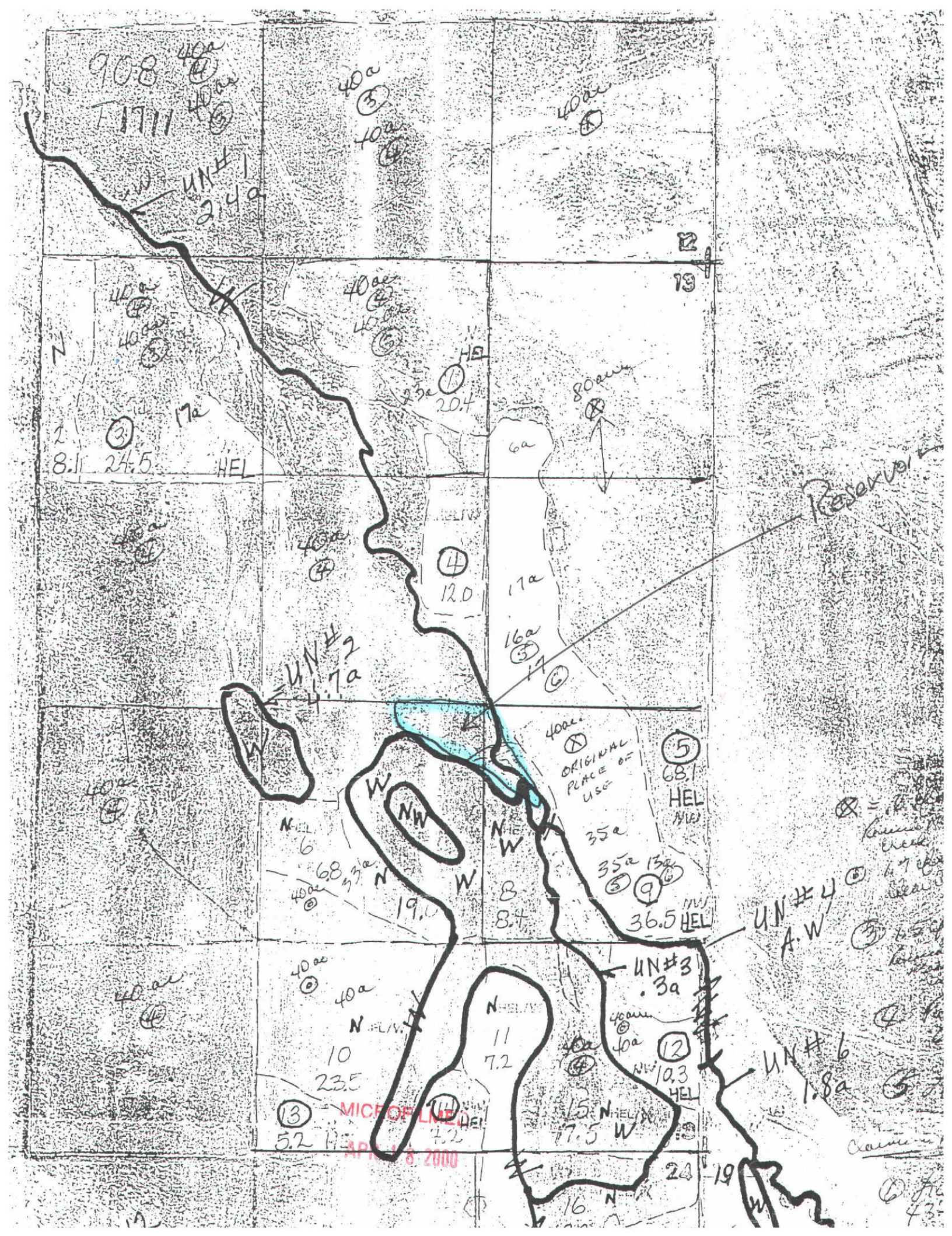

90.8
F1711
UN #1
2.4a
40a
HEL
20.4
80acres
6a
Reservoir
UN #2
1.7a
ORIGINAL PLACE OF USE
68.1
HEL
35a
36.5
HEL
UN #4
A.W
UN #3
.3a
1.8a
UN #6
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A: Yes.

Q: And did it travel in the Round Mountain Creek channel below the house?

A: Yes.

Q: And it would travel down to where the present reservoir is?

A: Yes.

Q: When water would flow off the north end of the Round Mountain property, where would it go?

A: It would go down this Round Mountain Creek channel.

Q: Okay, do you know where it would go once it got into the channel?

A: If there was enough it would go to the Harold Jones place.

Q: Did you ever observe it flow down to the Harold Jones place?

A: Yes.

Q: I have no more questions, thank you.

MR. SPACKMAN: Mr. Ling, redirect?

MR. LING: Yes.

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REDIRECT EXAMINATION BY MR. LING:

Q: Yeah, Mr. Jones, when you observed flows that got to the Harold Jones place, was that when there was water coming ah, from a melt into Round Mountain Creek?

A: It would be that and then maybe high water years, possibly like last year when there's a high water flow from maybe Clear Creek and all different sources, it would be quite a bit of water in the channel.

Q: No further questions.

MR. SPACKMAN: Mr. Brown, further questions? Mr. Jones, just a minute.

MR. BROWN: I actually have --

MR. SPACKMAN: Not that easy to get away.

RECROSS EXAMINATION BY MR. BROWN:

Q: You referred in your testimony to Clear Creek water being used on Round Mountain Ranch, correct?

A: Yes.

Q: And you referred -- you said there was a right that was used, correct?

A: Yes.

Q: And what was the quantity of that right to cfs?

A: Ah, 85 inches.

Q: Okay. Is that the only Clear Creek right you used on the property?

A: There were additional water on the high years

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MR. LING: I'm going to object to reference of the right and left. If counsel wants to provide him a copy so he can look at it, I don't think anybody should have to be able to respond to a document without looking at it.

MR. SPACKMAN: Are we not looking at the application for transfer itself?

MR. LING: Yes -- no, he asked for if he's aware of the right number and gave the right number and I think that is a document such as a decree that he's entitled to look at it.

MR. BROWN: If he doesn't know, he can simply state so.

A: I do not know what it is.

MR. SPACKMAN: Yeah, I -- well, let me -- you've answered the question, I guess, but I think I'd overrule the objection. And I'm late, but go on. I think, Mr. Brown, you got the answer that you prompted him for so --

Q: Okay. 286B, looking at your application, is a right claim to be for 4.3 cfs, correct?

A: That's what it says here.

Q: And that right is claimed to be for 4.3 cfs out of a decree to Settler's Land and Livestock for 60 cfs, correct?

A: I'm not aware -- I do not know the facts on that.

Q: If you've got -- may I approach the witness?

MR. SPACKMAN: Yes.

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Q: If we could look back several pages in the Application for Amended Transfer, I guess it would be --

MR. SPACKMAN: I think I show page 5 of 12, is that what you're looking at?

MR. BROWN: I counted six. It is the page which says Application for Transfer, part 2 and the right is 286 is written in the first paragraph, correct.

A: Correct.

Q: (inaudible) -- understand that refers to what is on the front page of your transfer application and labeled right 286B, correct?

A: Correct.

Q: And that water, it says in your application that that water was decreed to Settler's Land and Water Co., correct?

A: That's what it says here.

Q: By 1928 court decree called *Albion Land and Cattle v. Job Adams, et al.*

A: It says Settler's Land and Water, yeah.

Q: What's the source of that water right?

A: Have no idea.

Q: Look down the page to number 3.

A: Clear Creek. Clear Creek water source.

Q: You ever use 4.3 cfs diverted out of Clear Creek under this right on Round Mountain Ranch?

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should give me more water.

Q: Would your ditch, or ditches, that bring water from Clear Creek to Round Mountain Ranch hold 4.3 cfs of water?

A: I do not believe it could.

Q: And certainly you don't believe it could hold the 4.3 plus the 1.7?

A: I don't think.

Q: Have you ever used, to your knowledge, any part of the right which is on your application and labeled as 286B on Round Mountain Ranch?

A: Not that I'm aware of.

Q: Has the water master ever delivered that water into a ditch for you to your knowledge?

A: Not that I'm aware of.

Q: You ever paid an assessment for delivery of that right to your knowledge?

A: Not that I'm aware of.

Q: And water users who take water from Clear Creek in that area generally pay assessments for delivery of their right by the water master, correct?

