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Department of Water Resources
Southern Region

November 12, 1997

Attached is a copy of the Final Order the Matter of Application for Permit No. 43-07321 and Application for Transfer No. 4640 in the name of Round Mountain Ranch

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State of Idaho

DEPARTMENT OF WATER RESOURCES

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November 12, 1997

PHILIP E. BATT
GOVERNOR

KARL J. DREHER
DIRECTOR

RE: In the Matter of Application for Permit No. 43-07321 and Application for Transfer No. 4640
in the name of Round Mountain Ranch

Dear Interested Parties:

The accompanying order is a "final order" issued by the department pursuant to section 67-5246 or 67-5247, Idaho Code.

Section 67-5246 provides as follows:

- (1) If the presiding officer is the agency head, the presiding officer shall issue a final order.
- (2) If the presiding officer issued a recommended order, the agency head shall issue a final order following review of that recommended order.
- (3) If the presiding officer issued a preliminary order, that order becomes a final order unless it is reviewed as required in section 67-5245, Idaho Code. If the preliminary order is reviewed, the agency head shall issue a final order.
- (4) Unless otherwise provided by statute or rule, any party may file a petition for reconsideration of any order issued by the agency head within fourteen (14) days of the issuance of that order. The agency head shall issue a written order disposing of the petition. The petition is deemed denied if the agency head does not dispose of it within twenty-one (21) days after the filing of the petition.
- (5) Unless a different date is stated in a final order, the order is effective fourteen (14) days after its issuance if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:
 - (a) the petition for reconsideration is disposed of; or
 - (b) the petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.
- (6) A party may not be required to comply with a final order unless the party has been served with or has actual knowledge of the order. If the order is mailed to the last known address of a party, the service is deemed to be sufficient.

(7) A non-party shall not be required to comply with a final order unless the agency has made the order available for public inspection or the nonparty has actual knowledge of the order.

(8) The provisions of this section do not preclude an agency from taking immediate action to protect the public interest in accordance with the provisions of section 67-5247, Idaho Code.

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a final order within fourteen (14) days of the service date of this order. The department will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5246(4) Idaho Code.

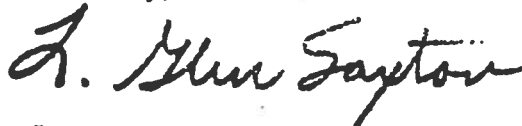
APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by a final order or orders previously issued in a matter before the department may appeal the final order and all previously issued orders in the matter to district court by filing a petition in the district court of the county in which:

- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or
- iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days a) of the service date of the final order, b) of an order denying petition for reconsideration, or c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. See section 67-5273, Idaho Code. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.

Sincerely,



L. GLEN SAXTON, Chief
Water Allocation Bureau

Enclosure

c: Inter-Office Distribution

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-feet 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 NWN 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:

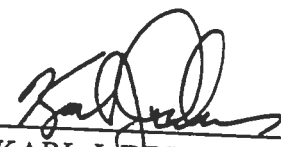
1. These rights when combined with all other rights shall provide no more than 4.0 acre feet annually per acre for the lands above.
2. Water right nos. 43-00045, 43-00182, and 43-00414, and claim no. A43-10116 when combined shall be limited to irrigation of not more than 231 acres, and when combined 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

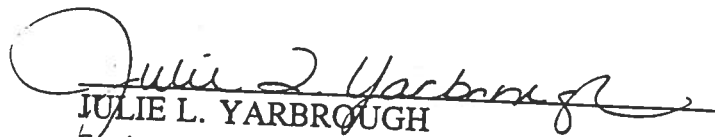
I HEREBY CERTIFY that on this 11th day of November, 1997, I mailed a true and correct copy, postage paid, of the foregoing **FINAL ORDER** to the following:

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

ATTACHMENT A

No. 43-00045

WATER RIGHT PROFILE REPORT

OWNER CODE	NAME & ADDRESS	PRIORITY DATE	WATER USE	USE PERIOD FROM TO	DIVERSION RATE	DIVERSION VOLUME
C	ALBION IDAHO LAND CO.	06/01/1882	IRRIGATION	00/00 00/00	1.700 CFS	

Water Source: CLEAR CREEK

Tributary to: RAFT RIVER

Stage: DECREED

T	R	S	NE	NESE	NESE	SESE	SESE	SESE
16S	27E	13	NE	NESE	NESE	SESE	SESE	SUM
16S	27E	24	NE	NESE	NESE	SESE	SESE	

No. A43-00045

ADJUDICATION CLAIM PROFILE REPORT

OWNER CODE	NAME & ADDRESS	PRIORITY DATE	WATER USE	USE PERIOD FROM TO	DIVERSION RATE	DIVERSION VOLUME
C	HERLE JONES	06/01/1882	IRRIGATION	04-01 11-01	1.70 CFS	

Water Source: CLEAR CREEK

Tributary to: RAFT RIVER

Stage: DECREED

Point(s) of Diversion: T16S R27E S27 SESENE

CASSIA County

T	R	S	NE	NESE	NESE	SESE	SESE	SESE
16S	27E	13	NE	NESE	NESE	SESE	SESE	SUM
16S	27E	24	NE	NESE	NESE	SESE	SESE	
16S	28E	19	NE	NESE	NESE	SESE	SESE	

TOTAL ACRES : 266.0

WATER RIGHT PROFILE REPORT

OWNER

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PRIORITY

WATER USE

C SETTLERS LAND & WATER CO.

11/23/1911 IRRIGATION

Water Source: CLEAR CREEK

Tributary to: RAFT RIVER

Stage: DECREED

NE

22

MS

[illegible]

No. A43-00286B

ADJUDICATION CLAIM PROFILE REPORT

OWNER

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--- C MERLE JONES

PRIORITY

WATER USE

11/23/1911 IRRIGATION

USE PER 100

CONVERSION
RATE

.....

Water Source: CLEAR CREEK

Tributary to: RAFT RIVER

Point(s) of Divergence:

T16S R27E S27

SESENE

Stage: DECREED

CASSIA COUNTY

EN

22

715

[illegible]

BECAUSE THIS IS A BENEFICIAL USE CLAIM FILED IN THE ADJUDICATION,
THE ADMINISTRATIVE WATER RIGHT FILES DO NOT CONTAIN ANY DOCUMENTS RELATED TO THIS CLAIM.

No. A43-10116

ADJUDICATION CLAIM PROFILE REPORT

PAGE: 1

OWNER CODE NAME & ADDRESS PRIORITY DATE WATER USE USE PERIOD FROM TO DIVERSION RATE DIVERSION VOLUME
C MERLE JONES 12/31/1900 IRRIGATION 04-01 11-01 20.00 CFS

Water Source: RICE CREEK
ROUND MOUNTAIN CREEK

Tributary to: ROUND MOUNTAIN CREEK
CLEAR CREEK

Stage: BENEFICIAL USE

Point(s) of Diversion:

T16S R27E S13
S24

SENESE
NESENE

CASSIA County
CASSIA County

		NE		NW		SW		SE			
T	R	S	NE	NE	NE	NE	NE	NE	NE	SE	SUM
16S	27E	13	06	23	17	17	17	17	17	17	
16S	27E	24	40								
16S	28E	19									
TOTAL ACRES											266.0

No. 43-00182

WATER RIGHT PROFILE REPORT

OWNER
CODE
C DAVID W. JONES
NAME & ADDRESS
PRIORITY
DATE
02/17/1912
WATER USE
IRRIGATION
USE PERIOD
FROM
00/00 00/00
TO
1500 CFS
DIVERSION
RATE
DIVERSION
VOLUME

Water Source: ROUND MOUNTAIN CREEK

Tributary to: CLEAR CREEK

Stage: DECREEED

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T R S : Lt Ac Lt Ac Lt Ac Lt Ac : Lt Ac Lt Ac Lt Ac Lt Ac : Lt Ac Lt Ac Lt Ac Lt Ac : SUM
16S 27E 12 :
16S 27E 13 :
No. 43-00414

