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Department of Water Resources

Roseberry Irrigation District

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IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR TWIN FALLS COUNTY

	)	
	)	
	)	Subcase No. 65-03115
In Re SRBA	)	
	)	
	)	CLOSING STATEMENT
Case No. 39576	)	
_____	)	

At issue in this proceeding is the correct priority date for the Roseberry Irrigation District's Boulder Lake water right. Specifically, the matter to be determined is whether the January 12, 1917 date decreed in the 1926 *Roseberry Irrigation District v. Shaw* decree is the correct priority date, or whether a 1949 priority date decreed in the *Payette Adjudication* is the correct priority date. The evidence admitted at the April 4, 2003 hearing substantiates that the January 12, 1917 priority date, as originally decreed, is correct and also confirms that, over the course of time, the water right has been administered based on that priority date. The evidence also establishes that the incorrect 1949 priority date derives from the *Payette Adjudication* claim which had been prepared by the Idaho Department of Water Resources' predecessor agency based on a 1949 permit issued to enlarge the reservoir, a project which never reached fruition.

Summary of the Evidence

A. The Development of the Reservoir

The early directors of the Roseberry Irrigation District submitted an application for a permit with the State Engineer for the Boulder Lake Reservoir on January 12, 1917. (Exhibit E at 0029-0030). The application was approved and Permit R-49 authorized the Roseberry Irrigation District to develop Boulder Lake for use as a water storage reservoir. (Exhibit E at 0030).

The records of the Idaho Department of Water Resources establish that by 1922, the Roseberry Irrigation District had complied with the terms of Water Right Permit No. R-49 and had made satisfactory proof of development of the storage right which dated from January 12, 1917. (Exhibit E at 0004-0006 and 0021). The engineer who examined the reservoir in August 1922 described the dam and associated diversion works as follows:

Small earth and rock claim 6' high at outlet on west end of Boulder Lake. Capacity of Reservoir 1200 A.F. Water follows channel of Boulder Creek to a point in the SE⁴NE⁴ Sec. 13 T 17, R 3E B.M. where it is diverted into main canal by small earth dam. Main canal is 10' on bottom, 16' on top, water depth 3', cap. 50 sec. ft.

(Exhibit E at 0008). A July 15, 1924 memorandum summarizing the Roseberry Irrigation District's water rights includes the following description of the R-49 Permit and further describes the location of the dam and the diversion works:

In addition to the foregoing, Roseberry District owns the following permits calling for storage in Boulder Lake: R-49, and use permit No. 12762.

The Boulder Lake storage is situated in Sections 26 and 27 of Township 18 North, Range 4 East. The dam is situated in the NE¹/₄ of the SE¹/₄ of Section 27.

The water impounded in this reservoir or lake is released at the dam and permitted to flow down the natural channel of Boulder Creek to a point in the SE¹/₄ of the NE¹/₄ of Section 13, Township 17 North, Range 3 East, at which point the said water, together with such natural flow as the district

uses and is entitled to, is diverted in a canal a distance of approximately five miles to and upon the lands in the district.

(Exhibit V at 0001).

Since Boulder Lake was on federal land, it was necessary for the Roseberry Irrigation District to obtain a right of way for the reservoir. As part of the process for obtaining the right of way, W.H. Wood, the engineer for the Roseberry Irrigation District, on August 29-31, 1922 surveyed the reservoir, as constructed. His notes establish the surveyed boundary of the high water line for the Boulder Lake Reservoir as well as the capacity of the reservoir at the time:

I hereby certify that the above notes correctly represent the Survey of the high water line of the Boulder Lake reservoir as now constructed. That the lines were run on their true bearings. That a Gurley Light Mountain transit graduated to single minutes was used and that the survey was made on August 29-30-31, 1922. That the total area of the Reservoir is 93.06 acres and that the available capacity is approximately 1200 acre feet.

(Exhibit C at 0045-0046). Based on his field notes, Mr. Wood also prepared a map depicting the surveyed reservoir as constructed. (Exhibit C, Map 2). A December 23, 1922 report by the Forest Supervisor describes the construction work that had been completed on the reservoir, which included a retaining wall and headgate. (Exhibit D at 0022). On July 26, 1923, Mr. Wood's "as constructed" map was approved by the First Assistant Secretary of the Department of Interior and became the basis for the federal right of way grant to the Roseberry Irrigation District. (Exhibit C, Map 2).

