

COPY RECEIVED

OCT 20 2003

Department of Water Resources

DISTRICT COURT-SRBA
TWIN FALLS CO., IDAHO
FILED _____

2003 OCT 17 PM 4 18

**SUPPLEMENTAL DIRECTOR'S REPORT REGARDING
SUBCASE NOS. 43-45, 43-286B, 43-2110 and 43-10116**

In Re SRBA

Twin Falls County Civil Case No. 39576

Report to the SRBA District Court

Prepared by the Idaho Department of Water Resources

Karl J. Dreher, Director

David R. Tuthill Jr., Adjudication Bureau Chief

October 17, 2003

I. INTRODUCTION

In his *Amended Trial Schedule Order* issued on August 13, 2003, Special Master Terrence A. Dolan requested that the Idaho Department of Water Resources ("IDWR") submit a report pursuant to Rule 706, Idaho Rules of Evidence for subcases 43-45, 43-286B, 43-2110 and 43-10116.¹ In response to this order and in accordance with Idaho Code § 43-1412(4), Administrative Order 1, and I.R.E., Rule 706, IDWR submits this Supplemental Director's Report. This report was prepared under the supervision of Karl J. Dreher, Director, and David R. Tuthill Jr., Adjudication Bureau Chief for IDWR.

The following IDWR employees have knowledge of the information contained in this report: Adjudication Supervisor Douglas Jones.²

II. BACKGROUND

Merle Jones, the predecessor in interest of Mr. Jeff Sessions, a co-owner of Round Mountain Ranch, claimed water rights 43-45, 43-286B, 43-2110 and 43-10116 in the SRBA in April of 1989. On May 24, 1995, Round Mountain Ranch filed an application for transfer no. 4640 with IDWR, proposing changes to rights 43-45, 43-286B and 43-10116 (and several other rights not at issue). Right 43-2110 was related to the application, but no changes were directly proposed for this right. Transfer no. 4640 was protested and, after administrative proceedings, the transfer was partially approved on November 7, 1997.

¹ The original filing deadline for the report was set at September 30, 2003. IDWR did obtain a deadline extension from Special Master Dolan to October 17, 2003 with the approval of the objector.

² Although IDWR employees Allen Merritt and Frank Hitchcock were involved in site visits early on in the investigation of these rights, Doug Jones was responsible for preparing the recommendations of these rights. Mr. Jones also made several site visits to the Round Mountain Ranch area. Frank Hitchcock has since left the employment of IDWR. The degree of involvement of these individuals in the investigation of these rights is discussed in the General Overview of the Recommendations, Infra.

On October 24, 1997, SRBA Presiding Judge Daniel C. Hurlbutt, Jr. issued an *Order for Director's Report* in Harold Jones et al. v. NAF Irrigation Company, et al., SRBA Case No. 92-00014, a case arising from a dispute between several water rights holders on Clear Creek. As requested in the order, IDWR prepared a Preliminary Director's Report for Water Rights Diverted from Clear Creek (Preliminary Director's Report) that was filed with the SRBA Court on February 27, 1998.

On May 7, 1998, Judge Hurlbutt issued an *Order for Supplemental Preliminary Director's Report and Interim Administration*. IDWR prepared a Supplemental Preliminary Director's Report for Water Rights Diverted from Clear Creek (Supplemental Preliminary Director's Report) that was filed with the SRBA Court on May 29, 1998. This supplemental report contained preliminary recommendations of ground water rights and water in Round Mountain Creek and other tributaries to Clear Creek that had not been requested in Judge Hurlbutt's prior Order for Director's Report.

Rights 43-45 and 43-286B were reported in the Preliminary Director's Report while rights 43-2110 and 43-10116 were reported in the Supplemental Preliminary Director's Report. In March of 1998, Mr. Sessions filed objections to the recommendations of water rights 43-45 and 43-286B³. In June of 1998, Mr. Sessions filed objections to the recommendations of water rights 43-2110 and 43-10116.

IDWR submitted the Director's Report for Irrigation and Other and Federal Reserved Right, Reporting Area 7, IDWR Basin 43, to the court on September 28, 2001. Rights 43-45, 43-286B, 43-2110 and 43-10116 appeared in that report as previously

³ Harold and Beth Jones, along with Ray Jones, also filed objections to rights 43-286B, 43-2110 and 43-10116 as well as responses to rights 43-45 and 43-286B. These objections and responses were dismissed on the record and will not be considered in this report.

recommended in the preliminary and supplemental preliminary reports. No new objections were filed on these recommendations.⁴

On April 7, 2002, a Notice of Completed Administrative Proceeding (NCAP) was filed in all four subcases (and several other Clear Creek rights not at issue here) changing ownership of the rights from Merle Jones to Shirley A. Jones. On July 18, 2003, another NCAP was filed (on these four rights alone) changing ownership of the rights from Shirley A. Jones to Round Mountain Ranch⁵. Shirley Jones is no longer a party to these proceedings.

III. DISCUSSION

This report will discuss the remaining objected-to elements of these water rights and the effects of transfer no. 4640 on these rights. Although ownership of rights 43-45, 43-286B and 43-2110 was originally an issue, the NCAP filed in July 2003 noted an ownership change from Shirley A. Jones to Round Mountain Ranch. As ownership of all four rights is no longer contested, that element will not be considered here. Place of use is an issue in all four subcases and, being as transfer no. 4640 involved the place of use of all four rights and played a significant role in the recommendations filed for the rights, it will be discussed first.

A. Transfer No. 4640:

Application for transfer no. 4640, filed May 24, 1995⁶, by Round Mountain Ranch on water rights 43-45, 43-286B, 43-10116 and 43-10824⁷, sought to change the

⁴ Clear Creek claimants were prohibited from filing additional objections to the Clear Creek water rights including rights 43-45, 43-286B, 43-2110 and 43-10116 in the Special Notice to Clear Creek Claimants included with the September 2001 recommendations of the Clear Creek rights.

⁵ Objector Jeff Sessions is a co-owner of Round Mountain Ranch.

⁶ The application for transfer no. 4640 found in water right file 43-00045 appears to be an amended application although no original application was found in the file.

place of use, the period of use and the nature of use. The proposed change in the place of use involved 40 acres of the 266 total acres claimed in the SRBA. The change proposed moving the place of use from 23 acres in the NWNE of Section 13 and 17 acres in the NENW of Section 13, all within T16S, R27E, B.M., to a 40-acre place of use in the NESW of Section 13, T16S R27E. The application also proposed the addition of a use for storage to the nature of use of the rights. The change in period of use involved right 43-10116. The right would change from an irrigation use of April 1 to November 1 to an irrigation and diversion to storage use of January 1 to December 31. Protests to the application were filed and IDWR conducted a hearing on February 21 and 22, 1996. The issues considered by the hearing officer centered on the 40-acre place of use to be transferred rather than on the total number of acres contained in the place of use. The hearing officer assumed for purpose of the transfer proceeding that the total number of acres in the place of use was the 266 acres claimed in the SRBA, but noted that the actual total number of irrigated acres would be determined in the SRBA (Conclusion of Law no. 19, page 15)⁸.

In the Final Order, the Director noted that Merle Jones (original claimant in the SRBA) had testified that all the 266 acres claimed in the SRBA may have been simultaneously irrigated during spring runoff for a brief period of time, but that there was not enough water to irrigate all 266 acres for the entire irrigation season (Finding of Fact no. 25, page 8). Mr. Jones also testified that lands in the NWNE and NENW of Section

⁷ Water rights 43-182 and 43-414 were combined in the SRBA and recommended under a new number, water right number 43-10824.