A: Correct.

Q: You would look at -- may I approach the witness?

MR. SPACKMAN: Yes. By the way, Mr. Brown, I'm not -- we have to be a little more informal, I don't have a bailiff to deliver these things, so I appreciate you and Mr. Ling doing

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top of page part 2 in item number 10 states, to your knowledge has any portion of this water right undergone a period of five or more consecutive years of non-use? Do you see where I'm referring?

A: I do.

Q: How did you respond to that question?

A: I wrote no. But when I wrote that application, I hadn't been around for five years.

Q: You thought you had used it when you wrote this application?

A: Well, no, as far as I knew it hadn't went a five year period without being used. I don't know when the period of use was.

Q: You understand that Mr. -- you don't dispute Mr. Merle Jones' testimony that he --

A: Right.

Q: -- only used one water right from Clear Creek and that was a right to 85 inches?

A: I don't dispute that.

Q: Let me have you look at the front page of the transfer application again. There is a water right in section B numbered 10824, do you see which right I'm referring to?

A: I do.

Q: That right is described to be in the amount of 2.1 cfs, correct?

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17th, you were able to continue to irrigate by utilizing water out of the reservoir?

A: Of course I was. I didn't drain it in 2 days.

Q: You testified earlier that 1995 you had all kinds of water coming on to your property from the south from waste water above you, correct?

A: Correct.

Q: Where was that water coming from?

A: From down -- I would have to say the -- the wash that gathers water from -- from properties more to the southwest of my property.

Q: Properties to the southwest of your property. Do you know who owns any of those properties?

A: Yeah, there's a lot of people that own it. Steve Hollengrain owns a lot, Larry Kempton owns a lot and probably Marv Keigler and Steve Scowfield own some up towards the canyon.

Q: Do you know who was using water which was wasting off their property and flowing down to Round Mountain Ranch?

A: I know who was using water?

Q: Yes.

A: Flowing off from where?

Q: The property to the southwest.

A: I'm sure everybody that it flowed on to probably used it. It come down to me even though I didn't want it, I --

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I was stuck with it. It flowed across me.

Q: Do you know who was wasting -- or was having waste water run off their property?

A: I know who couldn't contain it and he let it flow.

Q: Was Larry Kempton using water that was wasting off his property during the summer of 1995?

A: I'm sure he was using it and what he couldn't contain or couldn't use it was flowing off his property.

Q: Isn't it true that you know he was using it?

A: Well, it's his water, he should of had a right to use it.

Q: Do you know whether he had a right to use it?

A: No.

Q: Do you know how big the flows he was using were?

MR. LING: Your Honor, I'm going to object to this is outside of the scope of any direction and the use by Larry Kempton is not within the scope of this proceeding.

MR. BROWN: It's directly relevant to the testimony that will be upcoming. Mr. Chapman is an expert who testified that the water doesn't flow from Clear Creek to Round Mountain Ranch (inaudible).

MR. SPACKMAN: Well, it clearly, I think it is beyond the scope of direct examination. It's an issue that I failed to discuss with the attorneys and that is ah, (inaudible) limit

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Mr. Sessions' testimony to only those matters which have been raised in direct examination, but I suppose Mr. Brown has the opportunity to recall Mr. Sessions during those particular matters to light and develop a case, and I can, I guess I can rule either way. It seems to me to be more efficient once he's here to have him testify regarding these matters, but sometimes that may dilute your presentation of information, Mr. Ling, so --

MR. LING: But I -- I'll withdraw -- in an interest in economy that is, I'll withdraw that objection as far as not being on direct, but it is not relevant to the issues on this case. Ah, there is no indication that -- that the testimony of somebody's use of water from Clear Creek proves that the water from Clear Creek flows on to the Round Mountain Ranch. I mean that is, obviously, we know we irrigate with Clear Creek water and I don't think that is what anybody's ever testified to, so, I think, for the record we ought to know there's a civil case pending between the protestants and this applicant and other water users of Clear Creek. And to me this is getting into a discovery of that case and has nothing to do with the application in this case. If there's some relevancy, ah, certainly there's no relevancy as it's going to be evidence to dispute or contradict something that Mr. Chapman might say. He hasn't even testified yet in this case. He -- they took his deposition as to what he knew, but that doesn't mean that's

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testimony in this case.

MR. SPACKMAN: Mr. Brown, I'll allow you to just speak, then I'll rule on the objection.

MR. BROWN: It -- one of the issues in this case raised by the applicants is a claim of private water. In order to make a claim of private water, my understanding is not only do you have to show it's private, but you have to be able to separate it from other water. You have to be able to identify that portion which is private. It's perfectly relevant to talk about where all the water on the property is coming from. Secondly, Mr. Chapman, in his deposition, testified that the sources of the flow from the Clear Creek area, in his opinion, would not ah, go eastward to Round Mountain Ranch. And I think this -- this is directly goes to where waters coming from and how it gets to Round Mountain Ranch and whether it's private or not.

MR. SPACKMAN: Well, I struggle with the question of relevancy. Ah, I think the witness has testified that there is waste water that comes onto his property and he's testified generally where that water comes from and, Mr. Brown, I guess I don't know how much more testimony Mr. Sessions needs to give regarding the waste water and from whose property that waste water is coming. I -- I'll allow you to question a little more, but I want to limit how much of that we'd get into, because I think we need to move along and I think then your

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subsequent witnesss, if they differ with Mr. Sessions, and point out those differences. But I don't know how important it is for Mr. Sessions to testify who has water rights and what that quantity is and I just question the relevance at all of that coming from Mr. Sessions. So you may proceed and I'll -- I'll keep in mind your objection, Mr. Ling, and I think we will limit the ah, the questioning (inaudible) on that subject. Go forward if you will, Mr. Brown.

MR. BROWN: Okay, so you indicated that you thought water was coming from land owned by Larry Kempton, correct?

A: (no audible response).

Q: And that land, do you know -- does that water that gets to Mr. Kempton's land come from Clear Creek?

A: He's got water out of Clear Creek and Rice Canyon and springs off his own property.

Q: Okay, when you saw water flowing to your property, do you know whether it was coming from Rice Creek or from Clear Creek?

A: I don't, but I know what happened. He had a diversion break and there was so much water coming down out of all the sources that he couldn't control it and so it came to me and I couldn't control it and it was just there.

Q: Do you know how much water flowed on to your property, or how long it flowed?

A: I wouldn't guess on the amount 'cause I'd just be

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run-off in '94? I mean, how many days did that last, or months?

A: If I remember right, that flood was maybe 10 hours. 10, 12 hours.

Q: And ah, from your experience, is that the normal duration of large run-offs out of Round Mountain Creek and Rice Creek?

A: That was the largest I've seen. Most amount of water and probably the longest amount of time.

Q: Do you occasionally get flood waters that are flowing in Clear Creek and allowed to bring those to your property for irrigation?

A: Ask the question again?

Q: Are you allowed to receive Clear Creek water considered as flood waters, in other words, unregulated waters?

A: When the Clear Creek channel gets so high, from my experience, they -- all the decrees are filled and they have allowed water to go, if you can take it in your ditch or you can handle it you're allowed to take whatever you can take.

Q: You were asked a question about assessments from Clear Creek deliveries. Are you charged assessments when you're receiving flood waters?

A: I'm -- not that I'm aware of.

Q: So if you receive flood waters assessments you might have paid -- would not show up because it's an

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come in the spring or maybe even earlier than that from Round Mountain Creek ah, and if that water were to get into your reservoir and fill it, where would your water from your drain tile go after the reservoir is full?

A: Ah, with the overflow and down the Round Mountain channel.

Q: So if you used flood waters and that got into a reservoir that wasn't full and filled it, you would -- there would be that much more of your waste water from your drain it would go downstream?

MR. BROWN: I object. He's continuing to lead the witness and continuing to ask the witness to speculate. Not about what's happened, but what about what could happen some time in the future.

MR. SPACKMAN: I don't have a problem with the questions, Mr. Brown. Overruled and continue.

Q: Are you aware of whether or not 4.3 cfs has been available from Clear Creek since you've been on Round Mountain Ranch?

A: I wasn't aware of that water right until this protest stuff was brought up and we went to the Water Resources and somehow it got brought up in that, in them findings.

Q: But for the questions is, have you ever received it?

