

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

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

Petitioners,

vs.

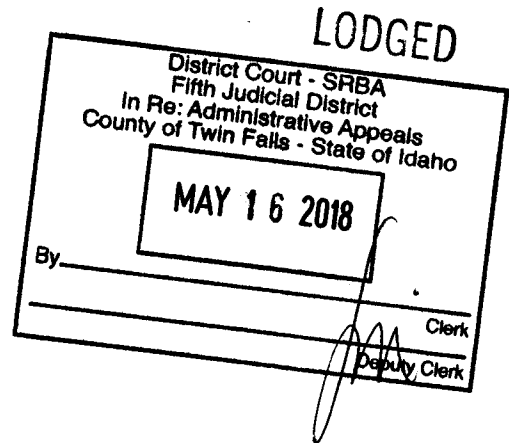
IDAHO DEPARTMENT OF WATER RESOURCES; AND GARY SPACKMAN, IN HIS CAPACITY AS THE DIRECTOR OF THE IDAHO DEPARTMENT OF WATER RESOURCES,

Respondents.

and

TWIN LAKES IMPROVEMENT ASSOCIATION, MARY A. ALICE, MARY F. ANDERSON, MARY F. ANDERSON ET AL., DEBRA ANDREWS, JOHN ANDREWS, MATTHEW A. BAFUS, CHARLES AND RUTH BENAGE, ARTHUR CHETLAIN JR., CLARENCE & KURT GEIGER FAMILIES, MARY K. COLLINS/BOSCH PROPERTIES, SANDRA COZZETTO, WES CROSBY, JAMES CURB, MAUREEN DEVITIS, DON ELLIS, SUSAN ELLIS, SCOTT ERICKSON, JOAN FREIJE, AMBER HATROCK, BARBARA HERR, WENDY AND JAMES HILLIARD, PAT & DENISE HOGAN, STEVEN & ELIZABETH HOLMES, LEIF HOUKAM, DONALD JAYNE, DOUGLAS I & BERTHA MARY JAYNE, TERRY KIEFER, MICHAEL KNOWLES, ADAM KREMIN, ROBERT KUHN, RENE LACROIX, JOAN LAKE-OMMEN, LARRY D & JANICE A FARIS LIVING TRUST, TERRY LALIBERTE, PATRICK E. MILLER, WILLIAM H. MINATRE, ANGELA MURRAY, DAVID R. NIPP, JOHN NOONEY, STEVE & PAM RODGERS, KIMBERLI ROTH, DAVID & LORI SCHAFFER, DARWIN R. SCHULTZ, MOLLY SEABURG, HAL SUNDAY, TCRV LLC, TWIN LAKES, LLC, RICK & CORRINNE VAN ZANDT, GERALD J. WELLER, BRUCE & JAMIE WILSON,

Case No. CV-2017-7491



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

Intervenors.

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

**PETITIONER SYLTE'S MEMORANDUM IN
SUPPORT OF PETITION FOR REHEARING**

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

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Petitioners Gordon Sylte, Susan Goodrich, John Sylte, and Sylte Ranch Limited Liability Company (collectively, “Sylte”), by and through their counsel of record and pursuant to Idaho Rule of Civil Procedure 84 and Idaho Appellate Rule 42(b), hereby submit this *Memorandum* in support of *Petitioner Sylte’s Petition for Rehearing* filed with this Court on May 2, 2018.

STATEMENT OF THE CASE

On April 11, 2018, this Court issued its *Memorandum Decision*¹ and *Judgment* affirming the September 6, 2017 *Order on Motion for Summary Judgment; Order Amending Instructions; Order Vacating Hearing Dates and Schedule* (“*Order*”) issued by the Idaho Department of Water Resources (“IDWR” or “Department”).

In the *Judicial Review Decision*, among other things, this Court rejected Sylte’s arguments that the Department improperly added to the *Instructions* the following language concerning the administration of water right No. 95-0734: “unless or until the maximum annual diversion volume of 4.1 acre feet has been delivered.” *Order* at 13 (R. at 1402). In rejecting Sylte’s argument, this Court stated:

The *Decree* unambiguously limits water right 95-734 to a total annual diversion volume of 4.10 acre-feet. Amending the instructions to include that volume limitation does not prejudice any substantial right of the [Syltes].”

Judicial Review Decision at 10.

On May 2, 2018, Sylte filed *Petitioner Sylte’s Petition for Rehearing* asking this Court for a rehearing concerning the language the Department added to the *Instructions*. Sylte

¹ Unless otherwise defined in this brief, the defined terms used herein have the same meanings set forth in *Sylte’s Opening Brief* dated December 22, 2017. To avoid confusion with the document in the record that has been referred to as the *Memorandum Decision* (i.e., Judge Magnuson’s 1989 *Memorandum Decision*), this Court’s April 11, 2018 *Memorandum Decision* will be referred to as the “*Judicial Review Decision*.”

contends that the Department's additional language should be stricken in its entirety from the *Instructions*. Sylte respectfully requests that the Court grant a rehearing on that issue.²

ARGUMENT

To be clear, Sylte does not dispute that the *Final Decree* includes a 4.1 acre-foot per annum element on water right no. 95-0734. Sylte's complaints concern the improper language added to the *Instructions* to implement that element, and the Department's improper procedure for adding that language.