WATER RIGHT PROFILE REPORT

OWNER
CODE
C JOHN LITHGO
NAME & ADDRESS
PRIORITY
DATE
04/01/1909
WATER USE
IRRIGATION
USE PERIOD
FROM
00/00 00/00
TO
0600 CFS
DIVERSION
RATE
DIVERSION
VOLUME

Water Source: ROUND MOUNTAIN CREEK

Tributary to: CLEAR CREEK

Stage: DECREEED

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16S 27E 12 :
16S 27E 13 :
No. A43-10824

ADJUDICATION CLAIM PROFILE REPORT

OWNER
CODE
C MERLE JONES
NAME & ADDRESS
PRIORITY
DATE
02/17/1912
WATER USE
IRRIGATION
STOCKWATER
USE PERIOD
FROM
04-01 11-01
TO
01-01 12-31
DIVERSION
RATE
2.10 CFS
0.04 CFS
TOTAL DIVERSION:
2.10 CFS

Water Source: ROUND MOUNTAIN CREEK
ROUND MOUNTAIN SPRING

Tributary to: CLEAR CREEK
ROUND MOUNTAIN CREEK

Stage: DECREEED

Point(s) of Diversion:

T16S R27E S13
R28E S18 Lot04(SWSWSW)

CASSIA County
CASSIA County

NE
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T R S : Lt Ac Lt Ac Lt Ac Lt Ac : Lt Ac Lt Ac Lt Ac Lt Ac : Lt Ac Lt Ac Lt Ac Lt Ac : SUM
16S 27E 13 : 06 23 : 17 : 17 : 35 33 40 40 : 211.0
16S 27E 24 : 40 : : : : : : : 40.0
16S 28E 19 : : : : : : : : 15.0
TOTAL ACRES : 266.0

State of Idaho
Department of Water Resources
Permit To Appropriate Water

NO. 43-07321

Proposed Priority: May 24, 1995

Maximum Diversion Rate:

1.00 CFS

This is to certify, that ROUND MOUNTAIN RANCH

HC 72 BOX 2346

MALTA ID 83342

has applied for a permit to appropriate water from:

ROUND MOUNTAIN CREEK

UNNAMED DRAIN

WASTE WATER

tributary of CLEAR CREEK

tributary of ROUND MOUNTAIN CREEK

tributary of ROUND MOUNTAIN CREEK

and a permit is APPROVED for development of water as follows:

BENEFICIAL USE

PERIOD OF USE

RATE OF DIVERSION

ANNUAL VOLUME

IRRIGATION STORAGE

DIVERSION TO STORAGE

11/16 to 03/14

11/16 to 03/14

1.00 CFS

26.0 AF

Totals

1.00 CFS

LOCATION OF POINT(S) OF DIVERSION:

NESE , Sec. 13, Township 16S, Range 27E

NWSE , Sec. 13, Township 16S, Range 27E

CASSIA County

PLACE OF USE: IRRIGATION STORAGE

TWN RGE SEC

16S 27E 13

NESE

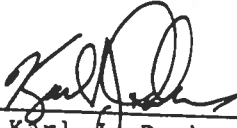
NWSE

CONDITIONS OF APPROVAL AND REMARKS

1. See Final Order for conditions and limitation for use of water under this approval.

This permit is issued pursuant to the provisions of Section 42-204, Idaho Code.
Witness the signature of the Director, affixed at Boise, this

7th day of November, 1997.


Karl J. Dreher, Director

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

TRANSFER OF WATER RIGHT

TRANSFER NO. 4640
WATER RIGHT NO(S). 43-00045/43-00182/43-00286B
43-00414 & CLAIM NO. A43-10116

This is to certify that: **ROUND MOUNTAIN RANCH**
HC 72 BOX 2346
MALTA ID 83342

has requested a change to the above captioned water right(s). This change in water right(s) is authorized pursuant to the provisions of Section 42-222, Idaho Code, provided the conditions listed below are met.

<u>BENEFICIAL USE</u>	<u>PERIOD OF USE</u>	<u>DIVERSION RATE</u>	<u>ANNUAL VOLUME</u>
Right No. 43-00045 : IRRIGATION Source: Clear Creek Tributary: Raft River	04/01 to 10/31	1.70 CFS	640.0 AF
Right No. 43-00182 : IRRIGATION Priority: 02/17/1912 Source: Round Mountain Creek Tributary: Clear Creek	04/01 to 10/31	1.50 CFS	633.7 AF
Right No. 43-00286B : IRRIGATION Priority: 11/23/1911 Source: Clear Creek tributary: Raft River	04/01 to 10/31	4.30 CFS	1064.0 AF
Right No. 43-00414 : IRRIGATION Priority: 04/01/1909 Source: Round Mountain Creek Tributary: Clear Creek	04/01 to 10/31	0.60 CFS	253.5 AF
Claim No. A43-10116 : IRRIGATION Priority: 12/31/1900 Source: Rice Creek & Round Mountain Creek Tributary: Round Mountain Creek & Clear Creek	04/01 to 10/31	20.00 CFS	924.0 AF
TOTAL:		* 28.10 CFS	* 1064.0 AF

TRANSFER NO. 4640
 WATER RIGHT NO(S). 43-00045/43-00182/43-00286B
 43-00414 & CLAIM NO. A43-10116

LOCATION OF POINT(S) OF DIVERSION:

SENESE , Sec. 13, Township 16S, Range 27E / Round Mountain Creek
 NESESE , Sec. 13, Township 16S, Range 27E / Round Mountain Creek
 NESENE , Sec. 24, Township 16S, Range 27E / Rice Creek
 SESENE , Sec. 27, Township 16S, Range 27E / Clear Creek
 SWSWSW , Sec. 18, Township 16S, Range 28E / Round Mountain Creek

PLACE OF USE: IRRIGATION

<u>TWN</u>	<u>RGE</u>	<u>SEC</u>	<u>ACRES</u>	<u>ACRES</u>	<u>ACRES</u>	<u>TOTAL</u>
16S	27E	13	NENE 6	SENE 17	NESW 40	
			NESE 35	NWSE 33	SWSE 40	
		24	SESE 40			211
28E	19		NENE 40			40
			NWNW 15			15
Total number of acres irrigated:						* 266

CONDITIONS OF APPROVAL AND REMARKS

* Right Nos. 43-00045, 43-00182, 43-00286B, 43-00414 and Snake River Basin Adjudication Claim No. A43-10116 are subject to the conditions of the Final Order in the matter of Application for Transfer No. 4640.

Dated this 7th day of November, 1997.


 KARL J DREHER
 Director



RECEIVED

APR 13 1998

Water Resource
Southern Region

NOT DELIVERABLE
UNABLE TO RETURN



State of Idaho

DEPARTMENT OF WATER RESOURCES

1301 North Orchard Street, Statehouse Mail, Boise, Idaho 83720-9000

Phone: (208) 327-7900 FAX: (208) 327-7866

JAN 03 1997

Resource
Section

PHILIP E. BATT
GOVERNOR

KARL J. DREHER
DIRECTOR

December 31, 1996

RE: In the matter of Application for Permit No. 43-07321 and Transfer No. 4640 in the name of Round Mountain Ranch

Dear Interested Party:

The accompanying order is a "**amended recommended order**" issued by the department pursuant to Section 67-5243, Idaho Code. The provisions of this order will not become effective until the Director issues a final order in this matter.

Each party to these proceedings who appeared at the hearing may file a petition for reconsideration, briefs and exceptions to the recommended order and may request oral argument before the Director of the department as further described below:

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a recommended order with the hearing officer issuing the order within fourteen (14) days of the service date of the order. The hearing officer will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See Section 67-5243(3), Idaho Code.

EXCEPTIONS AND BRIEFS

Within twenty-one (21) days after (a) the service date of this recommended order, (b) the service date of a denial of a petition for reconsideration from this recommended order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this recommended order, any party may in writing support or take exceptions to any part of a recommended order and may file briefs in support of the party's position on any issue in the proceeding. Written briefs in support of or taking exceptions to the recommended order shall be filed with the Director. Opposing parties shall have twenty-one (21) days to respond.