A: Not that I'm aware of.

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Q: Is it possible for you to divert Clear Creek water and receive it on Round Mountain Ranch without bringing it through your ditch?

A: It is not.

Q: Have you ever measured the capacity of your ditch?

A: Ah, no, but I have been told that --

Q: Well, I just -- you have not measured it?

A: I haven't.

Q: Did you receive more than 4.3 cfs flows that came down from, you indicated the Kempton diversion of Clear Creek water?

A: I -- the channel it came down was the Rice Creek channel and where the water came from, I have no idea. But as far as the amount of water it was a large stream, but I have no idea what it would have been.

Q: I think you testified that it -- you believe it came from Clear Creek or that area?

A: Well, it come down the Rice Creek channel, but Clear Creek water could have dumped in it up higher, I'm not sure.

Q: My question is, did that come down your ditch then?

A: It come down the Rice Creek channel and just dumped in my fields, there's no ditch it just dumped --

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STEVE SUNBERG:

Q: Mr. Sunberg, where do you live?

A: (inaudible), Utah.

Q: Which is where?

A: 25 miles south of Malta.

Q: You live essentially by the town of Naf?

A: Yes.

Q: On the map? Okay. So you live just to the southwest of Round Mountain Ranch?

A: Yes.

Q: Okay. Ah, you were here during the testimony yesterday, is that correct?

A: Yes.

Q: And you were here today?

A: Yes.

Q: And have you heard the testimony about ah, which pertained to whether or not there was a water right in the amount of 4.3 cfs?

A: Yes, I heard that.

Q: And do you have -- are you familiar with the water rights out of Clear Creek?

A: That's all we fight about up there. Yes.

Q: Yes. And when did you first become familiar with the water rights up there?

A: Well, you could kind of gradual like, 'cause my

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father was the water master since 1959 until two years ago.

Q: He was the water master from 1959 until when?

A: Until 1993.

Q: And why did he -- why is he no longer the water master?

A: He died.

Q: Okay. Did you accompany your dad when he distributed water out of Clear Creek?

A: Quite often.

Q: Okay. Are you familiar with what has been referred to as the 4.3 cfs under the Settlers Land and Water Company right?

A: Since last fall.

Q: You're -- you're --

(inaudible, both talking at once)

A: -- suggest until last fall as far as I know.

Q: Okay. Do you know whether it was ever delivered by your father?

A: No, he did not.

Q: Do you know whether it was ever delivered at all to Round Mountain Ranch?

A: I'm not sure, 40 years.

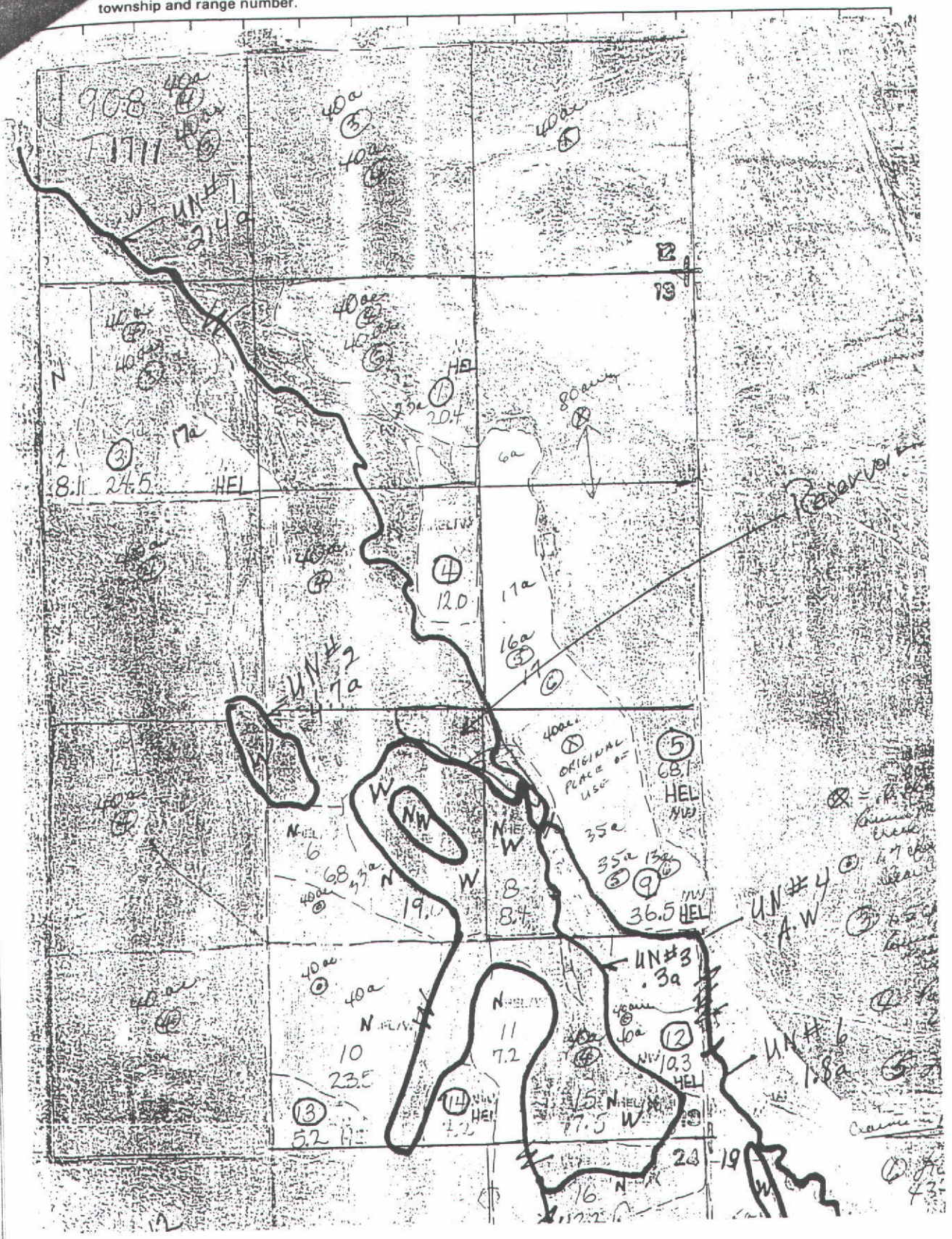
Q: And 40 years, you're referring to what time frame?

A: Well, since the '50's.

