoka Project and not natural flow water which could otherwise be diverted by the earlier priority natural flow rights." *The Development of Water Rights and Water Institutions in the Upper Snake River Valley*, Jerry R. Rigby, The Advocate, Vol. 53, No. 11/12 (Nov/Dec 2010); *see also, Institutional History of the Snake River 1850-2000*, R.A. Slaughter, University of Washington (2004) ("Jackson Lake storage produced the irony of natural flow right holders having their water shut off while there was substantial flow in the river, the flow belonging to storage right holders"). This was the result dictated by Idaho's prior appropriation doctrine. And, contrary to Sylte's assertion, the result was not different because Jackson Lake was in existence prior to Jackson Dam. The natural flow right holders were entitled to natural flow only, not storage. Twin Lakes is no different.

In other water districts in Idaho which include both natural flow and storage water rights, natural flow water right delivery is limited to the amount of natural flow available in the reach containing the diversion. *Concepts, Practices, and Procedures Used to Distribute Water within Water District #1*, Upper Snake River Basin, Tony Olenichak, at 28 (March 2, 2015). The natural flow holders do not receive storage. The result can be no different in Water District 95C.

As noted by the district court, in order to accomplish a continuous, guaranteed, and uninterrupted supply of water, Sylte would need to tap into the storage of the Twin Lakes, including the water rights held by TLIA and the Flood Control District, as a supplemental supply to Sylte's natural flow water right. R. at 232. That is precisely what Sylte attempted to do in the Twin Lakes Adjudication. It is what Sylte is attempting again in this proceeding. To allow such use by Sylte would be in direct violation of the *1989 Decree* and Idaho law. IDWR's order and the Instructions to the Watermaster appropriately recognize this, and the district court correctly upheld IDWR's decision by concluding that "the release of storage water to satisfy water right 95-734 is expressly prohibited under the *Decree*." *Id.*

C. The Express Quantity Elements of Sylte's Water Right Preclude a Continuous Year-Round Supply.

Sylte relies heavily on a generalized finding by Judge Magnuson, concluding that there was "always" water in Rathdrum Creek to serve Sylte's water right "on a continuous year-round basis." *Appellant Sylte's Opening Brief* at 29. Sylte contends that the "clear meaning" of Judge Magnuson's decision and what he "intended" was that Sylte's water right would be "protected." *Id.* at 31.

Of course, there can be no guarantee that a natural flow water right will "always" flow. Sooner or later, natural flows deplete during the summer months. Judge Magnuson's finding that water flowed to Rathdrum Creek before the construction of the dam in 1906 is useful in understanding the basis for excluding water right no. 95-0734 (as a pre-dam right) from the evaporation and seepage losses that were applied to other natural flow water rights (post-dam

rights), but it does not equate to a guarantee of a permanent, uninterrupted supply. There is certainly nothing in the *1989 Decree* that concludes that.

Even more problematic for Sylte is the fact that water right no. 95-0734 has a decreed maximum volume of 4.1 acre-feet. *Proposed Finding of Water Rights* at 3 (Listing of Rights) (R. at 26); *2018 Memorandum Decision* at 4 (R. at 229). This is true whether this limitation is expressly included in the Instruction to the Watermaster or not. It is in the *1989 Decree*, it is plain language, and it must be adhered to by the Watermaster. Idaho Code Sec. 42-607. There is no inference, alleged intent or asserted "clear meaning" that can provide otherwise.

Sylte insists that the water right must be satisfied on a continuous, year-round basis. At the decreed diversion rate of .07 cfs, a continuous supply would equate to a total of 50.7 acre-feet per year. *See, Water Conversion Factors* (available at idwr.idaho.gov) (1 cfs equals 1.9835 acre-feet per day) (.07 cfs x 1.9835 = .138845 acre-feet; .138845 acre-feet x 365 days = 50.7 acre-feet). This is 46.6 acre-feet more than the 4.1 acre-foot quantity authorized to be diverted under the water right, as decreed by Judge Magnuson.

Obviously, Sylte's right cannot be authorized "on a continuous year-round basis" at the rate of .07 cfs, or it would exceed the "max amount" in the decree by a factor or more than 12 times the quantity that is authorized. *Proposed Finding of Water Rights* at 3 (Listing of Rights) (R. at 26). Therefore, there can be no factual or legal basis for the "always" and "continuous, year-round" arguments made by Sylte.