Early Minutes of Roseberry Irrigation District meetings provide further information about the District's efforts to construct the Boulder Lake dam and diversion works. Minutes from May 13, 1912 describe the intention to obtain a water right for storage at Boulder Lake for approximately 2,000 acre feet. (Exhibit S at 0001). Minutes from November 6, 1912 describe negotiations with the federal government for the lake site. (Exhibit S at 0002). At a

December 12, 1912 meeting, the Roseberry Irrigation District adopted a resolution approving development of the proposed reservoir at Boulder Lake. (Exhibit S at 0003). Minutes from 1919 to 1921 describe the Roseberry Irrigation District's efforts to construct the Boulder Lake Reservoir. (Exhibit S at 0005-0015). Other Roseberry Irrigation District records include a 1921 Reclamation District Bond Commission report to the Idaho State Treasurer for certification of the Roseberry Irrigation District's bonds for construction of the reservoir along with other improvements. (Exhibit T at 0001-0006).

The Minutes indicate that by June 3, 1930, repairs to the dam and headgate already were necessary. On that date, the directors of the Roseberry Irrigation District had decided "to go to the dam to decide about the headgate and repairs for same." (Exhibit S at 0021). Likewise, Minutes from August 1933 establish that the reservoir was in use: "After the lake (reservoir) is dry, the ditch rider shall be paid by the hour to regulate the stock water." (Exhibit S at 0026). And, again, on August 1, 1939, the Roseberry Irrigation District decided it was necessary to fix the headgate at the dam. (Exhibit S at 0027).

In the early 1920's, the Roseberry Irrigation District filed suit to confirm its water rights in the Boulder Creek drainage, including the 1917 Boulder Lake storage right. (Exhibits A and B). After trial, the *Roseberry Irrigation District v. Shaw* Court, in its Findings of Fact, found:

That, in order to augment the water supply of said irrigation district, and in order to furnish sufficient water to irrigate the irrigable lands therein during the irrigation seasons, and more particularly during those portions thereof when the natural flow of Boulder creek available for irrigating the irrigable lands in said district is and will be insufficient for said purpose, plaintiff herein, on January 12, 1917, filed its application with the state engineer of the state of Idaho for the right to empound, [sic] continuously, 2,180 acre feet of the waters of Boulder creek, in Boulder Lake, situated on said creek in Valley County, Idaho, and to dam and obstruct said creek and thereby create additional reservoir capacity in said lake for the purpose of empounding [sic] water therein to be used in the irrigation of the lands within said district, and also on the date last above mentioned made application to the state engineer of the state of Idaho for a right to divert water amounting to 48.72 cubic

feet per second of time from Boulder creek, including the water so empounded, [sic] for the purpose of irrigating said lands; that immediately thereafter plaintiff commenced the work of constructing the said reservoir and of empounding [sic] and diverting said waters and, with due diligence, prosecuted the same to completion and has, within a reasonable time after making said applications, applied said waters so impounded and diverted to the beneficial use of irrigating the said lands, and has, in all respects and particulars, fully conformed to all the laws of the state of Idaho, relative to acquiring and perfecting water rights for irrigation purposes, and it thereby became, and is, entitled to so use and apply said waters for the purpose of the irrigation of the lands within said district, and is the sole and exclusive owner of the right to the use thereof, **with date of priority of January 12, 1917**

(Exhibit A at 0005-0006, emphasis added). Based on this finding, the court in 1926 issued a decree confirming that the Roseberry Irrigation District's Boulder Lake storage right had a priority date of January 12, 1917:

It is further ordered, adjudged and decreed, and this does order, adjudge and decree, that the plaintiff, Roseberry Irrigation District, is the sole and exclusive owner of a right to empound, [sic] continuously, 12,180 acre feet of the waters of Boulder creek, in Boulder lake, situated on said creek, in Valley County, Idaho, and to dam and obstruct said creek and thereby create additional reservoir capacity in said lake for the purpose of impounding [sic] water therein to be used in the irrigation of the irrigable lands within said district, above mentioned, and of the sole and exclusive right to divert water, mounting to 48.72 cubic feet per second of time from Boulder creek, including the water so empounded, [sic] for the purpose of irrigating said lands, **with date of priority of January 12, 1917**, said water to be measured at the point of diversion thereof from the stream

(Exhibit B at 0003, emphasis added). This decreed storage right subsequently was assigned Water Right No. 65-3115 by the Idaho Department of Water Resources.

(Exhibit U at 0004).

At the April 4, 2003 SRBA hearing, Paul Kleint, who grew up on land his family owned within the boundaries of the Roseberry Irrigation District, described his early recollections of the Boulder Lake Reservoir. As a child in the early 1940's, Mr. Kleint accompanied a miner to the area near Boulder Lake Reservoir. He recalled the Boulder Lake dam and diversion works in place at the time. His testimony further establishes that the

Boulder Lake Reservoir was constructed and in use prior to 1949. Mr. Kleint also testified about recent photographs from the 1990's at the Boulder Lake dam and his testimony establishes that the dam and diversion system remain little changed from the early 1940's.