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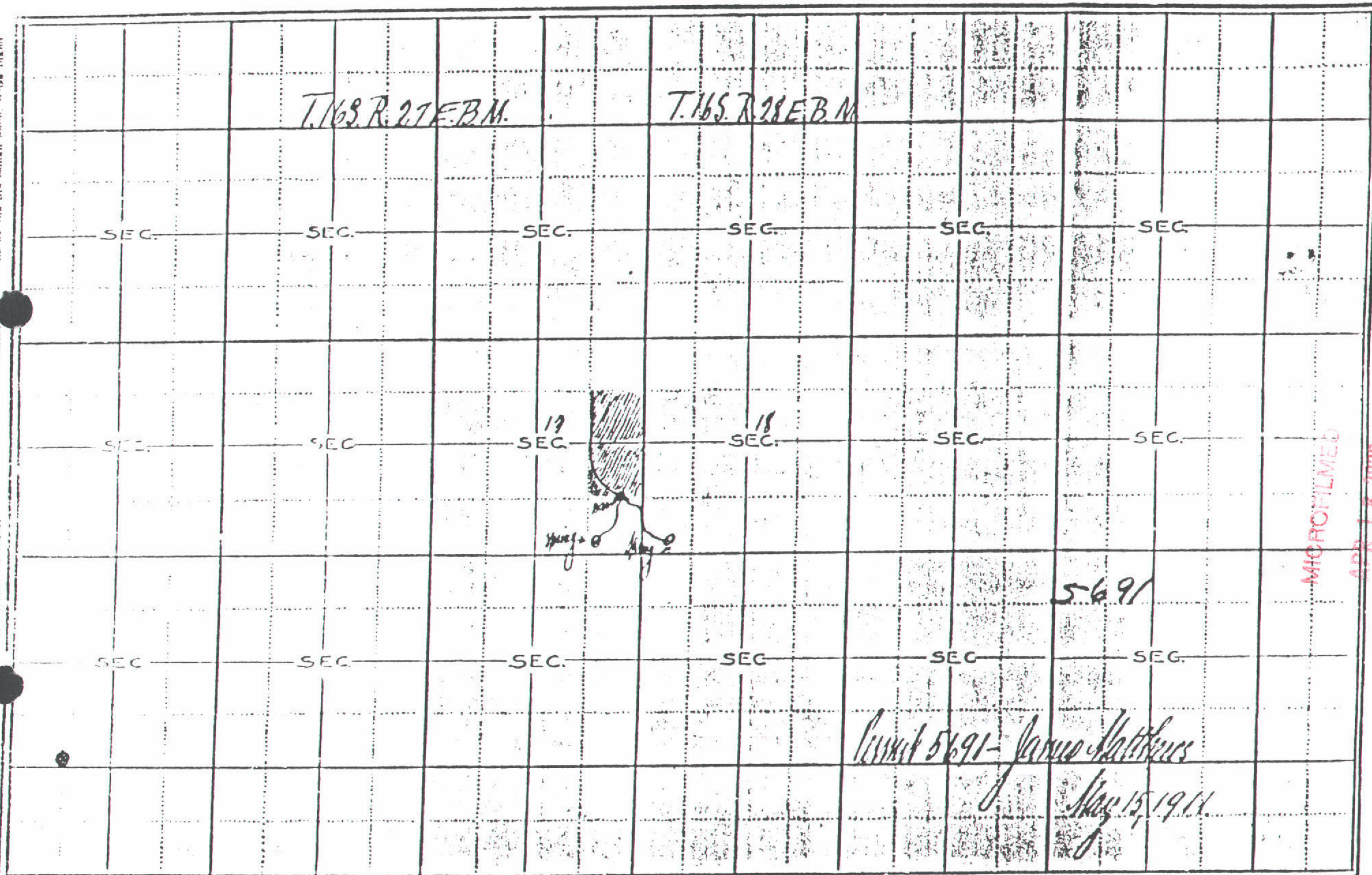
...mainly stored in private drain & seep water which originates ...ranch and does not flow off of ranch.

Map of proposed project: show clearly the proposed point of diversion, place of use, section number, township and range number.

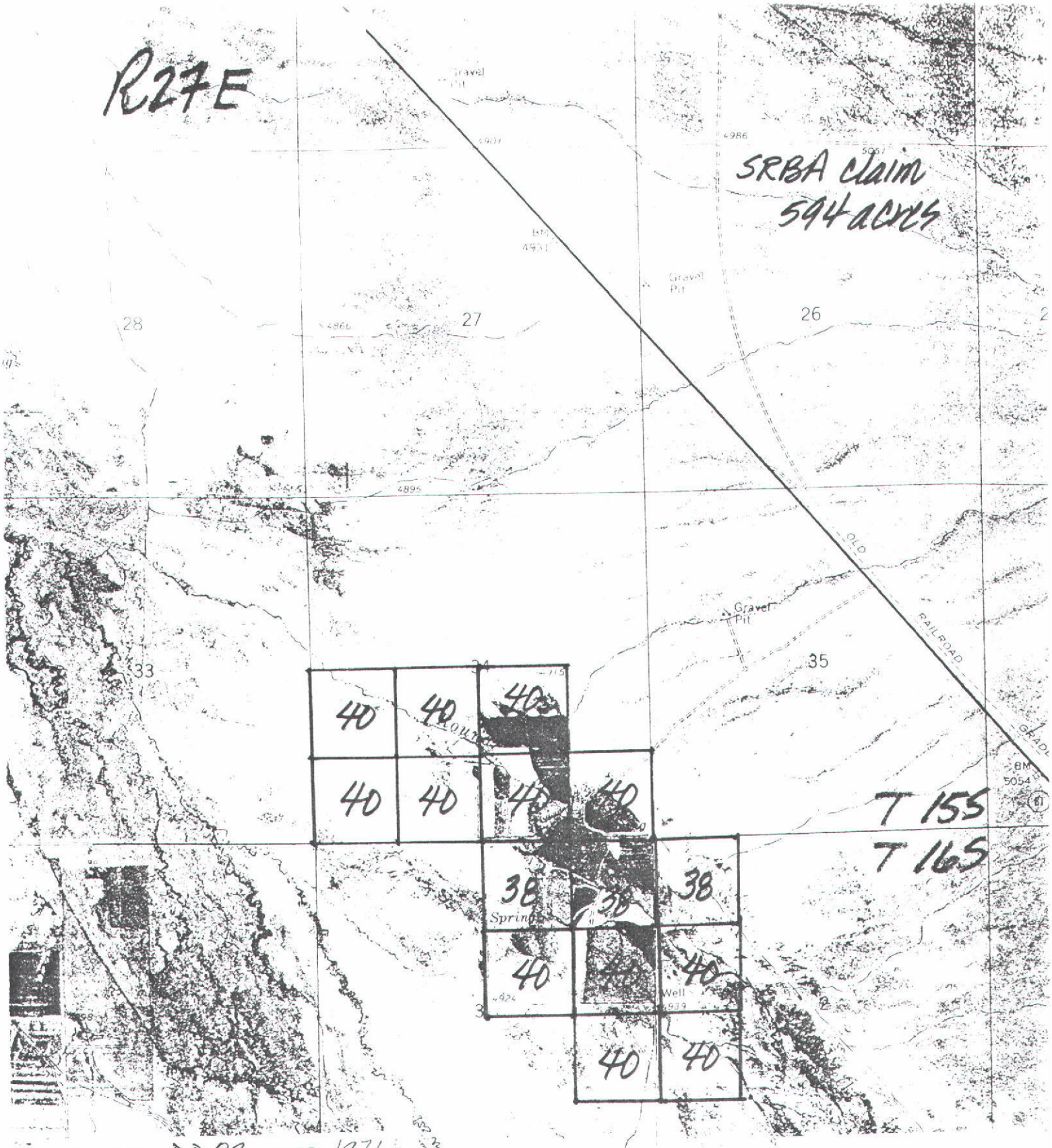


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SCALE: 2 INCHES=1 MI[illegible] W PLAN IN INK. Printed [illegible] by the Statesman Shop, Boise Idaho



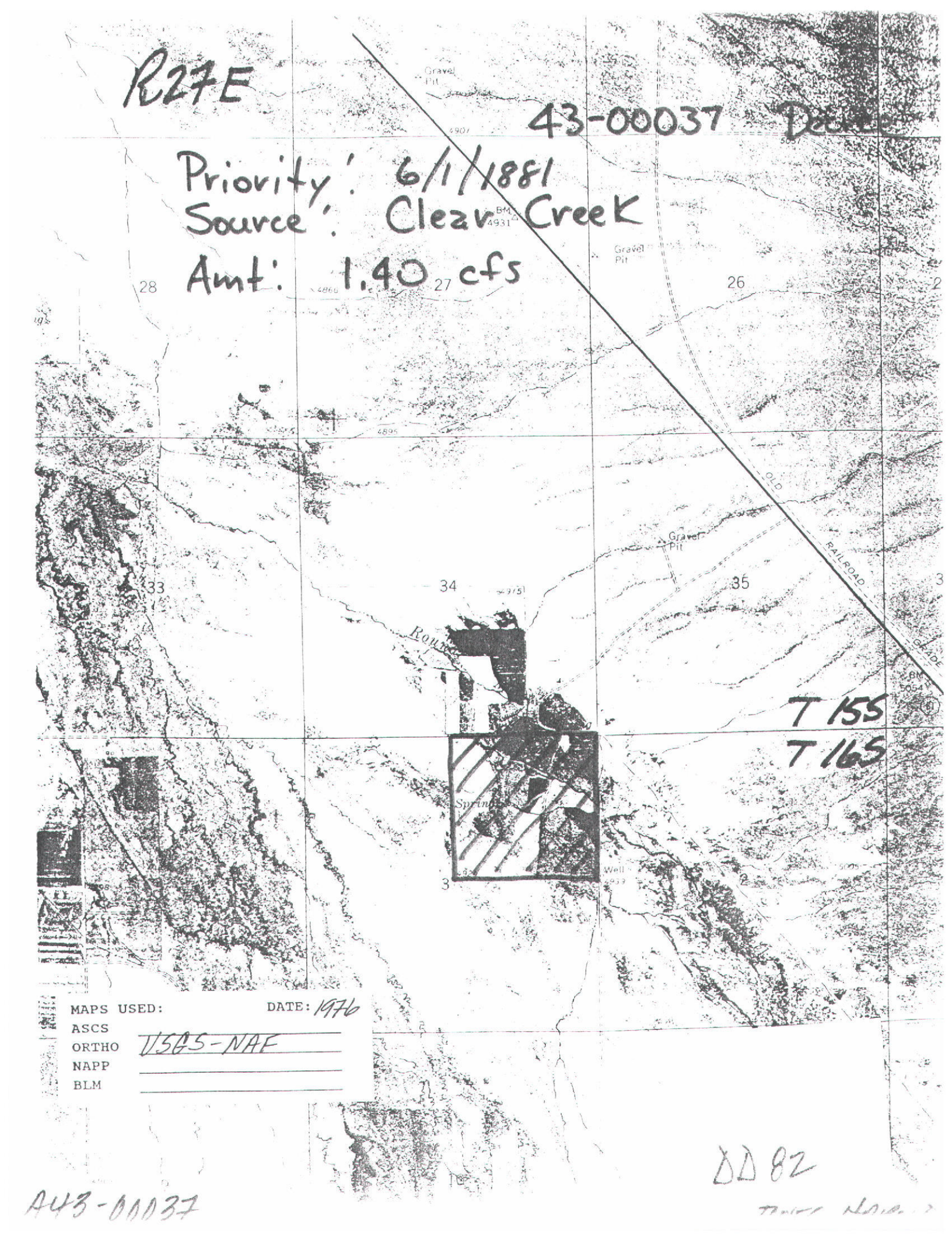
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APR 18 2000