⁸ Final Order in the Matter of Application for Permit No. 43-07321 and Application for Transfer No. 4640 in the Name of Round Mountain Ranch (Final Order) signed by Karl J. Dreher, Director on 11/7/1997. The Final Order is attached as Exhibit 1. References to specific Findings of Fact or Conclusions of Law contained within the Final Order are cited as "Finding of Fact No. ___" or "Conclusion of Law No. ___" and a page reference to location within the Final Order is provided.

13, T16S R27E were only irrigated during high water (Finding of Fact no. 29, page 8). The Director adopted the hearing officer's finding that, based on this testimony, only high water diverted pursuant to right no. 43-286 (part)⁹ was used on 35 of the 40 acres proposed to be transferred (Final Order, paragraph 2, page 2; Findings of Fact nos. 27, 30, and 32, page 8).

The Director did determine, however, that 5 acres of land in the NWNE had been consistently irrigated with water from Round Mountain Spring and other sources¹⁰ diverted by Round Mountain Ranch, rather than only by high water (Conclusion of Law no. 11, page 14), and, therefore, did allow the transfer of that 5 acres from the NWNE to the NESW of Section 13, T16S, R27E (Conclusion of Law no. 11, page 14). It was ordered that the 5-acre place of use in the NESW be a described place of use for water rights 43-45, 43-286 and 43-10116 (and rights 43-182 and 43-414, claimed and recommended as 43-10824, not at issue here) (Final Order, page 16). However, the Director adopted the hearing officer's determination that allowing irrigation of the remaining 35 acres of the proposed place of use on a continuous basis with earlier in time water rights would result in an enlargement and cause injury to downstream users (Final Order, paragraph 2, page 2). Therefore, irrigation of that acreage from the reservoir would be permitted only when Clear Creek water was simultaneously being delivered to the reservoir and water from Clear Creek was being diverted by Mr. Sessions pursuant to right 43-286(part) (Final Order, last paragraph, page 15). In other words, because 35 acres in the original place of use were found historically only to have been irrigated with

⁹ The hearing officer and the Director used the term "right no. 43-286(part)" to denote that only a portion of right no. 43-286 was used on the 35 acres in question. Right number 43-286 has now been split and recommended in the SRBA as rights 43-286A and 43-286B. The "part" of right number 286 referred to by the hearing officer and Director is now denoted as right 43-286B.

¹⁰ The various sources of water for these rights are discussed in the Final Order.

high water diverted pursuant to right 43-286(part), 35 acres in the proposed place of use could only be irrigated when high water was being diverted pursuant to right 43-286(part).

A Petition for Judicial Appeal of the Final Order in transfer 4640 was filed in the District Court of the Fifth Judicial District, Cassia County, on December 9, 1997 (Case No. CV97-0144D). IDWR understands that this case has been stayed pending determination of the elements of the rights in question in the SRBA. See Order of Dismissal/Retention issued September 29, 2003.

Water Rights

General Overview of the Recommendations

Adjudication Supervisor Douglas Jones had general familiarity with Round Mountain Ranch that predated his investigation and recommendation of these rights. In 1994 he had visited the ranch to investigate unrelated matters concerning the dam and reservoir on the property and to generally inspect the configuration of the irrigation delivery system for purpose of gathering information regarding an application for permit that was being proposed for filing at the time. While Mr. Jones met with Mr. Sessions at the time and was shown the configuration of the ditch system and irrigated ground, he did not conduct a particularized inspection of any parcel claimed to be irrigated.

Water Resource Agent Frank Hitchcock undertook the initial stage of the investigation of these rights for the SRBA. Mr. Hitchcock did a field inspection of Round Mountain Ranch for purpose of locating on maps and on the ground the claimed sources, points of diversion, and places of use. While Mr. Hitchcock collected general background information he did not make any recommendation of any element of any of

these rights. The information he collected, however, remained in the claim files for review by Mr. Jones.

Because delivery of water in the Clear Creek Drainage has a long and contentious history, Southern Region Office Manager Allen Merritt, and various other IDWR employees, have visited the Clear Creek Drainage and collected information regarding the ongoing delivery issues. Mr. Merritt has taken water measurements on Round Mountain Ranch. The IDWR Southern Region Office has large files containing this information. Mr. Jones was generally familiar with the delivery issues on Clear Creek and with the information contained in these files. He did not, however, rely on this information in making his recommendations of these rights in the SRBA.

All information relied on by Mr. Jones in preparing his recommendations of these rights is contained in documents in the SRBA claim files, within general reference materials too large to fit into the claim files, such as orthophotoquad maps, or on IDWRs electronic databases. All of this information is open for public inspection and will be made available to the claimant and/or his legal counsel upon request.

Mr. Jones did not make a separate field inspection of Round Mountain Ranch prior to making his recommendations of water rights 43-45 and 43-286B. Instead he utilized information already contained or referenced in the claim files, and especially the Final Order in Transfer 4640, discussed above. Mr. Jones viewed himself as being bound by the Final Order in all matters addressed by it, save for the determination of the total number of irrigated acres.¹¹

¹¹ IDWR interprets Judge wood's decision in the fish facility volume subcases 36-2708 et al. *Order of Challenge (Consolidated Issue) of "Facility Volume" Issue and "Additional Evidence" Issue* of December 29, 1999, as generally providing that IDWR, the claimant, and even the SRBA court are bound to the terms of a license or transfer, absent certain circumstances. One such circumstance is that the transfer itself

For purpose of understanding Mr. Jones' recommendations of these rights it is necessary to understand that IDWR construes the Final Order as determining that these rights lie within two overlapping permissible places of use (ppu's). The smaller ppu is comprised of the acres irrigated with water rights historically used whenever available throughout the entire irrigation system ("full-time" water¹²); the larger ppu is comprised of the "full-time" ppu plus 35 acres determined in the Final Order to historically have been irrigated only with high water diverted pursuant to water right 43-286B. Because the high water, whenever available, historically was delivered to as many acres as possible throughout the entire place of use, this "high-water" ppu overlaps the entire "full-time" ppu.

Mr. Jones' recommendations of these rights are based upon this determination in the Final Order. IDWR understands the gravamen of Mr. Sessions' objections to IDWRs recommendations to be that the 35 acres determined by the Final Order historically to have been irrigated only with high water under water right 43-286B is erroneous; that in truth the 35 acres historically has been also irrigated with "full-time" water pursuant to water right 43-45 and other "full-time" rights. IDWR understands this to be the central issue to be determined at trial.

Since the Final Order provided that the total number of irrigated acres was to be left for determination in the SRBA, Mr. Jones was not bound to the number of 266 total

contains a condition expressly providing that the water right as described in the transfer is subject to final determination in the SRBA. The Final Order in Transfer 4640 provides that the total number of acres claimed is subject to determination in the SRBA. See e.g. Sagewillow, Inc. v. Idaho Dept. of Water Resources, 138 Idaho 831, __, 70 P.3d 669, 683 (2003).

¹² This term is an inaccurate shorthand since not all of the "full-time" rights are always available throughout the irrigation season. The term is only used to distinguish these rights from the rights available only during the spring runoff, or "high-water" season.

acres claimed. Using GIS technology he determined that the larger, “high-water” ppu contains 258 acres. Therefore, because the Final Order determined that the “full-time” ppu contained 35 fewer acres than the “high-water” ppu, Mr. Jones recommended the “full-time” ppu as being 223 acres ($258 - 35 = 223$).

Since water rights 43-2110 and 43-10116 were not included within the scope of Judge Hurlbutt’s *Order for Director’s Report* they were not recommended in IDWR’s Preliminary Director’s Report. However, since they were within the scope of Judge Hurlbutt’s *Order for Supplemental Preliminary Director’s Report and Interim Administration*, Mr. Jones investigated them for recommendation in the Supplemental Preliminary Director’s Report.