Likewise, Joe Eld, a Roseberry Irrigation District board member who had grown up on a ranch served by the Roseberry Irrigation District, in his testimony recalled the Boulder Lake dam and reservoir from his childhood and confirmed the continuing use of the reservoir to this day. Lyle Points, another Roseberry Irrigation District director who had grown up on his parents' ranch in the District, testified that an August 18, 1946 aerial photograph showed that the Boulder Lake Reservoir was in use by that date. (Exhibit Q). He identified the dam on the aerial photograph. He also noted that a light area around the lake above the water's edge indicated that the reservoir had been partially drawn down at the time the aerial photograph was taken. Watermaster records for the 1948 season further confirm that Boulder Lake Reservoir had been in long use, by referring to newer reservoirs that had been constructed in the Boulder Creek drainage and that had necessitated the employment of a watermaster. (Exhibit I at 0015).

Robert Keyes, who served as the Watermaster of Water District 65-D, including Boulder Creek and all its tributaries, from about the year 1954 to the year 1981, confirmed that the Roseberry Irrigation District's water right from Boulder Lake always was administered based on a priority date of January 12, 1917. (Exhibit Y). He utilized an Abstract of Decree for administration of the water on Boulder Creek. (Exhibit Y). Page one of that Abstract of Decree identified the original storage right for Boulder Lake. Page two of that Abstract of Decree, in language which had been struck out, identified Permit No. R-842 for enlargement of Boulder Lake Reservoir to 1800 acre feet under a September 6, 1949 priority date. (Exhibit Y at A).

B. The Origin of the Incorrect 1949 Priority Date

Not long after the reservoir's construction was completed in 1922, projects to enlarge the reservoir's capacity began to be proposed. It was one of these proposals that is the source of the incorrect 1949 priority date. Roseberry Irrigation District records from September 1, 1929 to June 7, 1949 discuss various plans for raising the dam and enlarging the reservoir capacity. (Exhibit S at 0023, 0028 and 0030 and Exhibit T at 0007-0023 and 0026-0028). The District applied for water right permits for enlargement of the reservoir on several occasions, applying for a new permit each time the previous permit expired without the enlargement having been completed. (Exhibits F, G and H). It is the permit application submitted on September 6, 1949 (Permit No. R-842) that appears to be the source of the incorrect priority date. (Exhibit G at 0013). Permit No. R-842 was to enlarge the Boulder Lake Reservoir to 1800 acre feet, thereby adding another 600 acre feet of storage to the 1200 acre feet that had previously been approved under Permit No. R-49 and decreed in the 1926 decree.¹ (Exhibit G at 0012). Permit No. R-842 was cancelled by the Idaho Reclamation Engineer on March 1, 1955 for the failure to make proof of completion of the works by September 13, 1954. (Exhibit G at 0011). Nevertheless, it is the date of September 6, 1949, which appeared on *Payette Adjudication* Claim No. 65-3115.² (Exhibit M).

Mr. Kleint testified about *Payette Adjudication* Claim No. 65-3115, which he had signed and filed on behalf of the District on May 19, 1971. (Exhibit M). While his memory did not provide details concerning the preparation of that claim, his wife's testimony provided more information about these circumstances. In 1971, Gretel Kleint was the Secretary of the Roseberry Irrigation District. She confirmed that she prepared and signed the June 1, 1971 Minutes of the Roseberry Irrigation District meeting that described her and Mr. Kleint's visit

1. The 1926 Decree and Permit No. R-49 on which it was based, apparently had a typographical error. These documents specified 12,180 acre feet of storage, instead of 1200 acre feet which was the as constructed surveyed capacity in the right of way records and the capacity which is subsequently recognized in other documents.

2. The September 6, 1949 date indicated on the claim appears to have been incorrectly transcribed or keypunched in the *Payette Adjudication* process. On the Department's *Payette Adjudication* recommendation for water right 65-3115, the priority date is indicated to be 5/6/1949.

to the Idaho Department of Water Resources (then known as the Department of Water Administration) on May 19, 1971 for the purpose of submitting water right documentation relating to the Roseberry Irrigation District's water rights. (Exhibit O). She also testified about a May 27, 1971 letter that she had prepared on behalf of the Roseberry Irrigation District to the Department providing follow up information regarding *Payette Adjudication* Claim No. 65-3115. (Exhibit N). That letter confirms that the Department had assisted in preparation of the Boulder Lake Claim: "On this sheet are the locations for our Boulder Lake dam and the diversion, as requested to complete our refile for water that was accomplished with your assistance May 19, 1971." (Exhibit N). Along with the description of other pertinent elements of the Boulder Lake storage right, Ms. Kleint's letter noted the priority date to be "January 12, 1917." (Exhibit N). This letter confirms that at the time of submission of the *Payette Adjudication* Claim, the Roseberry Irrigation District continued to believe that its Boulder Lake storage right had a priority date of January 12, 1917.