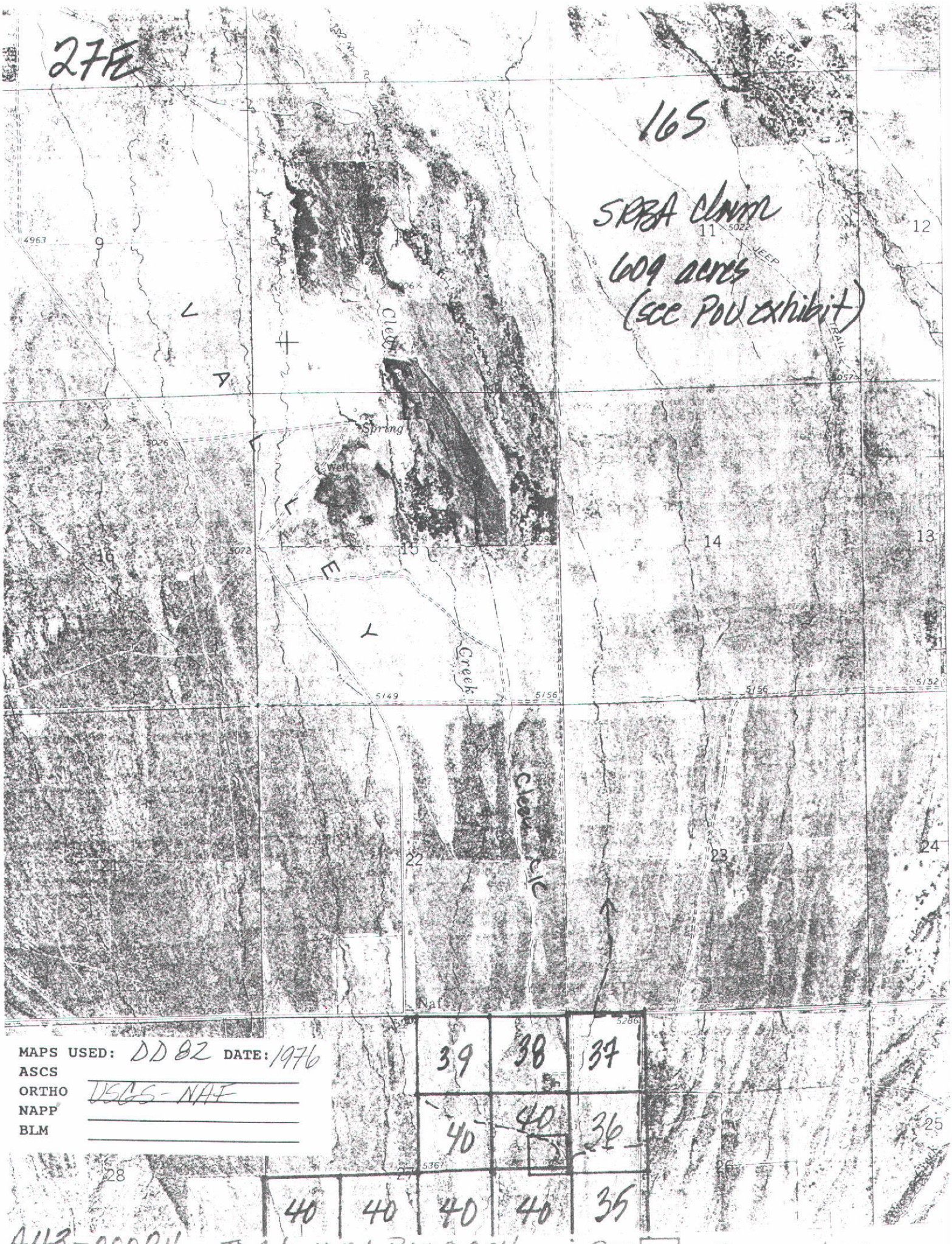


MAPS USED: DD 82 DATE: 1976
ASCS
ORTHO USGS-NAF
NAPP
BLM

DD 82

043-00037


R27E
43-00037 Decree
Priority: 6/1/1881
Source: Clear Creek
Amt: 1.40 cfs
Gravel Pit
BM 4931
28
27
26
33
34
35
OLD RAILROAD GRADE
Gravel Pit
T 15S
T 16S
Spring
Well
MAPS USED:
DATE: 1976
ASCS
ORTHO USGS-NAF
NAPP
BLM
DD 82
A43-00037


27E
16S
SRBA claim
609 acres
(see POU exhibit)
Spring
Well
Creek
Creek
Creek
JEEP TRAIL
MAPS USED: DD 82 DATE: 1976
ASCS
ORTHO USGS - NAF
NAPP
BLM
39
38
37
40
40
36
40
40
40
40
35
A43-00080 IDAHO-UTAH BOUNDARY

DECREE - pg. 17
43-00084
Source: Clear Cr.
Amount: 1.4 cfs
P/D: 8
POU: N½ NE, SWNE §27
NWNW §28
T16S R27E
priority 6-14-1911

T16S

MAPS USED: DATE: 1976
ASCS
ORTHO USGS-NAF
NAPP
BLM

MAPS USED: DD 83 DATE: 1976
ASCS
ORTHO USGS - STREVELL SW
NAPP
BLM

DUR-00084


27E
165
SRBA claim
609 acres
(see POU exhibit)
Creek
Spring
Well
Creek
Naf
MAPS USED: DD 82 DATE: 1976
ASCS
ORTHO USGS-NAF
NAPP
BLM
39
38
37
40
40
36
40
40
40
40
35

DECREE - pg. 17
43-00085
Source: Clear Cr.
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P/D: &
POU: N½NE, SWNE §27
NWNW §28
T16S R27E