D. IDWR's Futile Call Analysis Is Sound and Was Correctly Upheld.

The futile call doctrine is a bedrock principle of water rights administration and the prior appropriation doctrine in Idaho. Among other things, it guards against the waste of water when water flowing in its natural channel would not reach the point of diversion downstream. *Gilbert v. Smith*, 97 Idaho 735, 739 (1976). Sylte fails to identify any authority to the contrary. There is no exemption from the futile call doctrine for Sylte in either the *1989 Decree* or Idaho law.

IDWR was correct to require a futile call determination in the Instructions to the Watermaster, so as not to waste water. Such a requirement is certainly consistent with Idaho law and was properly upheld by the district court. R. at 235.

E. The Sylte Volume Limit Is Appropriate to Include in the Instructions.

In its petition for declaratory ruling, Sylte asked IDWR to revise the Instructions to the Watermaster. It should come as no surprise that IDWR revised the Instructions, albeit not in the way that Sylte requested.

IDWR added to the Instructions a reference to the decreed diversion volume for Sylte's water right. As correctly noted by the district court, this "max quantity" of 4.1 acre-feet per year is taken directly from the elements of the decreed water right. R. at 229, 235; *Proposed Finding of Water Rights* at 3 (Listing of Rights) (R. at 26). It is beyond reason how Sylte can complain about such an addition. There is no due process issue: The Syltes were parties to the Twin Lakes Adjudication, where the water right was decreed with the diversion volume. Res judicata principles preclude Sylte from challenging it.

The quantity element – both the diversion rate and annual diversion volume – is a key component of an adjudicated water right. Idaho Code Sections 42-1411(2)(c) and 42-1412(6). Without it, the Watermaster is unable to accurately and effectively ensure the delivery of water rights during times of shortage, as required by statute. Idaho Code Section 42-607.

Both the diversion rate and the annual diversion volume are defined in Sylte's water right, as decreed by Judge Magnuson. *Proposed Finding of Water Rights* at 3 (Listing of Rights) (R. at 26). Sylte cites no authority for the proposition that water rights should be administered only for their diversion rate, not their diversion volume. To do so would negate the purpose of adjudicating the water rights in the first place.

IDWR's decision is sound, will assist the Watermaster in administering water rights in the future, and was properly upheld by the district court.

F. The Additional Documents Cited by IDWR Are Related to the 1989 Decree, and Any Error from Reviewing Them Is Harmless.

Sylte claims that the IDWR Order's citation to the objection filed by the Syltes in the Twin Lakes Adjudication, and the additional citation to IDWR's Notice filed after the Final Decree was entered, were improper and somehow prejudiced substantial rights.

Both of these documents are part of the Twin Lakes Adjudication. The Syltes' objection is specifically referenced and discussed by Judge Magnuson in his Memorandum Decision. *1989 Memorandum Decision* at 3, 5, 8 (R. at 175, 177, 180). The district court further recognized these objections. *2018 Memorandum Decision* at 9 (R. at 234). And the Notice of Entry of Final Decree

is certainly related to the adjudication. As part of the court proceedings, it is difficult to understand why it would be improper for IDWR to review them.

In any event, it is evident that IDWR's decision in this matter is not based upon, or changed by, those two documents. The *1989 Memorandum Decision* and the *1989 Decree* are clear and unambiguous, as recognized by the district court. *Id*. at 6 (R. at 231). It is those documents that IDWR relied upon in its summary judgment order and the Instructions to the Watermaster. Accordingly, even if it was improper for IDWR to cite and review the two documents in question, the error is harmless. In addition, as the district court found, "the same result would have been reached by [IDWR] in its *Final Order* regardless of its consideration of the documents over which the Petitioners' complain." *Id.* at 11 (R. at 236). As a result, "there is no prejudice to the Petitioners' substantial rights." *Id.*

IV. CONCLUSION

For the above-stated reasons, the Respondents-Intervenors Twin Lakes Improvement Association et al. respectfully request that this Court uphold the district court's *Judgment* and *2018 Memorandum Decision* and that attorney fees and costs be awarded to said Respondents-Intervenors as prevailing parties.

DATED November 21, 2018.

PARSONS BEHLE & LATIMER

By: */s/ Norman M. Semanko*
Norman M. Semanko
Attorneys for Respondents-Intervenors Twin Lakes Improvement Association et al.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of November, 2018, I served a true and correct copy of the foregoing document on the parties listed below by their designated method of service as indicated.

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/s/ Norman M. Semanko
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