On May 7, 1998, when Mr. Jones was in the area to take measurements on other Clear Creek diversions, he conducted a field examination on the Round Mountain Ranch for purpose of gathering information regarding water rights 43-2110 and 43-10116. While conducting this field examination, Mr. Jones had opportunity to observe the 35 acres in the NWNE and NENW of Section 13 that had been determined in the Final Order to have been historically irrigated only with high water under water right 43-286B. Mr. Jones observed only sagebrush, native grasses and bare desert earth on this parcel. He also observed evidence of uncontrolled irrigation indicative of irrigation with high water throughout the 258-acre “high-water” ppu. His observations being consistent with the findings of the Final Order, Mr. Jones had no reason to question either the efficacy of those findings or the accuracy of his recommendations--based on those findings--of water rights 43-45 and 43-286B in the Preliminary Director’s Report. Mr. Jones subsequently

prepared recommendations for water rights 43-2110 and 43-10116. These were reported in the Supplemental Preliminary Director's Report.

Details of the Recommendations

Besides relying on the Final Order in Transfer No. 4640 in the preparation of the recommendations of rights 43-45, 43-286B, 43-2110 and 43-10116, IDWR relied on information collected from the claim files including field exam notes and/or measurements, GIS analysis results based on 1987 NAPP photography and general review notes. The particular basis for each objected-to element of each of the recommended water rights at issue is described below.

B. Water Right No. 43-45:

Water right 43-45 was decreed in the Jobe Adams Decree. *Albion-Idaho Land Company v. Jobe Adams*, Decree # 992, District Court of the United States for the State of Idaho, Southern Division, October 1928.

1. Point of Diversion

The decreed source of this right was Clear Creek. Mr. Sessions objected to the point of diversion stating that Brackenberry Ditch should be added to the point of diversion description. IDWR understands that this is no longer an issue in dispute. In any event IDWR does not include the name of the ditch along with the legal description of the point of diversion. It would however, list the name of the ditch as an explanatory remark.

2. Place of Use

Mr. Sessions also objected to the place of use stating that it should contain a total of 320 acres as reflected in the place of use prior to the application for transfer 4640,

instead of the 223 acres IDWR recommended. However, Merle Jones, the original claimant in the SRBA, claimed only a 266-acre place of use. IDWR will not recommend a place of use larger than claimed without the claimant first filing an amended claim for the larger place of use. GIS analysis found only 258 irrigated acres. Because 35 of these acres were determined by the Final Order historically to have been irrigated only with high water under right 43-286B, the combined place of use for all “full-time” rights, of which this right is one, was determined to be 223 acres. Additionally it was determined that 146 of these acres lay within the tracts originally decreed to right 43-45 in the Jobe Adams Decree. Therefore this right was recommended for the irrigation of 146 acres within the 223-acre ppu for “full-time” rights.

C. Water Right No. 43-286B:

This right is a portion of right 43-286, that was also decreed in the Jobe Adams Decree with a source of Clear Creek.

1. Point of Diversion

Mr. Sessions objected to the point of diversion of water right 43-286B, stating that Brackenberry Ditch should be added as a point of diversion. For the reasons stated above (see right 43-45), Brackenberry Ditch will not be added to the point of diversion legal descriptor but could be added as an explanatory remark.

2. Place of Use

Right 43-286B was claimed with a 266-acre place of use. Therefore, since the Final Order determined that high water diverted pursuant to this right historically was used across the entire “high-water” ppu, IDWR recommended the right with a 258-acre place of use (based on IDWR’s GIS analysis) and a combined limitation of 258-acres

with right 43-45 (delivered from Clear Creek). The recommendation of 258 irrigated acres mapped through GIS includes the 35 acres located in the NESW of Section 13, T16S, R27E irrigated with high water from Clear Creek and noted in the Final Order at page 16. Additionally, IDWR found 190 acres within the 258-acre “high-water” ppu were contained within the tracts decreed to this portion of decreed right 286 in the Jobe Adams Decree. Therefore this right was limited to use on 190 acres within the 258-acre “high-water” ppu.

D. Water Right No. 43-2110:

Water right 43-2110 is a licensed right for the irrigation of 51 acres with spring water.¹³ Merle Jones claimed the same 51 acres in the SRBA and IDWR recommended 51 acres within the 223-acre “full-time” permissible place of use.

Place of Use:

Mr. Sessions objected to the supplemental preliminary recommendation for water right 43-2110 stating the place of use should cover 266 acres instead of the 51 acres within the 223-acre “full-time” ppu recommended. Mr. Sessions objected to the combined use limits and stated the water right should also show accomplished expansion¹⁴ in the place of use pursuant to §42-1426, Idaho Code. However, since the right was claimed for only the 51 acres included in the license, an enlargement claim must be filed for additional acres under §42-1426, before a place of use of greater than 51 acres could be considered for recommendation.

¹³ License 43-2110 also noted domestic use. Licensed place of use is 35 acres of NESE & 16 acres of SENE, Sec. 13, T16S, R27E.

¹⁴ Mr. Sessions used the term “accomplished expansion” with reference to §42-1426, Idaho Code. Being as this statute concerns enlargements, IDWR assumes Mr. Sessions is referring to an enlargement of the water right.

As in the recommendation of right 43-45, the GIS analysis finding of 258 irrigated acres, as well as the Final Order restricting the irrigation of the 35 acres in the NESW of Section 13, resulted in the recommendation of this right within the 223-acre “full-time” ppu.

E. Water Right No. 43-10116

Water right 43-10116 is a beneficial use right for high water with sources of Rice Creek and Round Mountain Creek.

1. Quantity

Mr. Sessions objected to the 4.460 cfs recommended by IDWR, seeking 20.0 cfs as originally claimed. The right was recommended at the statutory standard of 0.02 cfs (one miners inch) of water to the acre. It is IDWRs understanding that quantity is no longer an issue and Mr. Sessions will accept an inch to the acre as a satisfactory quantity for the right.

2. Priority Date

Mr. Sessions objected to the April 1, 1962 priority date recommended by IDWR stating the entire flow had been historically used since 1900 or earlier. The right was claimed with a December 31, 1900 priority. In response to the IDWR’s inquiry into the priority date, Merle Jones submitted copies of affidavits that were received at IDWR in January of 1992. The affidavits¹⁵ note that water has flowed down Round Mountain Creek to Round Mountain Ranch and then spreads out over the ground. Affiants note that this has happened periodically in spring and after heavy rainfall for 30 years. Based on the information in the affidavits, the right was recommended with the 1962 priority

¹⁵ On January 24, 1992, IDWR received affidavits from Sam Ospital and Guy W. Sundberg signed January 23, 1992. IDWR had received an affidavit from Mr Sundberg in late December of 1991, but it appears to be an uncertified copy.

date, the priority date being the first day of the irrigation season 30 years prior to the date of the affidavits.¹⁶

It is IDWR's understanding that Mr. Sessions presently is looking for evidence to support an earlier priority date and IDWR will consider any additional information he provides.

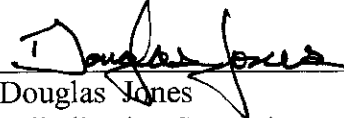
3. Period of Year

Mr. Sessions noted that the season of use should reflect use of water when available, not restricted to the normal irrigation season. The right was claimed and recommended with an April 1 to November 1 season of use.

4. Place of Use

Mr. Sessions objected to the place of use stating it should recognize all acres actually irrigated when water was available. IDWR only recommended use of this right within the 223 "full-time" ppu. This was done in error. As this right is a high water right, IDWR should have recommended all 258-acres of the "high-water" ppu. IDWR agrees to amend the recommendation of this right to reflect all 258 acres found in the GIS analysis.