ORAL ARGUMENT

The Director may schedule oral argument in the matter before issuing a final order. Oral argument on exceptions to a recommended order shall be heard at the discretion of the Director. If oral arguments are to be heard, the Director will, within a reasonable time, notify each party of the place, date and hour for the argument of the case. Unless the Director orders otherwise, all oral arguments will be heard in Boise, Idaho.

CERTIFICATE OF SERVICE

All exceptions, briefs, requests for oral argument and any other matters filed with the Director in connection with the recommended order shall be served on all other parties to these proceedings in accordance with Rules of Procedure 302 and 303.

FINAL ORDER

The Director will issue a final order within fifty-six (56) days of receipt of the written briefs, oral argument or response to briefs, whichever is later, unless waived by the parties or for good cause shown. The agency may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order. The department will serve a copy of the final order on all parties of record.

APPEAL OF FINAL ORDER TO DISTRICT COURT

A party aggrieved by a final order of the Director is entitled to judicial review in compliance with sections 67-5271 through 67-5279, Idaho Code.

Sincerely,

A handwritten signature in black ink, appearing to read "L. Glen Saxton", written over the word "Sincerely,".

L. GLEN SAXTON
Chief, Water Allocation Bureau

Enclosure

C: IDWR - Region

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)
_____)

AMENDED RECOMMENDED 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, the applicant, Round Mountain Ranch (applicant), petitioned the hearing officer for reconsideration of its recommended order. On November 19, 1996, the hearing officer granted reconsideration.

ANALYSIS

Reconsideration was granted for two reasons. First, some decisions arising out of the Snake River Adjudication were issued simultaneous to the preparation of the recommended order. These decisions were not fully reviewed prior to issuance of the recommended order, and the decisions should be incorporated into the recommended order. Second, it was difficult to write a decision that recognized both the physical realities of water use and the law, and allegations of factual inaccuracies in the petition for reconsideration could affect the outcome.

Recent Adjudication Decisions

The hearing officer reviewed the Adjudication Court's decision regarding partial forfeiture (Basin Wide Issue No. 10), the Supreme Court's decision regarding the amnesty statutes (Basin Wide Issue No. 4) and a decision by Special Master Fritz X. Hammerle, In re, SRBA Case No. 39576 (Sept. 13, 1996), that discusses whether the elements of a previous decreed water right can be reevaluated or reduced based on continuing beneficial use in the absence of a claim of abandonment, forfeiture, adverse possession or estoppel.

The applicant argues that the hearing officer should have held, pursuant to the amnesty statutes, that all of the water rights from all of the sources that irrigate any of the lands on Round Mountain Ranch should be recognized as appurtenant to all of the lands. The argument is inconsistent with the testimony of Merle Jones who was familiar with and operated the Round

Mountain Ranch from approximately 1952 through 1992. This is further discussed in the next section of the decision.

The decisions regarding partial forfeiture and reevaluation of a decree are more pertinent to the decision. Judge Hurlbutt's decision regarding Basin Wide Issue No. 10 determines that a water right cannot be partially forfeited in the State of Idaho. The decision holds that if a water user has reduced his exercise of a component of a water right, he cannot lose the portion not used unless the water right is forfeited in its entirety.

Special Master Hammerle's decision can either be interpreted broadly to prohibit review of any of the components of a decreed water right solely based on beneficial use, or interpreted narrowly to only prohibit review based on beneficial use in a judicial setting and when the decree left nothing of the water right component in question. The hearing officer believes the decision should be interpreted narrowly.

There is some discussion in Special Master Hammerle's decision which suggests that when an application for transfer is filed with the Department of Water Resources, the applicant places questions of beneficial use before the department. This is consistent with the statutory directive of Idaho Code § 42-222, which requires that the department determine whether the proposed application will result in an enlargement of use, and whether the proposed application will injure other water users. Furthermore, the Adams v. Albion Idaho Land Co. decree, which determined water right nos. 43-00182 and 43-00414, did not specifically describe the number of acres irrigated in the NWNE¹ and NENW of Section 13, T16S, R27E, B.M.² Instead, the decree only generally located where the water was to be used. In other words, the decree did not specify that 320 acres were being irrigated. As a result, the department may review the extent of beneficial use on the lands from which the water is sought to be transferred. If the Department of Water Resources broadly interpreted Special Master Hammerle's decision in tandem with the decision regarding partial forfeiture issued by Judge Hurlbutt, the department would be without authority to meaningfully review many applications for transfer. Water users would be able to more efficiently apply water to acreage not traditionally irrigated to its full extent and detrimentally affect other water rights. The recommended order will not be amended because of the decisions issued through the Snake River Basin Adjudication.

The protestants argue that if water was ever delivered to the Round Mountain Ranch property pursuant to claim no. 43-00286B, the water right is abandoned. The protestants do not argue the right was forfeited, which skirts a possible conflict with the decision holding that a right cannot be partially forfeited in Idaho. Nonetheless, the decisions regarding partial forfeiture and amendment of a decreed right must be discussed in light of further review of the evidence.

¹The absence of a 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.

Review of the Evidence

The hearing officer listened to portions of the record, particularly the testimony of Merle Jones, Jeff Sessions, and Dave Sundberg. Merle Jones testified several times that lands located in the NWNE and the NENW of Section 13, T16S, R27E were only irrigated during very 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.

The five acres of land in the southeast corner of the NWNE, Section 13, T16S, R27E that were irrigated regularly are located east of the Round Mountain Creek Channel. The remaining 18 acres received some commingled water that was either Clear Creek water or Round Mountain Creek water because the land was only irrigated during periods of very 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 very high water.

The testimony of Dave Sundberg established that his father, the former watermaster, recognized portions of right no. 43-00286 owned at one time by W. Ayrhart and M. Iverson. Summaries of Clear Creek water rights purportedly owned by Dave Sundberg's father were received into evidence as protestants' exhibit K. The summaries are not official watermaster records. Dave Sundberg admitted most of his father's records were in the possession of the current watermaster. The records are insufficient to establish that the Round Mountain Ranch property did not have a right to or did not receive water pursuant to water right no. 43-00286B.

When Merle Jones was questioned about Clear Creek water rights appurtenant to Round Mountain Ranch, he stated a right of 85 inches was diverted from Clear Creek. His description matches the 1.7 cfs authorized by water right no. 43-00045. He also stated there was other water that came, probably surplus waste water from Clear Creek, well beyond the 85 inches, in a stream probably three to four times the 85 inches. When asked whether other water rights were diverted from Clear Creek he stated he didn't "regularly" use other water rights from Clear Creek.

Jeff Sessions testified that other water in addition to the 1.7 cfs authorized by water right no. 43-00045 was delivered to Round Mountain Ranch in the ditches diverting water from Clear Creek.

Neither Merle Jones or Jeff Sessions expressed an intent to abandon the right to divert the excess water. Merle Jones testified the excess water was diverted when the stream was unregulated. Jeff Sessions testified that assessments are not levied against the water users for diverting water during periods of unregulated flows.

Water right no. 43-00286 bears a priority date of November 23, 1911, one of the latest priorities of rights authorizing diversion from Clear Creek. It is also a very large water right that could only be satisfied, if at all, during very high water flows. Merle Jones testified that he

received waste water from other users upstream. Downstream water rights are often satisfied by return flows, and the watermaster may not have needed to deliver the high water rights for water users diverting from the lower reaches of Clear Creek. Water right no. 43-00286B was diverted from Clear Creek by Merle Jones, but only during times when the watermaster was not regulating diversions by junior right holders to satisfy senior water rights.

This decision must be written so that the water rights describe the limits of the entitlement. The 17 acres in the NENW of Section 13 and the 18 acres in the NWNE of Section 13 (35 acres total) will only be recognized as a place of use for water right no. 43-00286B. Thirty-five acres of the 40 acres proposed as a place of use in the NENW, Section 13, T16S, R27E, may be irrigated only with Clear Creek water until the watermaster begins regulating junior priority water rights to satisfy senior priority water rights. The 35 acres may be irrigated with commingled water from the reservoir if Clear Creek water is simultaneously delivered to the reservoir and the rights of Clear Creek are unregulated as described above.