Ms. Kleint's testimony also establishes that she had not prepared *Payette Adjudication* Claim No. 65-3115, and that it had been prepared by a Department agent. She compared the type on the only typewriter that she had at the time and which she used to type the May 27, 1971 letter and the June 1, 1971 Minutes, with the type on the Claim and confirmed that a different typewriter, not hers, had been used to prepare the Claim. She further stated that there would have been no one associated with the District, besides herself, who would have typed that Claim. Mr. Saxton's *Affidavit* confirms that the notary public whose certificate appears on the *Payette Adjudication* Claim was an employee of the Department at the time, further substantiating that the Claim was prepared at the Department on one of its typewriters. (Exhibit W). Thus, the priority date on the *Payette Adjudication* Claim apparently had been incorrectly transcribed from Department records by the agent who prepared the form.

Mr. Shaff of the Idaho Department of Water Resources, who had been involved with the *Payette Adjudication*, testified about how *Payette Adjudication* claims were a triplicate form with one of the pages being submitted to the court (Exhibit M), another page being used

by the Department for its claim review (Exhibit K at 0003), and the third page being provided to the claimant as a receipt. The page used for the claim review indicates several notations and edits made by the claim examiner. (Exhibit K at 0003). However, with respect to the incorrect priority date a checkmark is indicated, establishing that the Department official reviewing the Claim apparently also incorrectly relied on cancelled Permit R-842 as the basis for confirming the priority date. (Exhibit K at 0003).

The Roseberry Irrigation District brought the erroneous priority date matter to the attention of the Idaho Department of Water Resources early in the SRBA process. In November 1988, Mr. Keyes submitted a letter and affidavit to the Idaho Department of Water Resources describing the error. (Exhibit L at 0058-0059). Also, the SRBA claim submitted by the Roseberry Irrigation District on December 27, 1988 claimed a priority of January 12, 1917. (Exhibit L at 0076). Although the Department subsequently amended its recommendation based on the *Payette Adjudication*, the Department's SRBA claim review file indicates the Department's decision to recommend the January 12, 1917 priority date in the original Director's Report. (Exhibit L at 0001 and 0009).

Conclusion

The evidence establishes that January 12, 1917 is the correct priority date for the Roseberry Irrigation District storage right for 1200 acre feet in Boulder Lake. This priority date is corroborated by a number of important documentary sources, including the Idaho Department of Water Resources' R-49 permit file, Department of Interior right of way files and *Roseberry Irrigation District v. Shaw* records. The testimony of Bob Keyes, the former watermaster, confirms that in the years before and after the *Payette Adjudication* Claim was submitted, it was understood that the Roseberry Irrigation District's storage right had a January 12, 1917 priority date and the storage water was administered based on that priority date. The transcription of the September 6, 1949 priority date onto the *Payette Adjudication* Claim likely resulted from an agency representative's confusion concerning a 1949 permit for

enlargement of Boulder Lake Reservoir. The May 27, 1971 letter from the Roseberry Irrigation District Secretary, Gretel Kleint, confirms that at the time of submission of the *Payette Adjudication* Claim, the Roseberry Irrigation District continued to consider its Boulder Lake Reservoir to have a January 12, 1917 priority date. Based on the evidence, the validity of the January 12, 1917 priority date for water right no. 65-3115 is apparent, just as the erroneousness of the 1949 priority date for this water right also is clear. Water Right No. 65-03115 should be decreed in the SRBA with the priority date established by the evidence to be correct: January 12, 1917.

DATED this 2nd day of May, 2003.

HOFSTETTER LAW OFFICE, LLC
For the Roseberry Irrigation District

By

A handwritten signature in black ink, appearing to read "Dana L. Hofstetter", written over a horizontal line.

Dana L. Hofstetter

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May 2, 2003

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MAY - 5 2003

Department of Water Resources

Debbie Lash
Snake River Basin Adjudication Court
P.O. Box 2707
Twin Falls, Idaho 83303-2707

Re: SRBA Subcase No. 65-03115

Dear Ms. Lash:

Enclosed are proposed Findings of Fact and Conclusions of Law for the above-referenced subcase. Please let me know if Special Master Cushman also would like an e-mail of the document for editing.