IDWR respectfully submits the Supplemental Director's Report Regarding Subcase Nos. 43-45, 43-286B, 43-2110 and 43-10116 this 17th day of October, 2003.


Douglas Jones
Adjudication Supervisor

¹⁶ Although the source and prior owner were found in earlier decrees, this right was not. IDWR views this as indicating that the right had not yet been established as of the dates of those decrees. That being the case, the priority date of right 43-10116 could not be found to be earlier than those decrees.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of October, 2003, I caused to be served a true and correct copy of the foregoing by the following method to:

1. Original to:

Clerk of the District Court
Snake River Basin Adjudication
253 Third Avenue North
P.O. Box 2707
Twin Falls, ID 83303-2707

☐ Overnight Mail
☐ Regular Mail
☒ Hand-Delivered
☐ Facsimile

2. Office of the Attorney General
Natural Resources Division
Box 83720
Boise, ID 83720-0010

☐ Overnight Mail
☒ Regular Mail
☐ Hand-Delivered
☐ Facsimile

United States Department of Justice
Environment & Natural Resources Div.
550 West Fort St. MSC 033
Boise, ID 83724

☐ Overnight Mail
☒ Regular Mail
☐ Hand-Delivered
☐ Facsimile

Jason Walker
P.O. Box 396
Rupert, ID 83350

☐ Overnight Mail
☒ Regular Mail
☐ Hand-Delivered
☐ Facsimile



BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE
STATE OF IDAHO

IN THE MATTER OF APPLICATION)
FOR PERMIT NO. 43-07321 AND)
APPLICATION FOR TRANSFER)
NO. 4640 IN THE NAME OF)
ROUND MOUNTAIN RANCH)
_____)

FINAL ORDER

Protests were filed with the Idaho Department of Water Resources (department) contesting application for permit to appropriate water no. 43-07321 and application for transfer no. 4640. The department conducted a hearing on February 21 and 22, 1996. A recommended order was issued on October 15, 1996. On October 29, 1996, Round Mountain Ranch (applicant) petitioned the hearing officer for reconsideration of the recommended order. On November 19, 1996, the hearing officer granted reconsideration. On December 31, 1996, the hearing officer issued an amended recommended order. Exceptions to the amended recommended order were filed by the applicant and by Harold Jones and Ray Jones (protestants).

ANALYSIS

Applicant's Exceptions

The applicant filed numerous exceptions to the amended recommended order. Most of the exceptions can be consolidated into a larger issue: does the department have the authority to review the extent of beneficial use under a water right sought to be transferred pursuant to Idaho Code § 42-222?

Application for transfer no. 4640 sought to change the place of use, the period of use, and the nature of use of existing water rights. By filing the application for transfer, the applicant subjected the water rights to review by the department pursuant to the criteria of Idaho Code § 42-222. The only change in the place of use proposed by the application was a

change of irrigation of 23 acres in the NWNE¹ of Section 13, and 17 acres in the NENW of Section 13, all within T16S, R27E, B.M.², to 40 acres located in the NESW of Section 13, T16S, R27E. The hearing officer properly focused on the 40-acre place of use sought to be transferred. The hearing officer noted that the remaining place of use under the water rights would be reviewed at the time the Snake River Basin Adjudication considers claims for Basin 43.

The applicant argues that the department does not have the authority to restrict irrigation use on 35 acres in the NESW of Section 13 to only high water diverted from Clear Creek. The applicant cites legal authority related to diffuse surface water, private water, and waste water, and also cites recent SRBA District Court decisions regarding partial forfeiture and res judicata to argue that the department is prohibited from restricting the applicant in the use of water rights.

The hearing officer found, based on the testimony of the applicant's own witnesses at the hearing, that the lands from which water is sought to be transferred were only irrigated with high water, and further found that the high water was diverted pursuant to water right no. 43-00286(part). The hearing officer concluded that allowing irrigation of 35 acres on a continuous basis with earlier in time water rights would result in an enlargement and would injure downstream water users. The decision of the hearing officer limiting irrigation of the 35 acres in the NESW of Section 13 under water right no. 43-00286(part) will not be changed.

The applicant objects to the statement in Finding of Fact No. 5 that the application for transfer "proposes changes in the period of use and nature of use of the rights." The applicant signed the application for transfer wherein on page 1 of part 1 the applicant seeks to change the nature of use for claim no. A43-10116 from irrigation to irrigation and diversion to storage and the period of use from the period April 1 to November 1 to the period January 1 to December 31. A change to provide for diversion to storage would be a change in the nature of use, and a change to provide for diversion on a year-round basis would be a change in the period of use.

The applicant objects to the comparison of the water rights and adjudication claims contained in Finding of Fact No. 6. Finding of Fact No. 6 was included in the decision to point out some of the differences between the water rights and the adjudication claims. Attachment A, appended to this decision, is a summary of the water rights and adjudication claims in more complete form. Finding of Fact No. 6 is unnecessary and is deleted from the decision.

¹The absence of the quadrant identifier implies that the fraction "1/4" should be read into the description.

²The acronym "B.M." is an abbreviation for "Boise Meridian" and will be eliminated in the remainder of the text.

The applicant argues that Idaho Code § 42-211 establishes ownership of "private water" in the landowner. This argument is not supported by the language of the statute. Idaho Code § 42-211 does not establish the ownership of water that is wholly contained upon the lands of a person. It simply limits the authority of the department to issue permits to appropriate the water to a person other than the landowner.

The applicant asserts that the finding that Merle Jones constructed the pipeline from Round Mountain Spring to the reservoir was incorrect in Finding of Fact No. 14. In contrast to the applicant's assertion, Merle Jones testified that he constructed a pipeline that captured the flows of Round Mountain Spring, and discharged the flows to a holding tank.

The applicant correctly points out that water from other sources may also be diverted to the reservoir. Language to that effect will be added to Finding of Fact No. 25 (now number 24). Finding of Fact No. 49 (now number 48) will also be modified to reflect that surface water diversions from other sources are commingled in the reservoir.

The applicant correctly points out that the statutory language quoted in Conclusion of Law No. 3 should be corrected to refer to a spring not a stream. Other language has also been modified.

Protestants' Exceptions

The protestants object to the conclusion that water was diverted pursuant to water right no. 43-00286(part) to irrigate 35 acres in the NWNE and the NENW of Section 13 from which water is sought to be transferred. The protestants assert that water right no. 43-00286(part) was abandoned by Merle Jones and/or Jeff Sessions. The testimony of Merle Jones and Jeff Sessions transcribed and submitted by the protestants demonstrates an unfamiliarity with the water right numbers of the water rights owned by the parties. It does not clearly and convincingly establish that Merle Jones or Jeff Sessions abandoned the right to divert high flood waters from Clear Creek. To the contrary, both Merle Jones and Jeff Sessions testified that there was water in excess of the quantity of flow authorized by water right no. 43-00045 that was diverted to Round Mountain Ranch during periods of high flow in Clear Creek. This high flow is attributable to water right no. 43-00286(part). The decision of the hearing officer, concluding that water right no. 43-00286(part) is not abandoned, will not be disturbed.

Finding of Fact No. 11 (now number 10) is amended to state that the gullies or incised channels of Round Mountain Creek upstream and downstream of Round Mountain Ranch are not as defined on Round Mountain Ranch because of obstructions placed in the channel.

Finding of Fact No. 28 (now number 27) is amended to state that Merle Jones asserted that lands from which water is sought to be transferred were irrigated.

