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STATE OF IDAHO
COUNTY OF KOOTENAI
FILED: ss

2017 OCT -3 PM 3: 56

CLERK DISTRICT COURT

DEPUTY

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

GORDON SYLTE, an individual, SUSAN
GOODRICH, an individual, JOHN SYLTE, an
individual, AND SYLTE RANCH LIMITED
LIABILITY COMPANY, an Idaho limited
liability company,

Petitioners,

vs.

IDAHO DEPARTMENT OF WATER
RESOURCES,

Respondent.

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

IDWR DOCKET NO. P-DR-2017-001

Case No.: CV17-7491

**PETITION FOR JUDICIAL REVIEW OF
AGENCY ACTION**

**CATEGORY FEE: L.3.a
FEE AMOUNT: \$221.00**

Confirmation # 066341

Petitioners Gordon Sylte, Susan Goodrich, John Sylte, and Sylte Ranch Limited Liability Company (collectively, "Sylte"), by and through their counsel of record Givens Pursley LLP, and pursuant to Idaho Code §§ 42-1701A(4) and 67-5270 through 67-5279, and Rule 84 of the Idaho Rules of Civil Procedure, hereby file this petition ("Petition") seeking judicial review of an agency action by the Idaho Department of Water Resources ("IDWR" or "Department").

SYLTE'S PETITION FOR JUDICIAL REVIEW - 1
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JOHN T. MITCHELL

SUMMARY OF THE CASE

1. This is a civil action pursuant to Idaho Code §§ 42-1701A(4) and 67-5270 through 67-5279 seeking judicial review of the September 6, 2017 *Order on Motions for Summary Judgment; Order Amending Instructions; Order Vacating Hearing Dates and Schedule* in IDWR Docket No. P-DR-2017-001 (“*Order*”) issued by IDWR Hearing Officer Shelly Keen, and the Hearing Officer’s September 7, 2017 letter (“*Letter*”) identifying the *Order* as a “final action of the agency” pursuant to Idaho Code § 67-5255(3)¹ and IDWR Rule of Procedure 402 (IDAPA 37.01.01.402).

2. Following a court trial, on February 22, 1989, First Judicial District Court Judge Richard Magnuson issued his *Memorandum Decision, In the Matter of the General Distribution of the Rights to the Use of the Surface Waters of Twin Lakes, Including Tributaries and Outlets*, Case No. 32572 (1st Jud. Dist. Ct. Feb. 27, 1989) (“*Memorandum Decision*”).

3. The *Memorandum Decision* made findings and conclusions with respect to parties’ objections to the Department’s January 14, 1985 *Proposed Finding of Water Rights in the Twin Lakes – Rathdrum Creek Drainage Basin* (“*Proposed Finding*”).

4. On April 19, 1989, Judge Magnuson issued his *Final Decree* (“*Decree*”), in which he adopted the *Memorandum Decision* as findings of fact and conclusions of law, and incorporated it therein by reference.

5. Sylte holds a number of valid water rights recognized in the *Memorandum Decision* and *Decree*, including year-round, natural flow stockwater water right no. 95-0734

¹ The Hearing Officer’s *Letter* appears to have incorrectly cited Idaho Code § 67-5255 as the statute relevant to a declaratory ruling in this proceeding. Sylte commenced this proceeding under Idaho Code § 67-5232.

whose source is Rathdrum Creek (tributary to sinks), and whose 1875 priority date makes it the most senior priority of all water rights in Water District 95 (“WD 95C”).²

6. In his *Memorandum Decision*, Judge Magnuson found, among other things, that at the time water right no. 95-0734 was appropriated in 1875: (a) Rathdrum Creek was the sole natural outlet of Twin Lakes—a natural lake that typically filled with water during spring high flows, and gradually decreased in capacity during the summer months as water flowed out of Twin Lakes into Rathdrum Creek over the top of the natural lake obstruction during periods of high water and through the natural obstruction at all times; and (b) there was sufficient water in Rathdrum Creek, furnished from the waters of Twin Lakes, to satisfy the water right no. 95-0734 on a continuous year-round basis.

7. In a letter to the WD 95C Watermaster dated September 20, 2016 (the “*Instructions*”), IDWR’s Northern Regional Manager, Morgan Case, provided the Department’s first ever guidance concerning the administration of water rights in WD 95C, including water right no. 95-0734.

8. On February 16, 2017, Sylte filed its *Petition for Declaratory Ruling* (“*Sylte’s Petition*”) with the Department, asking the Department to reverse and set aside the *Instructions* because they improperly limit the distribution of water to water right no. 95-0734 to the “natural tributary inflow to Twin Lakes,” which Sylte contends is contrary to the *Memorandum Decision*, the *Decree*, and Idaho’s prior appropriation doctrine.