As argued in *Sylte's Opening Brief* and *Sylte's Reply Brief*, which are incorporated herein by reference, the Department's modification to the *Instructions* prejudiced Sylte's water right no. 95-0734 because the Department (1) acted on an issue no party raised, and without providing Sylte notice of the added language or an opportunity to be heard concerning the language, and (2) added language that incorrectly describes how water right no. 95-0734 should be administered. Contrary to this Court's conclusion in the *Judicial Review Decision*, the Department's *sua sponte* amendment to the *Instructions* did prejudice 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 question of what the 4.1 acre-foot per annum element means and how it should be administered was not presented to the Department in this proceeding. Accordingly, no record

² By limiting their request for rehearing to this issue, Sylte is not conceding the correctness of any other part of the *Judicial Review Decision* and *Judgment*. Sylte reserves its right to appeal any portion of the *Judicial Review Decision* and *Judgment* as provided by relevant statutes and rules.

was developed and no arguments were presented on that question. Nevertheless, the Department decided it.

Had the Department's added language been included in the original *Instructions*, Sylte would have been able to challenge it and compile the necessary record for that issue to be decided. However, because it was added *sua sponte* by the Department after the record and briefing in the administrative proceeding were complete, Sylte had no chance to address it. This prejudiced Sylte's due process rights. *Bradbury v. Idaho Judicial Council*, 136 Idaho 63, 72, 28 P.3d 1006, 1015 (2001) ("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 occur."); *Aberdeen-Springfield Canal Co. v. Peiper*, 133 Idaho 82, 91, 982 P.2d 917, 926 (1999) ("The opportunity to be heard must occur at a meaningful time and in a meaningful manner in order to satisfy the due process requirement." (internal quotation marks omitted)).

In addition, the Department's added language prejudiced Sylte's substantive rights. The Department's language says that the 4.1 acre-foot element is to be administered by counting the amount of water "delivered." Administration in this manner would offend the *1989 Decree* and Idaho law.

The *1989 Decree's* Conclusion of Law No. 2 states: "Regulation of diversion by the Watermaster shall be on the basis of the rates of diversion herein specified rather than by the acre-foot allotment." *Amended Proposed Findings* at xviii (R. at 204). Thus, according to the plain language of the *1989 Decree*, water right no. 95-0734 should be administered on the basis of its 0.07 cfs diversion rate, and not the 4.10 acre-foot per year element.

But even if the water right should be administered according to the 4.10 acre-foot per year element, it should not be administered based on the amount delivered. In *Sylte's Opening Brief* at 46-47 and *Sylte's Reply Brief* at 20-23, incorporated by reference, Sylte explained how natural flow water rights must be accounted for by the amount diverted, not delivered.

This is not simply semantics. Obviously, it would severely impair a natural flow water right if its satisfaction were based on the volume delivered to the headgate regardless of whether the water was actually diverted.

This point should not be controversial. At oral argument before this Court on judicial review, the Department's attorney confirmed that the Department would not administer the water right based on the amount simply delivered to Sylte's headgate. While Sylte appreciates the Department's clarification, it does not provide Sylte with much comfort in light of the amended language in the *Instructions* (which actually uses the word "delivered"), the Department's rationale in the *Order* at 11 (R. at 1400), and the Department's arguments in its *Respondent's Brief* at 20-22. The Syltes are entitled to the protection of a judicial order rejecting and striking the Department's added language.³

Thus, contrary to this Court's conclusion in the *Judicial Review Decision*, Sylte's substantial rights are prejudiced by the Department's additional language. "Water rights are valuable property" *Head v. Merrick*, 69 Idaho 106, 109, 203 P.2d 608, 609 (1949). Sylte's valuable property rights in water right no. 95-0734 are prejudiced because the water right should

³ Water rights administration involves many issues in addition to those addressed here and elsewhere during this proceeding. For example, there is the question of whether water should accrue to a natural flow water right "in priority" when there is more water supply than needed to fulfill all rights on a system (it should not). These other questions concerning the administration of water rights are not at issue in this proceeding. Sylte does not

not be administered based on the amount of water “delivered,” as stated in the Department’s added language to the *Instructions*. See *917 Lusk*, 158 Idaho at 18-19, 343 P.3d at 47-48 (substantial rights include harm to property).

In addition, the Department’s *sua sponte* addition of the language violates Sylte’s substantial right to procedural due process because Sylte had no notice or opportunity to be heard on an issue concerning its valuable property rights in water right no. 95-0734. See *Bradbury*, 136 Idaho at 72, 28 P.3d at 1015 (procedural due process includes “the minimal requirements of notice and a hearing if the deprivation of a significant life, liberty, or property interest may occur.”). *Aberdeen-Springfield Canal Co. v. Peiper*, 133 Idaho 82, 91, 982 P.2d 917, 926 (1999) (the opportunity to be heard “must occur at a meaningful time and in a meaningful manner in order to satisfy the due process requirement” (internal quotation marks omitted)).

CONCLUSION


For the reasons discussed herein, Sylte respectfully asks this Court to grant its *Petition for Rehearing* on the limited issue of the *Order’s* improper modification of the *Instructions* concerning the 4.1 acre-foot per year element. The Department’s added language should be stricken in its entirety.

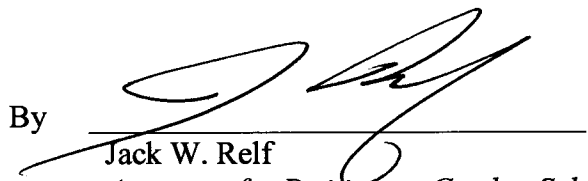
waive any such issues or arguments, or waive or limit its right to fully participate in any proceedings, concerning the administration of water rights in WD 95C.

DATED this 15TH day of May, 2018.

Respectfully submitted,

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By 
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By 
Jack W. Relf
*Attorneys for Petitioners Gordon Sylte,
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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of May, 2018, I caused a true and correct copy of the foregoing to be filed and copies delivered by the method indicated below, and addressed to the following:

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