Protestants object to Finding of Fact No. 26 (now number 25) that 266 acres "may have been irrigated" within the boundaries of the Round Mountain Ranch. The reason for this qualified finding is to defer a final determination of the irrigated acres to the Snake River Basin Adjudication. This deferral was incorporated because of the uncertainty about the status of the amnesty statutes at the time of the hearing, and uncertainty about how many acres the department could legally recognize as a place of use.

Miscellaneous Amendments

The recommended order has also been amended based on the Director's understanding of the facts. Most notable is a reference to an order providing for administrative relief signed by Judge Hurlbutt in the District Court of the Fifth Judicial District of the State of Idaho on May 15, 1996.

Based on the above discussion, the director issues the following Findings of Fact, Conclusions of Law, and Order:

FINDINGS OF FACT

1. On May 24, 1995, Round Mountain Ranch (applicant) filed application for permit no. 43-07321 with the department, proposing the storage of 26 acre feet of water to be diverted from Round Mountain Creek, drain water, and surface runoff water at points of diversion located within the NWNESE and NENWSE of Section 13, T16S, R27E. The applicant proposes diversion to storage of 1.0 cubic feet per second (cfs) for year-round storage, for irrigation, and stock water for 400 head of cattle. The application for permit proposes irrigation of the following place of use:

DESCRIPTION	ACRES
T16S, R27E, Section 13, NENE	6
T16S, R27E, Section 13, SENE	17
T16S, R27E, Section 13, NESW	40
T16S, R27E, Section 13, NESE	35
T16S, R27E, Section 13, NWSE	33
T16S, R27E, Section 13, SWSE	40

DESCRIPTION	ACRES
T16S, R27E, Section 13, SESE	40
T16S, R27E, Section 24, NENE	40
T16S, R28E, Section 19, NWNW	15
TOTAL ACRES	266

2. On May 24, 1995, the applicant also filed application for transfer no. 4640 with the department proposing changes to Snake River Basin Adjudication (SRBA) claim no. A43-10116 and to decreed water right nos. 43-00045, 43-00286(part), 43-00182 and 43-00414 (the last two when combined are similar to adjudication claim no. A43-10824). The water rights, as recorded, and the adjudication claims are compared in Appendix A attached to this decision.

3. Two other water rights, numbered in the department files as 43-02110 and 43-02061, relate to the pending applications. These water rights and adjudication claims are also compared in Appendix A. Water right nos. 43-02110 and 43-02061 initially authorized diversion and beneficial use of Round Mountain Spring and other springs west of Round Mountain Spring.

4. The application for transfer proposes a change in the place of use for 40 acres of the 266 acres claimed in the SRBA as irrigated lands. The place of use proposed by the application for transfer is identical to the land list proposed by application for permit no. 43-07321, described in finding of fact no. 1.

5. The applicant proposes to change the place of use from 23 acres in the NWNE and from 17 acres in the NENW of Section 13, T16S, R27E, to 40 acres in the NESW of Section 13, T16S, R27E. The application for transfer also proposes to change the period of use for claim no. A43-10116 and to change the nature of use of the rights to include use for storage.

6. The department published notice of the applications which were subsequently protested by Harold Jones and Ray Jones (protestants). The protestants own lands irrigated by water flowing in the channel of Round Mountain Creek. The protestants claim a right to divert 1.90 cfs from Kelso Spring pursuant to water right nos. 43-00259 and 43-00260. The SRBA claims for these rights state that "[t]he water from Kelso Springs seeps into Round Mountain Creek and is diverted at the indicated point of diversion." The protestants also own water rights diverted from Clear Creek.

7. On February 21 and 22, 1996, the department conducted a hearing. The applicant was represented by Roger Ling. The protestants were represented by Pat Brown.

8. Issues identified by the protestants include the following:
 - a) The proposed transfer will injure existing water rights.
 - b) The proposed transfer will enlarge the use of the original rights.
 - c) The applications conflict with the local public interest.

The protestants assert that approval of the applications will diminish the quantities of water available for diversion pursuant to their water rights.

9. Round Mountain Ranch contains approximately 600 acres located in Sections 13 and 24, T16S, R27E, and in Section 19, T16S, R28E. Round Mountain Ranch derives its name from a small peak called Round Mountain located east of the ranch.

10. Round Mountain Creek has eroded defined gullies both upstream and downstream of Round Mountain Ranch. There is no defined gully or incised channel for Round Mountain Creek within Round Mountain Ranch because of obstructions placed in the channel. Water can flow in a low place through Round Mountain Ranch in the direction of the downstream channel of Round Mountain Creek.

11. Round Mountain Spring emits from the ground on the southeast side of Round Mountain Ranch. Round Mountain Spring originally flowed to the northwest and discharged into the channel of Round Mountain Creek, a stream that flows during high run-off events.

12. Several decades ago, the water from Round Mountain Spring was diverted directly north along the east property line of Round Mountain Ranch. Water from Round Mountain Spring flood irrigated land on Round Mountain Ranch.

13. Merle Jones, a prior owner of Round Mountain Ranch, constructed a pipeline that captured the flows of Round Mountain Spring. The document labeled applicant's exhibit no. 6 depicts the pipeline location. The pipeline gathered water approximately 200 feet north of Round Mountain Spring. A pipeline that heads near the spring was later constructed to capture spring water. The pipeline extends northwesterly toward the reservoir.

14. A boggy area was located less than one-quarter mile west of where Round Mountain Spring arises. The 1915 engineer's report for water right no. 43-02061 locates the springs authorized as the source of water in the vicinity of the boggy area.

15. The boggy area was difficult to farm. In 1961, Merle Jones constructed an east-west tile drain that collects the subsurface waters in the shallow water table. The subsurface waters collect in the tile drain and discharge into a north-south pipeline. The pipeline delivers water for irrigation.

16. The drain pipe is equipped with a headgate somewhere near the discharge point to north-south irrigation line. The tile drain discharge can be obstructed by lowering the headgate in the pipe.

17. After construction of the tile drain, the ground water levels in the boggy area declined, making the ground more useable for growing crops.

18. Water discharging from the drain pipe was diverted to irrigate lands of Round Mountain Ranch. Beneficial use of these waters was not specifically authorized by a decreed, licensed or permitted water right. License no. 43-02061 authorizes diversion from springs which may have arisen from ground water intercepted by the tile drain.

19. When deliverable, water is diverted from Clear Creek through ditches flowing from the southwest onto Round Mountain Ranch property. Clear Creek water irrigates lands in the vicinity of and south of the tile drain. When Clear Creek water is delivered and applied to these lands, the discharge of the tile drain increases.

20. In July 1994, Department of Water Resources personnel measured the flows of the tile drain at 75 gallons per minute, or 0.17 cfs. This compares to a flow of 0.16 cfs authorized by license no. 43-02061. On the same date, department personnel measured the discharge of Round Mountain Spring at 68 gallons per minute, or 0.15 cfs. Testimony established that these flows have increased since the time of the measurement.

21. Jeff Sessions (Sessions) is the principal owner of Round Mountain Ranch. Sessions acquired the ranch in December of 1992. After he acquired Round Mountain Ranch, Sessions evaluated the property to determine better ways to irrigate the ranch. He extended the upstream end of the pipeline, capturing Round Mountain Spring.

22. A prior owner buried a 1500 gallon tank that was filled by water flowing from Round Mountain Spring in a pipeline. The prior owner pressurized a sprinkler system from the tank.

23. In his evaluation of the property, Sessions identified an old embankment and swampy area located in NESE of Section 13, T16S, R27E. This embankment and impoundment area are referred to in the 1915 engineer's report for water right no. 43-02061.