9. On June 23, 2017, Sylte filed *Sylte’s Motion for Summary Judgment* (“*Sylte’s MSJ*”), together with a supporting brief and affidavit, requesting that the Department determine,

² Water right no. 95-0734 was decreed to John and Evelyn Sylte. 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.

as a matter of law, that: (a) the holders of water right no. 95-0734 are entitled to delivery of water to the water right on a continuous year-round basis irrespective of the amount of natural tributary inflow into Twin Lakes; (b) the application of the futile call doctrine with respect to water right no. 95-0734 is not dependent on the amount of natural tributary inflow into Twin Lakes; and (c) the *Instructions* must be set aside and reversed on grounds that they are contrary to the *Decree*, *Memorandum Decision*, and *Proposed Finding* (as amended by the *Memorandum Decision*) and are not in accordance with Idaho's Prior Appropriation Doctrine as required by Idaho Code Section 42-602.

10. On July 7, 2017, intervenor Twin Lakes Improvement Association filed *Twin Lakes Improvement Association's Cross-Motion for Summary Judgment* ("TLIA's MSJ"),³ together with a supporting brief, requesting that the Department deny *Sylte's Petition* and uphold the *Instructions*.

11. On September 6, 2017, following the parties' submission of additional briefing, the Hearing Officer issued the *Order* in which he denied in *Sylte's MSJ*, granted *TLIA's MSJ*, and upheld and *sua sponte* amended the *Instructions*. The *Order* was issued with a sheet entitled "Explanatory Information to Accompany a Preliminary Order."

12. On September 7, 2017, the Hearing Officer issued the *Letter* in which he identified the *Order* as a "final action of the agency" pursuant to Idaho Code § 67-5255(3) and IDWR Rule of Procedure 402 (IDAPA 37.01.01.402), and with which he enclosed a sheet entitled "Explanatory Information to Accompany a Final Order."

13. The *Order* and the *Letter* are the subject of this *Petition*.

³ *TLIA's MSJ* was amended on July 10, 2017 by *Twin Lakes Improvement Association's Amended Cross-Motion for Summary Judgment* ("*TLIA's Amended MSJ*").

STATEMENT OF INITIAL ISSUES

14. Pursuant to Idaho Code Sections 67-5270 through 67-5279, Sylte seeks review of the *Order* and *Letter*, and the findings, inferences, conclusions or decisions therein, which are: (1) in violation of constitutional or statutory provisions, or administrative rules of the Department; (2) in excess of the Department's statutory authority or its authority under the administrative rules of the Department; (3) made upon unlawful procedure; (4) not supported by substantial evidence on the record as a whole; and (5) arbitrary, capricious, and/or an abuse of the Department's discretion. In summary, by upholding and amending the *Instructions*, the *Order* and *Letter* improperly limit the exercise of decreed water right no. 95-0734, and prejudice Sylte's rights under Idaho's prior appropriation doctrine, and Idaho's and the United States' constitutions.

15. Specifically, and without limiting the foregoing, Sylte contends that the *Order* and *Letter* are in error by:

- a. Denying *Sylte's MSJ*;
- b. Granting *TLIA's MSJ*;
- c. Upholding the *Instructions*;
- d. Ordering, *sua sponte*, that the following language be added to the *Instructions*: "unless or until the maximum annual diversion volume of 4.1 acre feet has been delivered";
- e. Reviewing and citing documents outside the agency record in the proceeding; and
- f. Identifying the *Order* as a preliminary order and, subsequently, as a final action of the agency.

JURISDICTION AND VENUE

16. This *Petition* is authorized by Idaho Code §§ 67-5270 through 67-5279.

17. If the *Order* is a final agency action (as indicated in the *Letter*), this Court has jurisdiction over this action pursuant to Idaho Code §§ 42-1701A(4), 67-5232(3), 67-5270, and 67-5272. Alternatively, if the *Order* was a preliminary order, this Court has jurisdiction over this action pursuant to Idaho Code §§ 42-1701A(4), 67-5243(1)(b), 67-5246(3), 67-5270, and 67-5272.⁴

18. Venue lies in the Court pursuant to Idaho Code § 67-5272. Petitioners Gordon Sylte, Susan Goodrich, and John Sylte reside in Kootenai County, Idaho. Petitioner Sylte Ranch Limited Liability Company's principal place of business is in Kootenai County, Idaho. Water right no. 95-0734's source, point of diversion, and place of use are located in Kootenai County, Idaho.