T16S

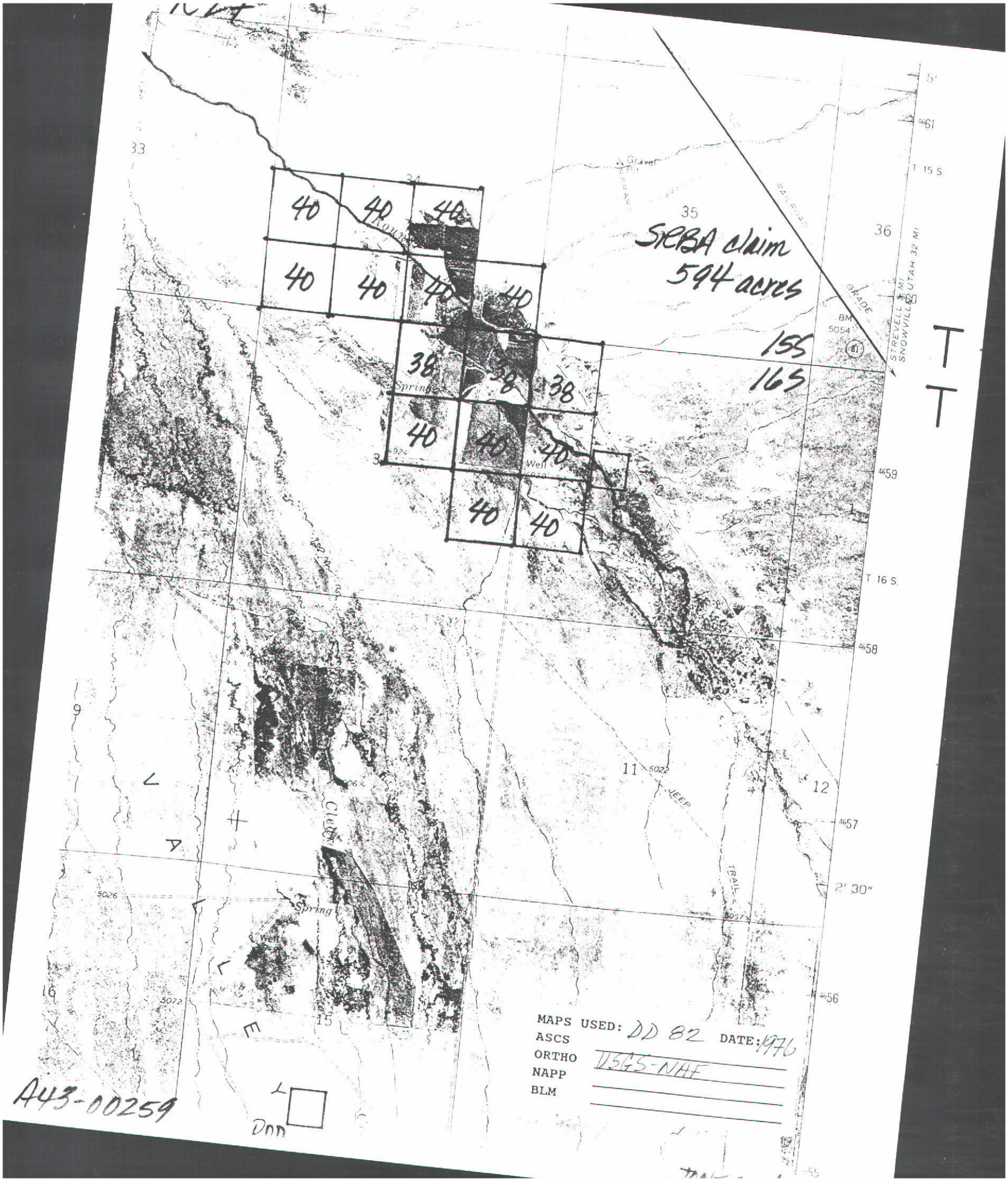
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ASCS
ORTHO USGS-NAF
NAPP
BLM

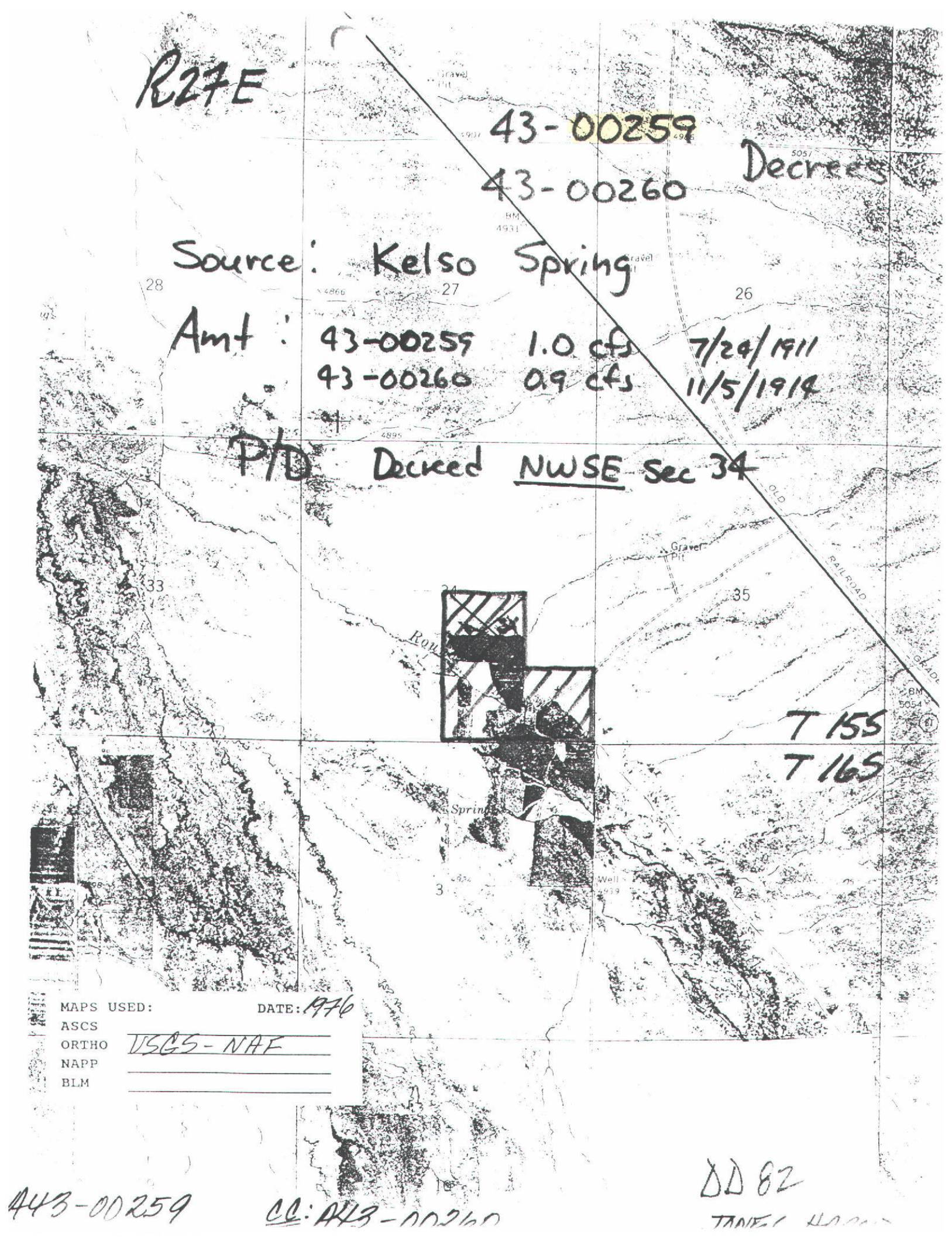
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ORTHO USGS-STREVELL SW
NAPP
BLM