24. Sessions determined that he could better manage his irrigation water by constructing a dam to form a small reservoir near the location of the old dam and by abandoning the storage tank. Sessions constructed a dam forming a reservoir of 20 to 30 acre-foot capacity in late 1993. The reservoir location is depicted on applicant's exhibit no. 6. The reservoir captures discharge from Round Mountain Spring and also from the tile drain. Water from other sources can also be diverted to the reservoir.

25. The adjudication claims filed by Merle Jones assert the right to irrigate 266 acres within the boundaries of Round Mountain Ranch. The testimony of Merle Jones indicates that all 266 acres may have been irrigated simultaneously for a short period during spring runoff, but that there is insufficient water during the entire irrigation season to irrigate the full 266 acres. A determination of how many total acres are irrigated within Round Mountain Ranch is deferred until the water rights are decreed in the SRBA, as discussed in Conclusion of Law nos. 18-20.

26. Applicant's exhibit no. 6 depicts two parcels of property on the north side of Round Mountain Ranch. The two parcels are labeled "dry." The parcels are located in the NWNE and the NENW of Section 13, T16S, R27E and are the parcels from which water is sought to be transferred.

27. Applicant's exhibit no. 6 outlines lands within the NWNE and the NENW of Section 13 that may have been irrigated. The map depicts 23 acres of land in the NWNE of Section 13 and 17 acres of land in the NENW of Section 13, all within T16S, R27E. Merle Jones testified that these lands were irrigated during high water.

28. Most of the land described in the prior paragraph grows a mixture of crested wheat grass, sagebrush, and other range vegetation. Approximately five acres, located in the extreme southeast corner of the NWNE of Section 13, have been irrigated sufficiently to grow alfalfa and grain.

29. Merle Jones testified several times that lands located in the NWNE and the NENW of Section 13, T16S, R27E were only irrigated during high water. When asked specifically what water was applied to these lands, he stated that they were irrigated with Clear Creek water or Clear Creek waste water from upstream water users. Upon being questioned further, he testified that the lands east of the Round Mountain Creek channel were irrigated with commingled water.

30. Approximately 23 acres of the irrigated lands are located east of the Round Mountain Creek channel. The five acres of land in the southeast corner of the NWNE of Section 13, T16S, R27E that were irrigated regularly are part of the 23 acres located east of the Round Mountain Creek Channel. The remaining 18 acres may have received some commingled water that was either Clear Creek water or Round Mountain Creek water because the land was only irrigated during periods of high water. Merle Jones testified that high water flowed in Round Mountain Creek for only a day or two. Clear Creek would have provided most of the water to irrigate these lands during high water.

31. The protestants proved that there are no written watermaster records showing delivery of Clear Creek water to Round Mountain Ranch pursuant to water right no. 43-00286 or assessments for delivery of water right no. 43-00286. Dave Sundberg, son of a long-time

watermaster who recently died, testified that his father's records recognized some portions of water right no. 43-00286, but did not show ownership of any of water right no. 43-00286 by the applicant or its predecessor. However, the written documents produced by Dave Sundberg (protestants exhibit no. K) did not prove non-delivery of the right. At best, the documents showed two people named W. Ayrhart and M. Iverson were entitled to a portion of right no. 43-00286.

32. The applicant proved that a flow of water in excess of 1.7 cfs, authorized by right no. 43-00045, was diverted and beneficially used on Round Mountain Ranch during periods of high water when the watermaster was not regulating diversions. The applicant did not establish how much water was diverted during high flows. No water right or adjudication claim other than water right no. 43-00286(part) authorizes diversion of these high water flows. The owners of Round Mountain Ranch did not call the watermaster for delivery of water pursuant to water right no. 43-00286(part) once the watermaster began administering the rights.

33. Jeff Sessions, dba Round Mountain Ranch; Ray Jones; and Harold Jones are all parties in *In re* SRBA Case No. 39576 (5th Jud. Dist. Idaho May 15, 1996), *Jones v. NAF Irrigation Co.*, subcase no. 92-00014. The adjudication court issued an order providing for preliminary injunctive relief for delivery of water for the 1996 irrigation season. With respect to delivery of water from Clear Creek by Jeff Sessions, the court stated in para. 5c, p.5: "After the above water with a November 23, 1911 priority date [water right no. 43-00286] is filled, defendant Jeff Sessions shall be entitled to 80" of water for use on Round Mountain Ranch by diversion through the Idaho Weir. . . ."

34. The adjudication court also issued an order for a Director's Report because of the dispute between water right holders on Clear Creek. The court has ordered the department of water resources to prepare a preliminary director's report for water rights claimed in the Snake River Basin Adjudication on Clear Creek on or before February 27, 1998. During preparation of this report, the department will recommend a quantity of water, if any, to be diverted pursuant to adjudication claim no. A43-00286B.

35. Water was diverted from the tile drain into the reservoir constructed by Sessions beginning on October 1, 1994, and the reservoir filled in approximately 90 days. The reservoir filled with water from the tile drain in approximately 60 days during the fall of 1995, indicating that the flows of the tile drain increased from the 1994 flows.

36. Sessions testified that during filling of the reservoir in the fall, water from Round Mountain Spring would discharge into an artificial ditch along the east side of the reservoir and would completely percolate into the ground. Sherl Chapman, an expert witness for Sessions, also testified that he had observed the water from Round Mountain Spring sinking into the ground at approximately the location of Sessions' house.

37. Sessions testified that during mid-February 1996, and after the reservoir was full, water discharging from the reservoir into the Round Mountain Creek channel completely percolated into the ground approximately 200 yards downstream from the north property line of Round Mountain Ranch.

38. Merle Jones testified that when he owned Round Mountain Ranch, discharge from Round Mountain Spring would at times flow past his north property line. Merle Jones testified that flow past the north property line of Round Mountain Ranch was particularly prevalent during the winter months when he was not diverting Round Mountain Spring water with a series of ditches onto his land.

39. The protestants own and/or operate a ranch, known locally as the Kelso Ranch, located approximately 1½ miles northwest of the Round Mountain Ranch.

40. The Kelso Ranch is irrigated by water diverted from the Round Mountain Creek channel. Testimony established that there are springs that discharge water into the channel of Round Mountain Creek from midway between Round Mountain Ranch and Kelso Ranch down to the south boundary of Kelso Ranch. Some or all of these springs may be known as Kelso Springs. Ray Jones testified that there was as much as 0.70 cfs to 1.5 cfs flowing in the Round Mountain Creek channel that he could beneficially use on his property.

41. Ray Jones testified that his supply of water diminished significantly in 1994 and 1995. Very little water flowed in Round Mountain Creek in 1994 and 1995 at the location of Kelso Ranch and into a small impoundment that was built in the southeast corner of Kelso Ranch.

42. Several witnesses who observed Round Mountain Creek during the 1960s, 1970s and 1980s testified they regularly saw water flowing in Round Mountain Creek between Round Mountain Ranch and Kelso Ranch during all seasons of the year. The weight of evidence established that these flows were not intermittent but were regular and perennial.

43. The expert witnesses disagreed about the source of shallow ground water located below Round Mountain Ranch and also disagreed where Round Mountain Spring derives its water. Sherl Chapman, expert witness for the applicant, testified that an impervious clay layer underlays Round Mountain Ranch and extends to approximately the north property boundary of Round Mountain Ranch. He testified that water is perched on top of the impervious clay layer and does not originate as ground water underflow in the Clear Creek drainage. He testified that the confining clay layer disappears just north of Round Mountain Ranch, and it is his opinion that Round Mountain Creek loses water as it flows north.

44. In contrast, Charles Brockway, expert witness for the protestants, testified that ground water underlying Round Mountain Ranch is probably a combination of precipitation,

percolating irrigation water applied to Round Mountain Ranch and deeper underflow from the south. He further testified that Kelso Springs, or more generally the springs which arise in the channel of Round Mountain Creek north of Round Mountain Ranch but upstream of Kelso Ranch, are an expression of ground water underflow.