19. Pursuant to the Idaho Supreme Court's Administrative Order issued on December 9, 2009, "all petitions for judicial review of any decision regarding administration of water rights from the Department of Water Resources shall be assigned to the presiding judge of the Snake River Basin Adjudication Court of the Fifth Judicial District." The Snake River Basin Adjudication Court's procedures instruct the clerk of the district court in which the petition is

⁴ The Hearing Officer's issuance of the *Order* with "Explanatory Information to Accompany a Preliminary Order" and his subsequent issuance of the *Letter* indicating that the *Order* is instead a "final action of the agency" has created confusion about the procedural remedies available to Sylte, as well as the procedures that must be taken to exhaust administrative remedies. Compare, e.g., I.C. §§ 67-5245(3) (parties may request the agency head review preliminary orders issued by non-agency head presiding officers) and 67-5246(4) (a party "may file a motion for reconsideration of any final order issued by the agency head" (emphasis added)). In an effort to satisfy procedural requirements, on September 20, 2017, Sylte filed with the Director of IDWR *Sylte's Appeal, Exceptions, Request for Reconsideration and Clarification, and Request for Hearing* ("*Sylte's Exceptions*") pursuant to Idaho Code Sections 67-5245(3) and 67-5246(4), and IDWR Rules of Procedure 730, 740, and 770 (IDAPA 37.01.01.730, .740, and .770) asking, among other things, for clarification of whether the *Order* is a preliminary order or a final agency action. *Sylte's Exceptions* will not have been decided before the 28-day deadline for filing this *Petition* has run. Indeed, it is not clear whether *Sylte's Exceptions* will be reviewed by the agency head at all, let alone whether he will deem the *Order* a preliminary order or a final agency action.

filed to issue a *Notice of Reassignment*. Sylte has attached a copy of the Snake River Basin Adjudication Court's *Notice of Reassignment* form for the convenience of the clerk.

AGENCY RECORD

20. Judicial review is sought of the *Order* and *Letter*.

21. The Department has compiled a documentary record. Because no hearing has been held, there is no transcript. Sylte anticipates that it can reach a stipulation regarding the contents of the agency's official record for this judicial review, which shall include, without limitation:

- a. the *Order*;
- b. the *Letter*;
- c. *Sylte's Petition*;
- d. *Sylte's MSJ*;
- e. *Sylte's Memorandum in Support of Motion for Summary Judgment* dated June 23, 2017;
- f. *Affidavit of Michael P. Lawrence* dated June 23, 2017, together with its Exhibits A through F;
- g. *Sylte's Reply Memorandum in Support of Motion for Summary Judgment* dated July 13, 2017; and
- h. *Sylte's Response to Twin Lakes Improvement Association's Cross-Motion for Summary Judgment* dated July 20, 2017.

22. The undersigned attorney for Sylte hereby certifies that Sylte has paid the clerk of the agency the estimated fee of \$20.00 for the preparation of the record.

SERVICE

23. The undersigned hereby certifies that service of this *Petition* has been made on Respondent and all other parties to the proceeding before the agency.

DEMAND FOR ATTORNEY FEES AND COSTS

24. As a result of Respondent's actions, Sylte has had to retain counsel. For services rendered, Sylte is entitled to their reasonable attorney fees and costs should they prevail in this action pursuant to Idaho Code Section 12-117 and Rule 54 of the Idaho Rules of Civil Procedure.

Respectfully submitted this 3d day of October, 2017.

GIVENS PURSLEY LLP



Michael P. Lawrence

Jack W. Relf

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

CERTIFICATE OF SERVICE

I hereby certify that on this 3d day of October, 2017, I caused to be filed and served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

DOCUMENT FILED:

First Judicial District Court, Kootenai County
324 West Garden Ave
Coeur d'Alene, ID 83814
Fax: (208) 446-1188

U. S. Mail
 Hand Delivered
 Overnight Mail
 Facsimile

COURTESY COPY TO:

Snake River Basin Adjudication Court
of the Fifth Judicial District
PO Box 2707
Twin Falls, ID 83303-2707

U. S. Mail
 Hand Delivered
 Overnight Mail
 Facsimile

SERVICE COPIES TO:

Gary Spackman, Director,
Idaho Department of Water Resources
322 East Front Street
P.O. Box 83720
Boise, ID 83720-0098

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Shelley Keen, Hearing Officer
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I hereby certify that on this 3d day of October, 2017, I caused to be served a true and correct copy of the foregoing by U.S. Mail and addressed to the following:⁵

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⁵ In the proceedings before IDWR, a number of individuals and entities in the service list that follows designated Mr. Norman Semanko as their spokesperson for multiple purposes, including the service of documents. However, it is not clear that service of this *Petition* upon Mr. Semanko for such individuals and entities would satisfy Idaho Rule of Civil Procedure 84(d) which requires service to "all other parties to the proceeding before the agency." Accordingly, Sylte is serving such individuals and parties by U.S. Mail directly.

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