The applicant points out that water right no. 43-00286 describes both the lands from which water is sought to be transferred and the lands to which water is sought to be transferred (where the pivot is located) as a place of use. The hearing officer's review of the record confirms that these lands were all described as a place of use by water right no. 43-00286. Nonetheless, the applicant filed its application for transfer seeking to move water rights, including water right no. 43-00286, to the new place of use. Furthermore, Merle Jones testified that Clear Creek water had never been beneficially used on the new place of use where the pivot is located. Based on Merle Jones' testimony, the hearing officer concluded that a transfer of the water right was necessary because the water had not been used on the proposed place of use.

At least once during his testimony, Merle Jones testified that during the winter time, water flowing solely from Round Mountain Spring ran down the Round Mountain Creek channel. This evidence is only important for characterizing the waters from Round Mountain Spring and other waters as public not private waters. The hearing officer determined that the waters are not private waters pursuant to Idaho Code § 42-211. The finding will not be modified.

The type of vegetation grown on a parcel of property is relevant because it is evidence of the beneficial use of water on the land in question. Crested wheat grass and sagebrush are normally plants that are not irrigated and are associated with dry land range. Findings related to the type of growth and the regularity of irrigation will not be disturbed.

The recommended order was modified in the following paragraphs to attempt to more carefully reflect the testimony in the record. Findings of fact nos. 7, 16, 19, 21, 25, 30, 32, and 37 were modified. Finding of fact no. 33 was added. Finding of Fact 46 was deleted because, although it is consistent with the testimony, it is not important to the decision. Conclusion of law no. 10 was added, and conclusion of law no. 11 (formerly no. 10) was modified. The order portion was amended to reflect changes in the findings and conclusions.

With the above-changes, the hearing officer recommends the following findings of fact, conclusions of law and order:

FINDINGS OF FACTS

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, Section 13, T16S, R27E. The applicant proposes diversion to storage of 1.0 cubic feet per second (cfs) for year-round storage and 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, NENW	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
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, 43-00286B, 43-00182 and 43-00414 (the last two combined into adjudication claim no. A43-10824). The water rights, as recorded, and the corresponding 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. The 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, Section 13, T16S, R27E, to 40 acres in the NESW, Section 13, T16S, R27E. The application for transfer also proposes changes in the period of use and nature of use of the rights.

6. The following is a comparison of the water rights and the adjudication claims:

**WATER RIGHTS
43-00045**

- Authorizes irrigation of, at most, 160 acres
- Does not authorize irrigation of 40 acres from which water is proposed to be moved.

43-00286

- Does not authorize irrigation of any land in the NENE or SENE of Section 13, T16S, R27E, or any land in Section 19, T16S, R28E.

43-00182 & 43-00414

- Authorize diversion from Round Mountain Creek.
- Authorize irrigation of, at most, 320 acres.
- Authorize irrigation of the parcels from which water is sought to be transferred.

**ADJUDICATION CLAIMS
A43-00045**

- Claims right to irrigate 266 acres
- Claims 40 acres irrigated from which water is proposed to be moved.

A43-00286B

- Claims six acres in the NENE, 17 acres in the SENE, Section 13, T16S, R27E, and 15 acres in the NWNW, Section 19, T16S, R28E.

A43-10824

- Combination of rights 43-00182 & 43-00414.
- Asserts right to divert from Round Mountain Creek and Round Mountain Spring.
- Claims place of use of 266 acres.
- Claims 40 acres of irrigation from which water is proposed to be transferred.

43-02061

- Authorizes irrigation of 30 acres from springs.

A43-02061

- Claims irrigation of 30 acres from springs.

43-02110

- Authorizes irrigation of 51 acres from a spring.

A43-02110

- Claims irrigation of 51 acres from Round Mountain Spring.

7. 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 claims state the "[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.

8. On February 21 and 22, 1995, the department conducted a hearing. The applicant was represented by Roger Ling. The protestants were represented by Pat Brown.

9. 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 would diminish the quantities of water available for diversion pursuant to their water rights.

10. 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 mountain called Round Mountain located east of the ranch.

11. Round Mountain Creek has eroded a defined channel both upstream and downstream of Round Mountain Ranch. There is no defined channel of Round Mountain Creek within Round Mountain Ranch, although water can flow in a low place in the direction of the Round Mountain Creek channel.

12. 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.

13. 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.

14. Merle Jones, a prior owner of Round Mountain Ranch, constructed a pipeline which 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 which heads near the spring was later constructed to capture spring water. The pipeline extends northwesterly toward the reservoir.

15. 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.

16. The boggy area was difficult to farm. In 1961, Merle Jones constructed an east-west tile drain which 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.

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

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

19. Water discharging from the drain pipe was diverted to irrigate lands of Round Mountain Ranch. Beneficial use of these waters were 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.

20. 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.

21. 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.

22. Jeff Sessions is the principal owner of Round Mountain Ranch. Sessions acquired the ranch in December of 1992. After the acquisition of 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 water at its present location.

23. 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.

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

25. Sessions determined that he could better manage his irrigation water by building a dam and pond near the location of the old dam and by abandoning the storage tank. Sessions built a dam and reservoir of 20 to 30 acre-feet 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.

26. The adjudication claims filed by Merle Jones assert the right to irrigate 266 acres within the boundaries of Round Mountain Ranch. Testimony established that, while all 266 acres may have been irrigated simultaneously for a short period during spring runoff, there is insufficient water during the entire irrigation season to irrigate the full 266 acres.

27. 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, Section 13, T16S, R27E and are the parcels from which water is sought to be transferred.

28. Applicant's exhibit no. 6 outlines lands that may have been irrigated within the NWNE and the NENW of Section 13. The map depicts 23 acres of land in the NENW of Section 13 and 17 acres of land in the NWNE of Section 13, all within T16S, R27E.

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

30. Merle Jones testified several times that lands located in the NWNE and the NENW of Section 13, T16S, R27E were only irrigated during very 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.

31. Approximately 23 acres are located east of the Round Mountain Creek channel. The five acres of land in the southeast corner of the NWNE, 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 very 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 very high water.

32. 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 longtime 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. The written documents produced by Dave Sundberg (protestants exhibit no. K) did not prove non-delivery of the right, however. At best, the documents showed two people named W. Ayrhart and M. Iverson were entitled to portion of right no. 43-00286.

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

34. Water was diverted from the tile drain into the reservoir 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.

35. Jeff 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 Jeff Sessions' house.

36. Jeff 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.

37. 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.

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

39. The Kelso Ranch is irrigated by water diverted from the Round Mountain Creek channel. Testimony established that there are springs which discharge water into the channel of Round Mountain Creek from midway between Round Mountain Ranch and the Kelso Ranch down to the south boundary of Kelso Ranch. Some or all of these springs may be 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 which he could beneficially use on his property.

40. 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 which was built in the southeast corner of Kelso Ranch.

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

42. 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 Round Mountain Ranch is underlaid by an impervious clay layer which extends to approximately the north end of the 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.

43. 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 Springs Ranch, are an expression of ground water underflow.

44. 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, prepared by Shane Bendixsen, July 1994, states that "surface and ground water are so interrelated in the area that one cannot be effected without affecting the other."

45. Based on the open file report, the testimony of Charles Brockway, and the many witnesses who testified regarding springs which arose in the Round Mountain Creek channel above the Kelso Ranch and below Round Mountain Ranch, the hearing officer finds that shallow ground water and the flows of Round Mountain Spring are related to the deeper ground water resources of the Raft River Basin.

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

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

48. The application for transfer proposes to change the place of use to 40 acres in the NESE, 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.

49. Surface water which percolates into the ground water, under flow of ground water, flood water, and flows of Round Mountain Spring are commingled in the reservoir. By storing water in the reservoir, the applicant can more efficiently operate its irrigation system.

50. 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 face of the dam, which probably prevents the movement of some ground water down gradient. The ground water captured is probably insignificant, however.

51. On April 30, 1993, the department issued a moratorium order prohibiting the further appropriation of ground water or surface water for consumptive purposes which 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.