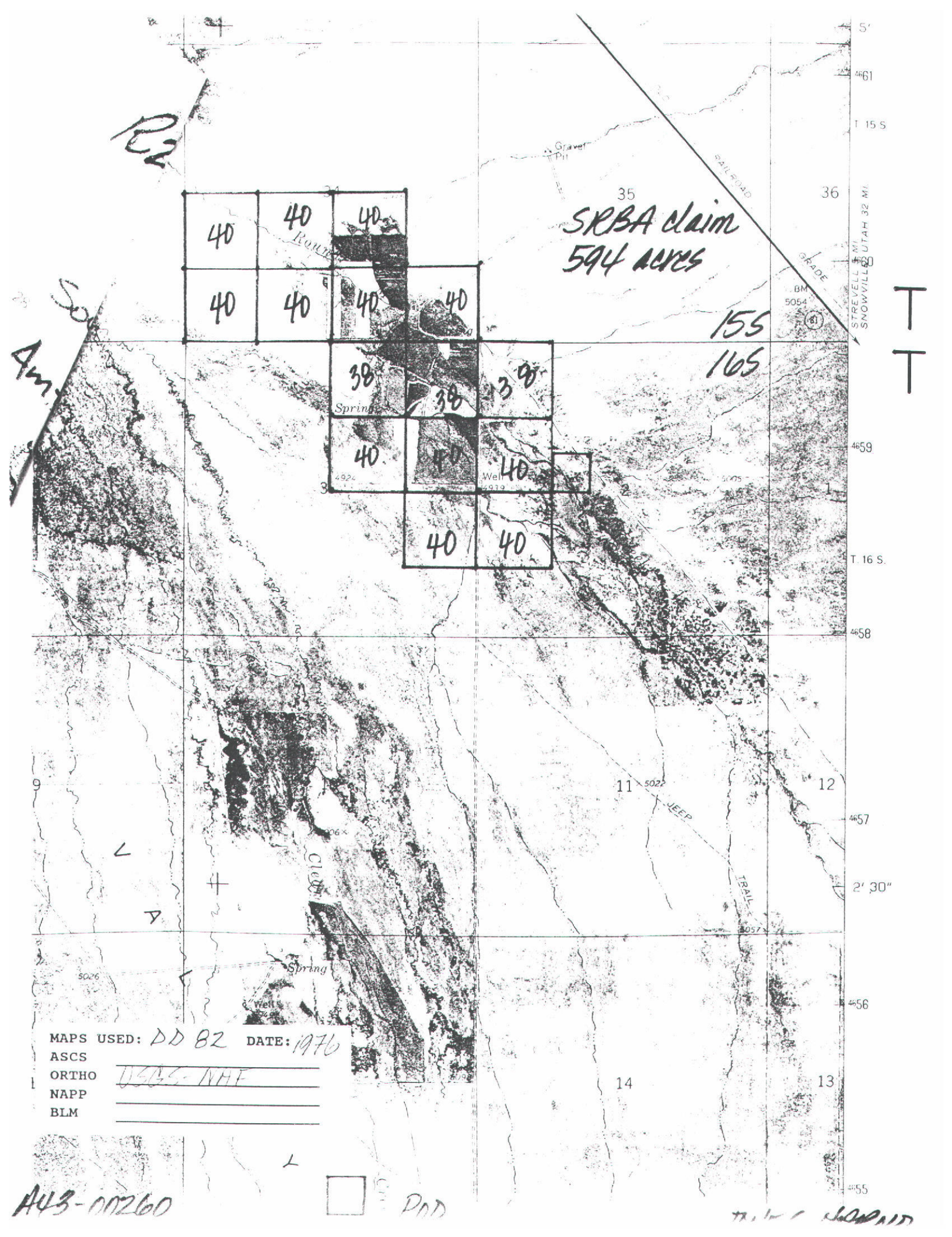
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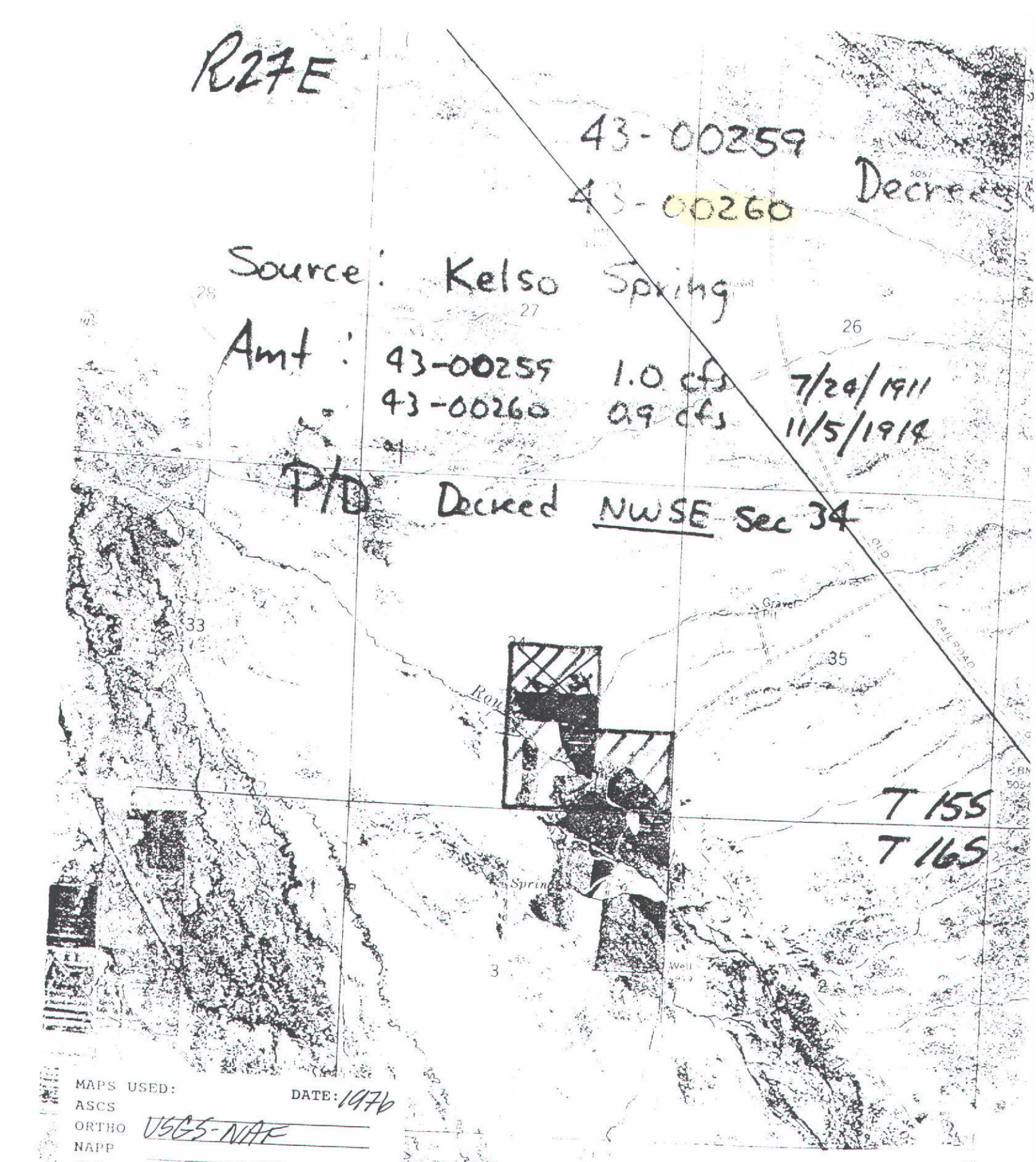
R27E R28E

JONES HAROLD


SRBA claim
594 acres
155
165
40
38
Gravel
Spring
Well
Cleft
JEEP
TRAIL
RAILROAD
GRADE
STREVELL 4 MI
SNOWVILLE UTAH 32 MI
BM 5054
T 15 S
T 16 S
2' 30"
MAPS USED: DD 82 DATE: 1976
ASCS
ORTHO USGS-NAF
NAPP
BLM
A43-00259
DDD