Thank you for your assistance.

Sincerely,

HOFSTETTER LAW OFFICE, LLC



Dana L. Hofstetter

Enclosure

cc: Idaho Department of Water Resources w/ enclosure
Chief Natural Resources Division, Idaho Attorney General's Office w/ enclosure
Charles McDevitt, Esq. w/ enclosure
David Gehlert, Esq. w/ enclosure
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**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR TWIN FALLS COUNTY**

	)	Subcase No. 65-03115
	)	
	)	
In Re SRBA	)	SPECIAL MASTER'S REPORT
	)	AND RECOMMENDATION
	)	
Case No. 39576	)	FINDINGS OF FACT AND
	)	CONCLUSIONS OF LAW
_____	)	

An evidentiary hearing regarding the priority date for Water Right No. 65-03115 was held in Emmett, Idaho on April 4, 2003. The Special Master, having heard the testimony of the witnesses, having reviewed the other evidence, and having considered applicable law, makes the following findings and conclusions:

I.

FINDINGS OF FACT

1. On January 12, 1917, the Roseberry Irrigation District submitted to the Idaho State Engineer a permit application for a storage water right in Boulder Lake located in Valley County, Idaho. The application was approved on January 20, 1917 and the permit was designated Permit R-49.

2. By 1922, the Roseberry Irrigation District successfully had completed construction of the Boulder Lake dam and diversion works and had applied the water to beneficial use pursuant to the terms of Permit R-49.

3. The Roseberry Irrigation District's storage water right for Boulder Lake, based on Permit R-49, was confirmed to have a priority date of January 12, 1917 in the *Roseberry Irrigation District v. Shaw* decree filed on July 19, 1926. This decreed storage water right subsequently was assigned the number 65-3115.

4. The Roseberry Irrigation District's Water Right No. 65-3115 historically has been administered and delivered based on the January 12, 1917 priority date.

5. The *Payette Adjudication* claim for Water Right No. 65-3115 that was filed by the Roseberry Irrigation District on May 19, 1971 had been prepared by an agent of the Idaho Department of Water Administration, the predecessor agency to the Idaho Department of Water Resources. *Payette Adjudication* Claim No. 65-3115 incorrectly identified a September 6, 1949 priority date for the water right.

6. The erroneous September 6, 1949 priority date came from Permit No. R-842 which the Roseberry Irrigation District had obtained to enlarge the Boulder Lake Reservoir and which was cancelled on March 1, 1955 because of the failure to submit proof of construction for the increase to the Boulder Lake dam.

7. A May 27, 1971 letter from the Secretary of the Roseberry Irrigation District to the Department of Water Administration states that the priority date for the Roseberry Irrigation District's Boulder Lake storage right is January 12, 1917, and confirms that at the time of submitting the *Payette Adjudication* claim, the Roseberry Irrigation District continued to consider its Boulder Lake Reservoir water right to have the January 12, 1917 priority date.

8. *Payette Adjudication* Claim No. 65-3115 references the 1926 *Roseberry Irrigation District v. Shaw* decree as the basis for the water right, substantiating the erroneous nature of the 1949 date.

9. The error of the September 6, 1949 priority date on *Payette Adjudication* Claim No. 65-3115 was not identified by the Department in the *Payette Adjudication* claim review process.

10. The erroneous September 6, 1949 priority was further compounded by another mistake during the *Payette Adjudication* process. Since the water right ultimately was decreed as proposed by the Department in the *Payette Adjudication* with a May 6, 1949 priority date, the "9" for the month of September on the Claim apparently was input as a "5" for the month of May during data transcription.

11. Early in the SRBA, in November 1988, the Roseberry Irrigation District notified the Idaho Department of Water Resources by letter and affidavit of the erroneous 1949 date assigned to Water Right No. 65-3115.

12. On December 27, 1988, the Roseberry Irrigation District, filed its SRBA claim for Water Right No. 65-3115, asserting the original January 12, 1917 date.

II.

CONCLUSIONS OF LAW AND SPECIAL MASTER'S RECOMMENDATION

Having weighed the entirety of the evidence presented and considered the applicable law, the Special Master concludes that January 12, 1917 is the correct priority date for Water Right No. 65-03115. Accordingly, the Special Master recommends that Water Right No. 65-03115 be decreed in the SRBA with a priority date of January 12, 1917, as set forth in the attached Special Master's Recommendation.

DATED this ____ day of May, 2003.

THOMAS R. CUSHMAN
Special Master
Snake River Basin Adjudication

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