52. Diversion and beneficial use of additional water to lands not previously irrigated 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 ability of 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 stream in this state, which is located or situated wholly or entirely upon the lands of a 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 prevents the intrusion or trespass of prospective water users on the land of another to divert surface water wholly contained on the landowner's property. The section 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 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 additional 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 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 flow from the spring is not located wholly upon 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 which 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 nonirrigation 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 insignificantly affect the flows of the springs in the Milner Dam to King Hill reach of the Snake River, and will insignificantly affect the hydropower water rights owned by Idaho Power. The storage portion of application for permit no. 43-07321 can be approved if the approval is carefully conditioned.

10. The applicant proved that it diverted water from Clear Creek pursuant to water right no. 43-00286B, 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 NESE, Section 13, T16S, R27E, shall be irrigated only with water right no. 43-00286B until diversions from Clear Creek pursuant to junior water rights 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 junior water rights diverted from Clear Creek are not being curtailed. Five acres located in the NESE, Section 13, T16S, R27E may be irrigated for the entire irrigation season because approximately five acres, located in the NWE, 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 authorized.

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

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 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. 43-00286B, 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 additional acreage as a place of use than was described by the water right. These laws, known as the presumption statutes, were held to be unconstitutional by the Idaho Supreme 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 amnesty statutes were also challenged, and the district court ruled that the statutes are constitutional. The Idaho Supreme Court recently affirmed that the amnesty statutes are constitutional.

18. The adjudication claims filed have not been field verified because of the very recent affirmation by the Idaho Supreme Court that additional acres claimed can be recognized.

19. This decision does not verify the entire place of use proposed by the applicant's adjudication claims. The extent of beneficial use is only being evaluated 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 nonirrigation season proposed by application for permit no. 43-07321 is APPROVED. All other portions of application for permit no. 43-07321 are REJECTED. Because of difficulty in separating natural flow from storage water, 35 acres of the proposed place of use, located in the NESW, Section 13, T16S, R27E, cannot be irrigated with storage water, but can be irrigated with water from the reservoir only if : (1) Clear Creek water is simultaneously being delivered to the reservoir, and (2) diversions pursuant to junior water rights in Clear Creek are not being curtailed to satisfy senior water rights.

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

The storage of water under this right is contingent upon the certification of the dam and authorization of storage per the dam safety provisions of Idaho Code.

This right only authorizes an annual volume of water to fill the storage facility.

After specific notification by the department, the right holder shall install suitable measuring devices to determine the amount of water diverted and shall report the information to the department.

Proof of construction of works and application of water to beneficial use shall be submitted to the department on or before the date shown in the final order of the department.

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. 43-00286B 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, Section 13, T16S, R27E, can only be irrigated with Clear Creek water pursuant to water right no. 43-00286B until the watermaster begins regulating junior priority water rights to satisfy senior priority water rights. The 35 acres may be irrigated from the reservoir provided that: (1) Clear Creek water is simultaneously being delivered to the reservoir, and (2) diversions pursuant to junior water rights in Clear Creek are not being curtailed to satisfy senior water rights.

IT IS FURTHER ORDERED that the remaining five acres of the 40 acres located in the NESW, Section 13, T16S, R27E, will be described as a place of use for water right nos. 43-00045, 43-00286, 43-000182, 43-00414 (the last two combined into A43-10824), and will also be described as a place of use in the water right representation of adjudication 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 the remainder of the place of use proposed by the application for transfer will be recognized as proposed with the following condition:

The place of use described is the place of use proposed by the adjudication claims and has not been field verified. The place of use is subject to further limitation based on future investigations and determination in the Snake River Basin Adjudication.

IT IS FURTHER ORDERED that water right nos. 43-00045, 43-00286, 43-000182, 43-00414 and A43-10116 shall be conditioned as follows:

Use of water under this water right will be regulated by the watermaster of State Water District No. 43B.

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

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

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.

Approval of this transfer does not preclude the opportunity for review of the validity of the water right in the ongoing Snake River Basin Adjudication.

Prior to diversion of water under this approval, the right holder shall provide a means of measurement acceptable to the Department from all authorized points of diversion which will allow determination of the total rate of diversion.

The total instantaneous diversion of water from all points of diversion under transfer no. 4640 and permit no. 43-07321 shall not exceed 28.10 cfs, nor total combined annual volume of 1064.0 acre feet.

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 43-00286B, shall be limited to irrigation of not more than 266 acres.

That portion of the total diversion rate authorized under transfer no. 4640 in excess of 5.32 cfs is limited to use for conveyance losses in delivery of these rights.

Right no. 43-00045 is limited to the irrigation of 160 acres within 231 acres in the place of use described above in 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 in a single irrigation season.

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

Approval of transfer no. 4640 in no way confirms Snake River Basin Adjudication claim no. A43-10116.

Signed this 31st day of December, 1996.


GARY SPACKMAN

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 31st day of December, 1996, I mailed a true and correct copy, postage paid, of the foregoing **AMENDED RECOMMENDED 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

ATTACHMENT A

No. 43-00045
=====

WATER RIGHT PROFILE REPORT
=====

OWNER CODE	NAME & ADDRESS	PRIORITY DATE	WATER USE	USE PERIOD FROM TO	DIVERSION RATE	DIVERSION VOLUME
C	ALBION IDAHO LAND CO.	06/01/1882	IRRIGATION	00/00 00/00	1.700 CFS	

Water Source: CLEAR CREEK Tributary to: RAFT RIVER Stage: DECREED

		NE		NW		SW		SE		SUM		
T	R	S	Lt	Ac	Lt	Ac	Lt	Ac	Lt	Ac	Lt	Ac
16S	27E	13	:	:	:	:	:	:	:	:	:	:
16S	27E	24	:	:	:	:	:	:	:	:	:	:

No. A43-00045
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ADJUDICATION CLAIM PROFILE REPORT
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OWNER CODE	NAME & ADDRESS	PRIORITY DATE	WATER USE	USE PERIOD FROM TO	DIVERSION RATE	DIVERSION VOLUME
C	HERLE JONES	06/01/1882	IRRIGATION	06-01 11-01	1.70 CFS	

Water Source: CLEAR CREEK Tributary to: RAFT RIVER Stage: DECREED

Point(s) of Diversion: T16S R27E S27 SESENE CASSIA County

		NE		NW		SW		SE		SUM		
T	R	S	Lt	Ac	Lt	Ac	Lt	Ac	Lt	Ac	Lt	Ac
16S	27E	13	:	:	:	:	:	:	:	:	:	:
16S	27E	24	:	:	:	:	:	:	:	:	:	:
16S	28E	19	:	:	:	:	:	:	:	:	:	:

TOTAL ACRES : 266.0

BECAUSE THIS IS A BENEFICIAL USE CLAIM FILED IN THE ADJUDICATION,
THE ADMINISTRATIVE WATER RIGHT FILES DO NOT CONTAIN ANY DOCUMENTS RELATED TO THIS CLAIM.

No. A43-10116

ADJUDICATION CLAIM PROFILE REPORT

PAGE: 1

OWNER CODE NAME & ADDRESS PRIORITY DATE WATER USE USE PERIOD FROM TO DIVERSION RATE DIVERSION VOLUME
C MERLE JONES 12/31/1900 IRRIGATION 04-01 11-01 20.00 CFS

Water Source: RICE CREEK Tributary to: ROUND MOUNTAIN CREEK Stage: BENEFICIAL USE
ROUND MOUNTAIN CREEK CLEAR CREEK

Point(s) of Diversion: T16S R27E S13 S24 NESESE NESESE CASSIA County CASSIA County

		NE		NW		SW		SE		SUM	
T	R	S	Lt	Ac	Lt	Ac	Lt	Ac	Lt	Ac	
16S	27E	13	06	23	17	17	17	35	33	40	211.0
16S	27E	24	40								40.0
16S	28E	19									15.0
										TOTAL ACRES	266.0

No. 43-00182

DIVERSION

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STAGE: DECISION

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16S	27E	13	06	23			17																								211.0		
16S	27E	24	40																												40.0		
16S	28E	19																													15.0		
									01-15																		TOTAL ACRES						266.0

No. 43-02061

WATER RIGHT PROFILE REPORT

OWNER
CODE
NAME & ADDRESS
C JAMES MATHEWS
PRIORITY
DATE
01/19/1910
WATER USE
IRRIGATION
USE PERIOD
FROM
00/00 00/00
TO
0.160 CFS
DIVERSION
RATE
DIVERSION
VOLUME