45. Protestant's exhibit no. H, an open file report prepared by the Idaho Department of Water Resources titled "Summary of Ground Water Conditions in the Raft River Area," authored by Shane Bendixsen and dated July 1994, concludes that surface and ground water are so interrelated in the area that one cannot be affected without affecting the other.

46. Based on the open file report, the testimony of Charles Brockway, and the many witnesses who testified regarding springs that arise in the Round Mountain Creek channel above Kelso Ranch and below Round Mountain Ranch, the department finds that shallow ground water and the flows of Round Mountain Spring are interrelated with the deeper ground water resources of the Raft River Basin.

47. Some of the shallow ground water in the area of Round Mountain Ranch is a result of ground water underflows from the southwest, particularly the alluvial fan area of Clear Creek.

48. Ground water migrates hydrologically downstream from Round Mountain Ranch to Kelso Ranch. The Kelso Springs are an expression of ground water that is close to the surface and that emits in the wash where Round Mountain Creek has scoured a channel.

49. The application for transfer proposes to change the place of use to 40 acres in the NESW of Section 13, T16S, R27E, that will be irrigated with a circular pivot. A shallow ground water table underlies the proposed place of use. During some times of the year, the shallow water table could supply water to growing crops, thus reducing the need for irrigation.

50. Surface water that percolates into the ground, underflow of ground water, flood water, flows of Round Mountain Spring, and surface water diversions from other sources are commingled in the reservoir. By storing water in the reservoir, the applicant can more efficiently operate its irrigation system.

51. The construction of the dam required the removal of overburden from the location of the dam and the building of an impervious clay key in the dam, which prevents the movement of some ground water down gradient. However, the ground water captured is insignificant.

52. On April 30, 1993, the department issued a moratorium order prohibiting the further appropriation of ground water or surface water for consumptive purposes that affects appropriations of water in the Raft River Valley. An exception in the order states that the

department will review applications for permit on a case-by-case basis to determine whether approval would injure other water users.

53. Diversion and beneficial use of additional water to lands not previously irrigated as proposed by the application for permit will affect the availability of water to other water users.

CONCLUSIONS OF LAW

1. Idaho Code § 42-203A provides, in pertinent part, as follows:

In all applications whether protested or not protested, where the proposed use is such (a) that it will reduce the quantity of water under existing water rights, or (b) that the water supply is insufficient for the purpose for which it is sought to be appropriated, or (c) where it appears to the satisfaction of the director that such application is not made in good faith, is made for delay or speculative purposes, or (d) that the applicant has not sufficient financial resources with which to complete the work involved therein, or (e) that it will conflict with the local public interest, where the local public interest is defined as the affairs of the people in the area directly affected by the proposed use, or (f) that it is contrary to conservation of water resources within the state of Idaho; the director of the department of water resources may reject such application and refuse issuance of a permit therefor

2. Idaho Code § 42-222, provides, in pertinent part, as follows:

The director of the department of water resources shall examine all the evidence and available information and shall approve the change in whole, or in part, or upon conditions, provided no other water rights are injured thereby, the change does not constitute an enlargement in use of the original right, and the change is consistent with the conservation of water resources within the state of Idaho and is in the local public interest as defined in section 42-203A(5), Idaho Code

3. Idaho Code § 42-212 restricts the appropriation of water by those seeking to divert water from sources located wholly upon the lands of another:

The department of water resources is hereby prohibited from issuing or granting permits to divert or appropriate the waters of any lake not exceeding five (5) acres in surface area at high water mark, pond, pool or spring in this state, which is located or situated wholly or entirely upon the lands of a person or

corporation, except to the person or corporation owning said land, or with his or its written permission, executed and acknowledged as required for the conveyance of real estate.

4. The applicant argues that water diverted from Round Mountain Spring and water captured by the tile drains, and subsequently diverted, is private water as defined by Idaho Code § 42-212. The applicant also argues that because it is private water, the applicant is entitled to divert the water without appropriating the water.

5. Idaho Code § 42-212 prohibits the department from issuing a permit to appropriate surface water located wholly on a landowner's property without the permission of the landowner. This statute does not describe those waters, however, as being solely owned by the landowner on whose lands they are found. It also does not exempt the landowner from the requirement that the water must be appropriated by obtaining permits and licenses from the department.

6. The applicant cites various court cases that characterize water as private water, diffuse surface water, or waste water, and grant the user some exclusive right to use the water. The applicant asserts it is entitled to divert water from Round Mountain Spring and the tile drain pursuant to one of these legal theories to the exclusion of any other water users, even if the water is hydrologically connected to water diverted by other water users. While not passing directly on the validity of these legal theories, adherence to any of the theories in this case would ignore hydrologic reality. The use of water from the drain and from Round Mountain Spring as well as other commingled water from the reservoir and application of the water to the acres not previously irrigated, would cause an increase in consumptive use and would reduce the quantity of water in the system available to downstream water users. As a result, the portion of application for permit no. 43-07321 seeking to divert and use additional natural flow exceeding the flow rate authorized by existing water rights during the irrigation season and also seeking to irrigate 40 acres not previously irrigated should be rejected.

7. Furthermore, Round Mountain Spring is not private water as defined in Idaho Code § 42-212 because the sources of water supplying the spring are not located wholly upon the lands owned by the applicant and the flow from the spring is not wholly contained on the lands owned by the applicant.

8. The department issued an amended moratorium "In the Matter of Applications for Permits for the Diversion and Use of Surface and Ground Water within the Eastern Snake River Plain Area and the Boise River Drainage Area" on April 30, 1993. The second paragraph of the order, printed on page four, states:

... a moratorium is established on the processing and approval of presently pending and new applications for permits to appropriate water from all surface

and ground water sources within the Eastern Snake River Plain Area. . . . The following provisions apply to the administration of the moratorium:

9. The moratorium does not prevent the Director from reviewing for approval on a case-by case basis an application that otherwise would not be approved under terms of this moratorium if,

a) Protection and furtherance of the public interest, as determined by the Director, requires consideration and approval of the application irrespective of the general drought related moratorium; or

b) The Director determines that the development and use of the water pursuant to an application will have no effect on prior surface and ground water rights because of its location, insignificant consumption of water or mitigation provided by the applicant to offset injury to other rights.

9. Storage of water flowing from Round Mountain Spring, the tile drains, and other drainages during the non-irrigation season and during high water flows will not injure other water right holders in the immediate vicinity of the applicant's reservoir. The storage will not significantly affect the flows of the springs in the Milner Dam to King Hill reach of the Snake River. The storage portion of application for permit no. 43-07321 can be approved if the approval is properly conditioned.

10. The applicant proved that it diverted water from Clear Creek pursuant to water right no. 43-00286(part), but only when the watermaster was not regulating diversions of water from Clear Creek.

11. Application for transfer no. 4640' can be approved with a condition that 35 acres of the proposed place of use in the NESW of Section 13, T16S, R27E, shall be irrigated only with water right no. 43-00286(part) until diversions from Clear Creek pursuant to water rights junior to water right no. 43-00286(part) must be curtailed to satisfy senior water rights. Water can be diverted from the reservoir to irrigate the 35 acres provided water is simultaneously being diverted from Clear Creek to the reservoir and water is being diverted by Sessions pursuant to water right no. 43-00286(part). Five acres located in the NESW of Section 13, T16S, R27E may be irrigated for the entire irrigation season because approximately five acres located in the NWNE of Section 13, T16S, R27E, were consistently irrigated with some of the water from Round Mountain Spring, the tile drain, and other sources of base flows diverted by the applicant.