Water Source: SPRINGS

Tributary to: ROUND MOUNTAIN CREEK

Stage: LICENSE

Point(s) of Diversion:

T16S R27E S13 NESE

CASSIA County

NE NESE NW NESE SE
NENE NENE SWNE SENE : NENE NWNW SWNW SESW : NENE NWSE SWSE SESE :
T R S : Lt Ac Lt Ac Lt Ac : Lt Ac Lt Ac Lt Ac : Lt Ac Lt Ac Lt Ac : SUM
16S 27E 13 : 17 : : : 13 : 30.0
TOTAL ACRES : 30.0

No. A43-02061

ADJUDICATION CLAIM PROFILE REPORT

OWNER
CODE
NAME & ADDRESS
C MERLE JONES
PRIORITY
DATE
01/19/1910
WATER USE
IRRIGATION
USE PERIOD
FROM
04-01 11-01
TO
0.16 CFS
DIVERSION
RATE
DIVERSION
VOLUME

Water Source: SPRINGS

Tributary to: ROUND MOUNTAIN CREEK

Stage: LICENSE

Point(s) of Diversion:

T16S R27E S13 NESE

CASSIA County

NE NESE NW NESE SE
NENE NENE SWNE SENE : NENE NWNW SWNW SESW : NENE NWSE SWSE SESE :
T R S : Lt Ac Lt Ac Lt Ac : Lt Ac Lt Ac Lt Ac : Lt Ac Lt Ac Lt Ac : SUM
16S 27E 13 : 17 : : : 13 : 30.0
TOTAL ACRES : 30.0

WATER RIGHT PROFILE REPORT

Stage: LICENSE

Tributary to: SINKS

Water Source: SPRING

CASSIA County

MSHS

T16S R28E S18

Point(s) of Diversion:

[illegible]

ADJUDICATION CLAIM PROFILE REPORT

Stage: LICENSE

Tributary to: ROUND MOUNTAIN CREEK

Water Source: ROUND MOUNTAIN SPRING

CASSIA County

MSMSMS

T16S R28E S18

Point(s) of Diversion:

		NE				NW				SW				SE						
T	R	S	NENE	NNE	NWNE	SNE	SENE	NENW	NNW	SWNW	SESW	NESW	NWSW	SWSW	SESW	NENE	NWSE	SWSE		
---	---	---	Lt	Ac	Lt	Ac	Lt	Ac	Lt	Ac	Lt	Ac	Lt	Ac	Lt	Ac	Lt	Ac		
16S	27E	13	---	---	---	---	16	---	---	---	---	---	---	---	---	---	---	---		
																			35	
																			TOTAL ACRES	
																			51.0	



State of Idaho

DEPARTMENT OF WATER RESOURCES

1301 North Orchard Street, Statehouse Mail, Boise, Idaho 83720-9000

Phone: (208) 327-7900 FAX: (208) 327-7866

OCT 21 1996

Department of Water Resources

October 17, 1996

PHILIP E. BATT
GOVERNOR

KARL J. DREHER
DIRECTOR

RE: In the matter of Application for Permit No. 43-07321 and Transfer No. 4640 in the name of Round Mountain Ranch

Dear Interested Party:

The accompanying order is a "**recommended order**" issued by the department pursuant to Section 67-5243, Idaho Code. The provisions of this order will not become effective until the Director issues a final order in this matter.

Each party to these proceedings who appeared at the hearing may file a petition for reconsideration, briefs and exceptions to the recommended order and may request oral argument before the Director of the department as further described below:

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a recommended order with the hearing officer issuing the order within fourteen (14) days of the service date of the order. The hearing officer will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See Section 67-5243(3), Idaho Code.

EXCEPTIONS AND BRIEFS

Within twenty-one (21) days after (a) the service date of this recommended order, (b) the service date of a denial of a petition for reconsideration from this recommended order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this recommended order, any party may in writing support or take exceptions to any part of a recommended order and may file briefs in support of the party's position on any issue in the proceeding. Written briefs in support of or taking exceptions to the recommended order shall be filed with the Director. Opposing parties shall have twenty-one (21) days to respond.

ORAL ARGUMENT

The Director may schedule oral argument in the matter before issuing a final order. Oral argument on exceptions to a recommended order shall be heard at the discretion of the Director. If oral arguments are to be heard, the Director will, within a reasonable time, notify each party of the place, date and hour for the argument of the case. Unless the Director orders otherwise, all oral arguments will be heard in Boise, Idaho.

CERTIFICATE OF SERVICE

All exceptions, briefs, requests for oral argument and any other matters filed with the Director in connection with the recommended order shall be served on all other parties to these proceedings in accordance with Rules of Procedure 302 and 303.

FINAL ORDER

The Director will issue a final order within fifty-six (56) days of receipt of the written briefs, oral argument or response to briefs, whichever is later, unless waived by the parties or for good cause shown. The agency may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order. The department will serve a copy of the final order on all parties of record.

APPEAL OF FINAL ORDER TO DISTRICT COURT

A party aggrieved by a final order of the Director is entitled to judicial review in compliance with sections 67-5271 through 67-5279, Idaho Code.

Sincerely,

A handwritten signature in black ink, appearing to read "L. Glen Saxton", is written over the printed name.

L. GLEN SAXTON
Chief, Water Allocation Bureau

Enclosure

cc: IDWR - Region

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE
STATE OF IDAHO**

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

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. The hearing officer recommends 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 NWNESE¹ and NENWSE, Section 13, T16S, R27E, B.M.² The applicant proposes diversion to storage of 1.0 cubic feet per second (cfs) for year-round storage and 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, NENW	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

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

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

DESCRIPTION	ACRES
T16S, R27E, Section 13, SWSE	40
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, 43-00286B, 43-00182 and 43-00414 (the last two combined into adjudication claim no. A43-10824). The water rights, as recorded, and the corresponding 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. The 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, Section 13, T16S, R27E, to 40 acres in the NESW, Section 13, T16S, R27E. The application for transfer also proposes changes in the period of use and nature of use of the rights.

6. The following is a comparison of the water rights and the adjudication claims:

WATER RIGHTS

43-00045

- Authorizes irrigation of, at most, 160 acres
- Does not authorize irrigation of 40 acres from which water is proposed to be moved.

43-00286

- Does not authorize irrigation of any land in the NENE or SENE of Section 13, T16S, R27E, or any land in Section 19, T16S, R28E.

43-00182 & 43-00414

- Authorize diversion from Round Mountain Creek.
- Authorize irrigation of, at most, 320 acres.
- Authorize irrigation of the parcels from which water is sought to be transferred.

43-02061

- Authorizes irrigation of 30 acres from springs.

43-02110

- Authorizes irrigation of 51 acres from a spring.

ADJUDICATION CLAIMS

A43-00045

- Claims right to irrigate 266 acres
- Claims 40 acres irrigated from which water is proposed to be moved.

A43-00286B

- Claims six acres in the NENE, 17 acres in the SENE, Section 13, T16S, R27E, and 15 acres in the NWNW, Section 19, T16S, R28E.

A43-10824

- Combination of rights 43-00182 & 43-00414.
- Asserts right to divert from Round Mountain Creek and Round Mountain Spring.
- Claims place of use of 266 acres.
- Claims 40 acres of irrigation from which water is proposed to be transferred.

A43-02061

- Claims irrigation of 30 acres from springs.

A43-02110

- Claims irrigation of 51 acres from Round Mountain Spring.

7. 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.

8. On February 21 and 22, 1995, the department conducted a hearing. The applicant was represented by Roger Ling. The protestants were represented by Pat Brown.

9. 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 would diminish the quantities of water available for diversion pursuant to their water rights.

10. 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 mountain called Round Mountain located east of the ranch.

11. Round Mountain Creek has eroded a defined channel both upstream and downstream of Round Mountain Ranch. There is no defined channel of Round Mountain Creek within Round Mountain Ranch, although water can flow in a low place in the direction of the Round Mountain Creek channel.

12. 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.

13. 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.

14. Merle Jones, a prior owner of Round Mountain Ranch, constructed a pipeline which 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 which heads near the spring was later constructed to capture spring water. The pipeline extends northwesterly toward the reservoir.

15. 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.

16. The boggy area was difficult to farm. During the mid-1960's, Merle Jones constructed an east-west tile drain which 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.

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

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

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

20. 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.

21. 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.

22. Jeff Sessions is the principal owner of Round Mountain Ranch. Sessions acquired the ranch in December of 1992. After the acquisition of 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 water at its present location.

23. 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.

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

25. Sessions determined that he could better manage his irrigation water by building a dam and pond near the location of the old dam and by abandoning the storage tank. Sessions built

a pond of 20 to 30 acre-feet capacity in late 1993. The pond location is depicted on applicant's exhibit no. 6. The pond captures discharge from Round Mountain Spring and also from the tile drain.

26. The adjudication claims filed by Merle Jones assert the right to irrigate 266 acres within the boundaries of Round Mountain Ranch. Testimony established that, while all 266 acres may have been irrigated simultaneously for a short period during spring runoff, there is insufficient water during the entire irrigation season to irrigate the full 266 acres.

27. 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, Section 13, T16S, R27E and are the parcels from which water is sought to be transferred.

28. Applicant's exhibit no. 6 outlines lands that may have been irrigated within the NWNE and the NENW of Section 13. The map depicts 23 acres of land in the NENW of Section 13 and 17 acres of land in the NWNE of Section 13, all within T16S, R27E.

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

30. The lands growing wheatgrass, sagebrush, and other range growth were only irrigated occasionally in the spring during periods of high run off. The water that irrigated these parcels was either Clear Creek water or waste water from upstream users during high water flows. Only the lands growing alfalfa hay and grain were irrigated regularly.

31. The protestants proved that there is no record of Clear Creek water having been delivered by the watermaster to Round Mountain Ranch pursuant to water right no. 43-00286. Applicants proved that water right no. 43-00286 is a high water right that can only be delivered at times when the watermaster would not be regulating diversions. The applicants also proved that when Clear Creek is flowing at flood stage, the applicant and its predecessors diverted large flow rates from the Clear Creek.

32. Water was diverted from the tile drain into the reservoir 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.

33. Jeff 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 Jeff Sessions' house.

34. Jeff 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.

35. 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.

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

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

38. 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 which was built in the southeast corner of Kelso Ranch.

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

40. 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 Round Mountain Ranch is underlaid by an impervious clay layer which extends to approximately the north end of the 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.

41. 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 Springs Ranch, are an expression of ground water underflow.

42. 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, prepared by Shane Bendixsen, July 1994, states that "surface and ground water are so interrelated in the area that one cannot be effected (sic) without affecting the other."

43. Based on the open file report, the testimony of Charles Brockway, and the many witnesses who testified regarding springs which arose in the Round Mountain Creek channel above the Kelso Ranch and below Round Mountain Ranch, the hearing officer finds that shallow ground water and the flows of Round Mountain Spring are related to the deeper ground water resources of the Raft River Basin.

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

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

46. The tile drain is located within 100 feet of the Round Mountain Spring and could affect spring flows in Round Mountain Spring.

47. The application for transfer proposes to change the place of use to 40 acres in the NESE, 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.

48. Surface water which percolates into the ground water, under flow of ground water, flood water, and flows of Round Mountain Spring are commingled in the reservoir. By storing water in the reservoir, the applicant can more efficiently operate its irrigation system.

49. 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 face of the dam, which probably prevents the movement of some ground water down gradient. The ground water captured is probably insignificant, however.

50. On April 30, 1993, the department issued a moratorium order prohibiting the further appropriation of ground water or surface water for consumptive purposes which 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.

51. Diversion and beneficial use of additional water to lands not previously irrigated proposed by the application for permit will affect the availability of water to other 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 ability of 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 stream in this state, which is located or situated wholly or entirely upon the lands of a 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 prevents the intrusion or trespass of prospective water users on the land of another to divert surface water wholly contained on the landowner's property. The section 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 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 additional 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 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 flow from the spring is not located wholly upon 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 which 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 nonirrigation 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 insignificantly affect the flows of the springs in the Milner Dam to King Hill reach of the Snake River, and will insignificantly affect the hydropower water rights owned by Idaho Power. The storage portion of application for permit no. 43-07321 can be approved if the approval is carefully conditioned.

10. Application for transfer no. 4640 can be approved with a condition that 35 acres of the proposed place of use in the NESE, Section 13, T16S, R27E, shall be irrigated only with water right no. 43-00286B until diversions from Clear Creek pursuant to junior water rights must be curtailed to satisfy senior water rights. Five acres located in the NESE, Section 13, T16S, R27E may be irrigated for the entire irrigation season because approximately five acres, located in the NWNE, Section 13, T16S, R27E, were consistently irrigated with some of the base flows previously diverted by the applicant.

11. To the extent water can be diverted to the pond 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 authorized.

12. The application for transfer did not propose any change in water right nos. 43-02061 and 43-02110. Water right no. 43-02061 authorized diversion of water from the same source as the

tile drain is extracting water from. The department will also allow temporary retention of water in the reservoir of water pursuant to these rights for management purposes.

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

14. Idaho Code § 42-222 (2) states:

All rights to the use of water acquired under this chapter or otherwise shall be lost and forfeited by a failure for the term of five (5) years to apply it to the beneficial use for which it was appropriated

15. Forfeiture of the portion of water right no. 43-00286 originally appurtenant to Round Mountain Ranch was not proven by clear and convincing evidence.

16. The applicant's adjudication claims were filed pursuant to Idaho Code § 42-1416 and § 42-1416A, which allowed water users to claim additional acreage as a place of use than was described by the water right. These laws, known as the presumption statutes, were held to be unconstitutional by the Idaho Supreme 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 amnesty statutes were also challenged, and the district court ruled that the statutes are constitutional. The Idaho Supreme Court recently affirmed that the amnesty statutes are constitutional.

17. The adjudication claims filed have not been field verified because of the very recent affirmation by the Idaho Supreme Court that additional acres claimed can be recognized.

18. This decision does not verify the entire place of use proposed by the applicant's adjudication claims. The extent of beneficial use is only being evaluated 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 nonirrigation season proposed by application for permit no. 43-07321 is APPROVED. All other portions of application for permit no. 43-07321 are REJECTED. Because of difficulty in separating natural flow from storage water, 35 acres of the proposed place of use, located in the NESW, Section 13, T16S, R27E, cannot be irrigated with storage water, but can only be irrigated during the period of time when Clear Creek water is deliverable pursuant to water right no. 43-00286B. Irrigation of the 35 acres must cease when delivery to junior water rights in Clear Creek must be curtailed to satisfy senior water rights.

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

The storage of water under this right is contingent upon the certification of the dam and authorization of storage per the dam safety provisions of the Idaho Code.

This right only authorizes an annual volume of water to fill the storage facility.

After specific notification by the department, the right holder shall install suitable measuring devices to determine the amount of water diverted and shall report the information to the department.

Proof of construction of works and application of water to beneficial use shall be submitted to the department on or before the date shown in the final order of the department.

IT IS FURTHER ORDERED that application for transfer no. 4640 is PARTIALLY APPROVED to allow storage during the nonirrigation season and 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, Section 13, T16S, R27E, can only be irrigated with a portion of water right no. 43-00286. Irrigation of the 35 acres is not permitted when diversion from Clear Creek to junior water rights must be curtailed to satisfy senior water rights.

IT IS FURTHER ORDERED that the remaining five acres of the 40 acres located in the NESW, Section 13, T16S, R27E, will be described as a place of use for water right nos. 43-00045, 43-00286, 43-000182, 43-00414 (the last two combined into A43-10824), and will also be described as a place of use in the water right representation of adjudication 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 the remainder of the place of use proposed by the application for transfer will be recognized as proposed with the following condition:

The place of use described is the place of use proposed by the adjudication claims and has not been field verified. The place of use is subject to further limitation based on future investigations and determination in the Snake River Basin Adjudication.