12. To the extent water can be diverted to the reservoir pursuant to water right nos. 43-00045, 43-00286, A43-10116, 43-00182, and 43-00414 during the irrigation season, temporary retention in the reservoir for management purposes is allowed.

13. The application for transfer did not propose any change in water right nos. 43-02061 and 43-02110. Water right no. 43-02061 authorizes diversion of water from the same source as the tile drain. Temporary retention of water in the reservoir pursuant to these rights for management purposes is also allowed.

14. The rights transferred shall be subject to all prior rights and shall be subject to regulation in their order of priority.

15. A water right may be found to be abandoned if the owner of the water right intends to abandon the right and it is not used after the intention is expressed, either explicitly or by the actions of the water right holder.

16. Abandonment of water right no. 43-00286(part), originally appurtenant to Round Mountain Ranch, was not proven by clear and convincing evidence.

17. The applicant's adjudication claims were filed pursuant to Idaho Code § 42-1416 and § 42-1416A, which allowed water users to claim expanded acreage as a part of the place of use under a water right. These laws, known as the presumption statutes, were held to be unconstitutional by the SRBA District Court. The statutes were repealed and Idaho Code § 42-1425 and § 42-1426, known as the amnesty statutes, were enacted to replace the presumption statutes. The Idaho Supreme Court held that the amnesty statutes are constitutional.

18. The applicant's adjudication claims have not yet been field verified by the department.

19. This decision does not verify the entire place of use set forth in the applicant's adjudication claims. The place of use is only being determined for the NWNE and the NENW of Section 13, T16S, R27E. The other places of use described by water rights appurtenant to Round Mountain Ranch will be determined in the Snake River Basin Adjudication.

ORDER

IT IS HEREBY ORDERED that storage during the non-irrigation season proposed by application for permit no. 43-07321 is APPROVED. All other portions of application for permit no. 43-07321 are REJECTED. Thirty-five (35) acres of the proposed place of use located in the NESW of Section 13, T16S, R27E, can only be irrigated with water from the reservoir if: (1) Clear Creek water is simultaneously being delivered to the reservoir, and

(2) water from Clear Creek is being diverted by Sessions pursuant to water right no. 43-00286(part) as ordered by the adjudication court.

IT IS FURTHER ORDERED that permit no. 43-07321 is conditioned as follows:

1. The storage of water under this right is contingent upon the certification of the dam and authorization of storage as provided by the dam safety provisions of Idaho Code.
2. This right only allows for the storage of a volume of water up to the maximum amount authorized once in each given year during the non-irrigation season. Once the authorized volume of water has been stored during the non-irrigation season in a given year, no additional water can be diverted to storage during the non-irrigation season of that year.
3. The right holder shall install suitable measuring devices to determine the amount of water diverted and shall report the information to the department annually.
4. Proof of construction of works and application of water to beneficial use shall be submitted to the department on or before November 1, 1998.

IT IS FURTHER ORDERED that application for transfer no. 4640 is PARTIALLY APPROVED to allow a change in the place of use for water right no. 43-00286(part) as described below, and to allow the retention of summer flows diverted pursuant to existing water rights for water management purposes.

IT IS FURTHER ORDERED that 35 acres located in the NESW of Section 13, T16S, R27E, can only be irrigated with Clear Creek water when water is available pursuant to water right no. 43-00286(part). The 35 acres may be irrigated from the reservoir provided that: (1) Clear Creek water is simultaneously being delivered to the reservoir, and (2) water from Clear Creek is being diverted by Sessions pursuant to water right no. 43-00286(part) as ordered by the adjudication court.

IT IS FURTHER ORDERED that the remaining five acres of the 40 acres located in the NESW of Section 13, T16S, R27E, will be described as a place of use for water right nos. 43-00045, 43-00286, 43-000182, 43-00414, and will also be described as a place of use in the adjudication claim nos. A43-10824 and A43-10116.

IT IS FURTHER ORDERED that the remainder of the place of use proposed by the application for transfer will be recognized as proposed with the following condition:

Other than the 40 acres in the NESW of Section 13, T16S, R27E, the place of use described is the place of use set forth in the adjudication claims that has not been field verified.

The remaining 226 acres comprising the place of use is subject to further limitation based on future determinations in the Snake River Basin Adjudication.

IT IS FURTHER ORDERED that application for transfer no. 4640 shall be conditioned as follows:

1. The change authorized by this transfer shall be accomplished within one (1) year of the date of this approval.

2. Failure to comply with the conditions of this transfer is cause for the director to issue an order to show cause why the approval of the transfer should not be rescinded.

3. Partial approval of this transfer does not preclude the opportunity for review of the validity of water rights nos. 43-00045, 43-00182, 43-00414, and 43-00286 in the ongoing Snake River Basin Adjudication and does not confirm Snake River Basin Adjudication claim no. A43-10116.

4. Prior to diversion of water under this approval, the right holder shall install suitable measuring devices or other means acceptable to the Department at all authorized points of diversion to determine the total rate of diversion.

5. The total instantaneous rate of diversion of water from all points of diversion under transfer no. 4640 shall not exceed 28.10 cfs, nor shall the total combined annual volume of diversion exceed 1064.0 acre feet.

6. That portion of the total diversion rate authorized in excess of 5.32 cfs is limited to use for conveyance losses in delivery of water right nos. 43-00045, 43-00182, 43-00414, and 43-00286, and claim no. A43-10116.

IT IS FURTHER ORDERED that all other portions of application for transfer no. 4640 are DENIED.

IT IS FURTHER ORDERED that transfer no. 4640 (water under right nos. 43-00045, 43-00286, 43-00182, 43-00414, and claim no. A43-10116) is hereby conditioned as follows:

1. These rights when combined with all other rights shall provide no more than 4.0 acre feet annually per acre for the lands above.

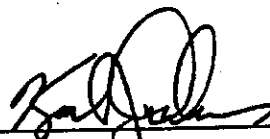
2. Water right nos. 43-00045, 43-00182, and 43-00414, and claim no. A43-10116 when combined shall be limited to irrigation of not more than 231 acres, and when combined with water right 43-00286(part), shall be limited to irrigation of not more than 266 acres.

3. During a single irrigation season, right no. 43-00045 is limited to the irrigation of 160 acres within the 231-acre place of use described above.

4. During a single irrigation season, right nos. 43-00182 and 43-00414 are limited to the irrigation of 160 acres each and a combined total of 231 irrigated acres within the place of use described above.

5. During a single irrigation season, claim no. A43-10116 is limited to the irrigation of 231 acres in the place of use described above.

Signed this 7th day of November, 1997.



KARL J. DREHER
Director

CERTIFICATE OF MAILING

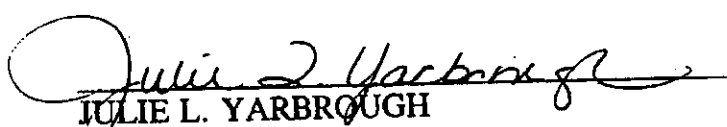
I HEREBY CERTIFY that on this 11th day of November, 1997, I mailed a true and correct copy, postage paid, of the foregoing **FINAL ORDER** to the following:

Jeff Sessions
Round Mountain Ranch
HC 72 Box 2346
Malta, ID 83342

Harold & Ray Jones
HC 72
Malta, ID 83342

Roger Ling, Esq.
LING, NIELSEN & ROBINSON
615 H. Street
P.O. Box 396
Rupert, ID 83350

Patrick D. Brown
HEPWORTH, LEZAMIZ &
HOHNHORST
P.O. Box 389
Twin Falls, ID 83303-0389



JULIE L. YARBROUGH
Senior Secretary