IT IS FURTHER ORDERED that water right nos. 43-00045, 43-00286, 43-000182, 43-00414 and A43-10116 shall be conditioned as follows:

Use of water under this water right will be regulated by the watermaster of State Water District No. 43B.

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

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

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.

Approval of this transfer does not preclude the opportunity for review of the validity of the water right in the ongoing Snake River Basin Adjudication.

Prior to diversion of water under this approval, the right holder shall provide a means of measurement acceptable to the Department from all authorized points of diversion which will allow determination of the total rate of diversion.

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

Right nos. 43-00045, 43-00182, and 43-00414 when combined shall not exceed the total combined irrigation of 231 acres, and when combined with right no. 43-00286B and claim no. A43-10116 shall not exceed a total combined annual diversion volume of 924.0 acre feet.

That portion of the total diversion rate authorized under transfer no. 4640 in excess of 5.32 cfs is limited to use for conveyance losses in delivery of these rights.

Right no. 43-00045 is limited to the irrigation of 160 acres within 231 acres in the place of use described above in 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 in a single irrigation season.

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

Approval of transfer no. 4640 in no way confirms Snake River Basin Adjudication claim no. A43-10116.

ATTACHMENT A

No. 43-00045

WATER RIGHT PROFILE REPORT

OWNER CODE	NAME & ADDRESS	PRIORITY DATE	WATER USE	USE PERIOD FROM TO	DIVERSION RATE	DIVERSION VOLUME
C	ALBION IDAHO LAND CO.	06/01/1882	IRRIGATION	00/00 00/00	1.700 CFS	

Water Source: CLEAR CREEK

Tributary to: RAFT RIVER

Stage: DECREED

OWNER CODE	NAME & ADDRESS	PRIORITY DATE	WATER USE	USE PERIOD FROM TO	DIVERSION RATE	DIVERSION VOLUME
T	R S : Lt Ac Lt Ac Lt Ac Lt Ac					
16S 27E 13 :						
16S 27E 24 :						

No. A43-00045

ADJUDICATION CLAIM PROFILE REPORT

OWNER CODE	NAME & ADDRESS	PRIORITY DATE	WATER USE	USE PERIOD FROM TO	DIVERSION RATE	DIVERSION VOLUME
C	MERLE JONES	06/01/1882	IRRIGATION	04-01 11-01	1.70 CFS	

Water Source: CLEAR CREEK

Tributary to: RAFT RIVER

Stage: DECREED

Point(s) of Diversion:

T16S R27E S27

SESENE

CASSIA County

OWNER CODE	NAME & ADDRESS	PRIORITY DATE	WATER USE	USE PERIOD FROM TO	DIVERSION RATE	DIVERSION VOLUME
T	R S : Lt Ac Lt Ac Lt Ac Lt Ac					
16S 27E 13 :						
16S 27E 24 :						
16S 28E 19 :						

TOTAL ACRES

266.0

DIVERSION RATE **DIVERSION VOLUME**

Stage: DECREED

Mo. A43-00286B

ADJUDICATION CLAIM PROFILE REPORT

DIVERSION RATE DIVERSION VOLUME

Stage: DECREED

		NE				NW				SW				SE				
T	R S	NENE	NENE	SHNE	SENE	NENW	NENW	SWNW	SENW	NESW	NWSW	SWSW	SESW	NESE	NWSE	SWSE	SESE	SUM
16S	27E 13	06	23	17	17									35	33	40	40	211.0
16S	27E 24	40																40.0
16S	28E 19					01-15												15.0
																		TOTAL ACRES
																		266.0

PAGE: 1

DIVERSION
VOLUME

20.00 CFS

Stage: BENEFICIAL USE

CASSIA County
CASSIA County

15.0
266.0

No. 43-00182

WATER RIGHT PROFILE REPORT

OWNER CODE	NAME & ADDRESS	PRIORITY DATE	WATER USE	USE PERIOD FROM TO	DIVERSION RATE	DIVERSION VOLUME
C	DAVID V. JONES	02/17/1912	IRRIGATION	00/00 00/00	1.500 CFS	

Water Source: ROUND MOUNTAIN CREEK

Tributary to: CLEAR CREEK

Stage: DECREED

OWNER CODE	NAME & ADDRESS	PRIORITY DATE	WATER USE	USE PERIOD FROM TO	DIVERSION RATE	DIVERSION VOLUME
T	R S : Lt Ac Lt Ac Lt Ac Lt Ac					
16S 27E 12 :						
16S 27E 13 :						

No. 43-00414

WATER RIGHT PROFILE REPORT

OWNER CODE	NAME & ADDRESS	PRIORITY DATE	WATER USE	USE PERIOD FROM TO	DIVERSION RATE	DIVERSION VOLUME
C	JOHN LITHGO	04/01/1909	IRRIGATION	00/00 00/00	0.600 CFS	

Water Source: ROUND MOUNTAIN CREEK

Tributary to: CLEAR CREEK

Stage: DECREED

OWNER CODE	NAME & ADDRESS	PRIORITY DATE	WATER USE	USE PERIOD FROM TO	DIVERSION RATE	DIVERSION VOLUME
T	R S : Lt Ac Lt Ac Lt Ac Lt Ac					
16S 27E 12 :						
16S 27E 13 :						

No. A43-10824

ADJUDICATION CLAIM PROFILE REPORT

OWNER CODE	NAME & ADDRESS	PRIORITY DATE	WATER USE	USE PERIOD FROM TO	DIVERSION RATE	DIVERSION VOLUME
C	MERLE JONES	02/17/1912	IRRIGATION	04-01 11-01	2.10 CFS	
			STOCKWATER	01-01 12-31	0.04 CFS	

TOTAL DIVERSION: 2.10 CFS

Water Source: ROUND MOUNTAIN CREEK
ROUND MOUNTAIN SPRINGTributary to: CLEAR CREEK
ROUND MOUNTAIN CREEK

Stage: DECREED

Point(s) of Diversion: T16S R27E S13 SENESE
R28E S18 Lot04(SHSWSW) MESESE
CASSIA County
CASSIA County

OWNER CODE	NAME & ADDRESS	PRIORITY DATE	WATER USE	USE PERIOD FROM TO	DIVERSION RATE	DIVERSION VOLUME
T	R S : Lt Ac Lt Ac Lt Ac Lt Ac					
16S 27E 13 :						
16S 27E 24 :						
16S 28E 19 :						

TOTAL ACRES

266.0

WATER BUILT PROFILE REPORT

OWNER	CODE	NAME & ADDRESS
1	1	1
2	2	2
3	3	3
4	4	4
5	5	5
6	6	6
7	7	7
8	8	8
9	9	9
10	10	10
11	11	11
12	12	12
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93	93	93
94	94	94
95	95	95
96	96	96
97	97	97
98	98	98
99	99	99
100	100	100

PRIORITY

USE PERIOD

DIVERSION DIVERSION

DIVERSION

0 160 REC

STAGE 1 REFERENCE

CASSIA County

2

[illegible]

SUM

TOTAL ACRES

30-0

ADJUDICATION CLAIM PROFILE REPORT

PRIORITY

USE PERIOD

DIVERSION

DIVERSION

01/19/1910 IRRIGATION

06-01 11-01

0 16 ccc

Tributary to: ROUND MOUNTAIN CREEK

STAGE 1: IDENTIFY

1165 B27E S13

MECE

CASSIA County

References

三

2

	SUM		SE									
:	MESH	MASH	SMH	SEM	: MESH	MUSE	SMSE	SESE	:		SUM	
:	Lt	Ac	Lt	Ac	Lt	Ac	Lt	Ac	Lt	Ac	Lt	Ac

SUM

10

TOTAL ARBEC

30.0

Signed this 15th day of October, 1996.


GARY SPACKMAN

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 17th day of October, 1996, I mailed a true and correct copy, postage paid, of the foregoing **RECOMMENDED ORDER** to the following:

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

Roger Ling, Esq.
LING, NIELSEN & ROBINSON
615 H. Street
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Rupert, ID 83350

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Patrick D. Brown
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HOHNHORST
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Twin Falls, ID 83303-0389


JULIE L. YARBROUGH
Senior Secretary