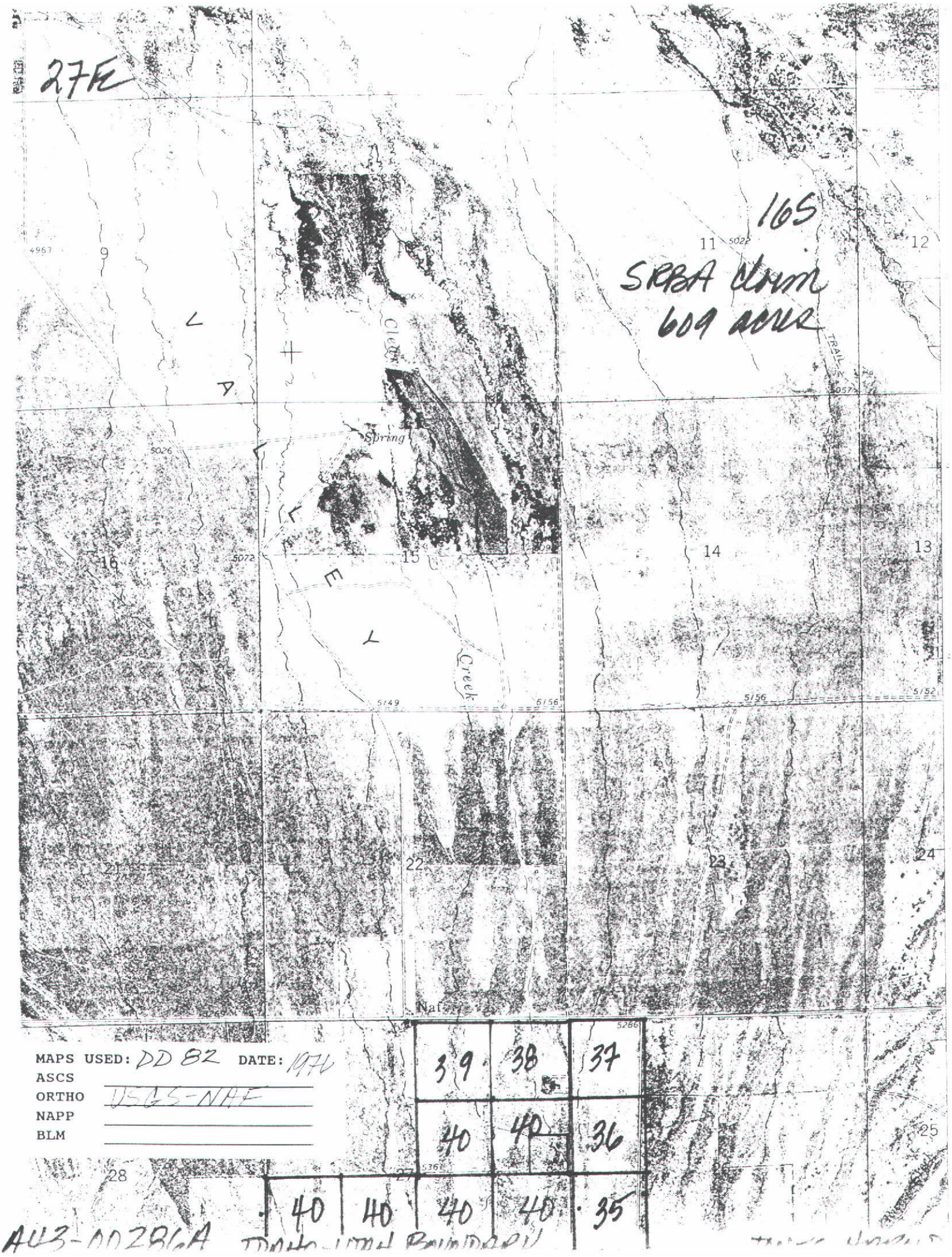

R27E
43-00259
43-00260
Decrees
Source: Kelso Spring
Amt: 43-00259 1.0 cfs 7/24/1911
43-00260 .9 cfs 11/5/1914
P/D Decreed NWSE Sec 34
Gravel Pit
OLD RAILROAD GRADE
T 15S
T 16S
Spring
Well
MAPS USED:
DATE: 1976
ASCS
ORTHO USGS - NAF
NAPP
BLM
43-00259
CC: 43-00260
DD 82


SRBA claim
594 acres
40
38
155
165
T 15 S
T. 16 S.
35
36
11
12
14
13
RAILROAD GRADE
STREVELL 4 MI
SNOWVILLE UTAH 32 MI
Gravel Pit
Spring
Well
JEEP TRAIL
Creek
BM 5054
MAPS USED: DD 82 DATE: 1976
ASCS
ORTHO USGS-NAF
NAPP
BLM
A43-00260
DD



43-00260 ORIGINAL IN 43-11259

DD 62



MAPS USED: DD 82 DATE: 1971
ASCS
ORTHO USGS-NAE
NAPP
BLM

AU3-00281A

T16S

DECREE Pg 34
43-00286
Source: Clear Cr.
Amount: 60 CFS
P/D: &
POU: Priority: 11-23-1911

Settlers Land & Water Company
1911-Nov. 23 00286 60 s.f.

To be diverted from Clear Creek for the irrigation of All of Sec. 2, S½ and NW¼, Sec. 3, S½ and W½NW¼, Sec. 4, E½, E½W½, S½W¼, Sec. 5, all of Sec. 8, all of Sec. 9, N½NW¼, N½NE¼, SE¼NE¼, Sec. 10, all of Sec. 11, N½, W½SW¼, W½SE¼, NE¼SE¼, Sec. 12, W½NE¼, W½, W½SE¼, SE¼SE¼, Sec. 13, all of Sec. 14, S½N½, Sec. 15, all of Sec. 16, all of Sec. 17, S½, Sec. 21, all of Sec. 22, W½SE¼ and S½, Sec. 23, all of Sec. 24, S½, S½N½, NE¼NE¼, Sec. 27, N½N½, E½E½, Sec. 26, N½ N½, Sec. 25, all in Twp. 16 S. R. 27 E.B.M. DECREE FILE: 43-A-I (2)

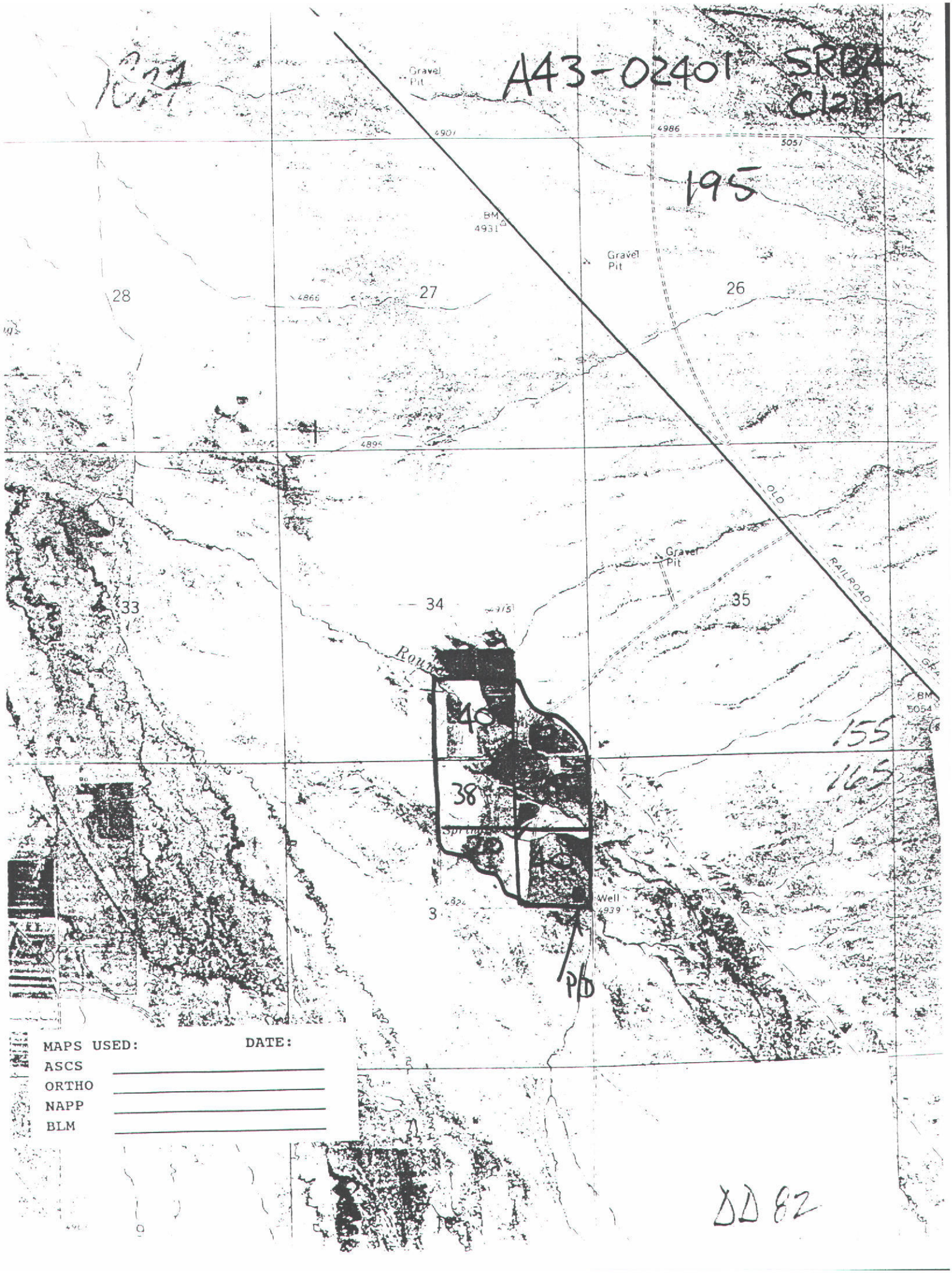
MAPS USED: DD 82 DATE: 1976
ASCS
ORTHO USGS-NAF
NAPP
BLM

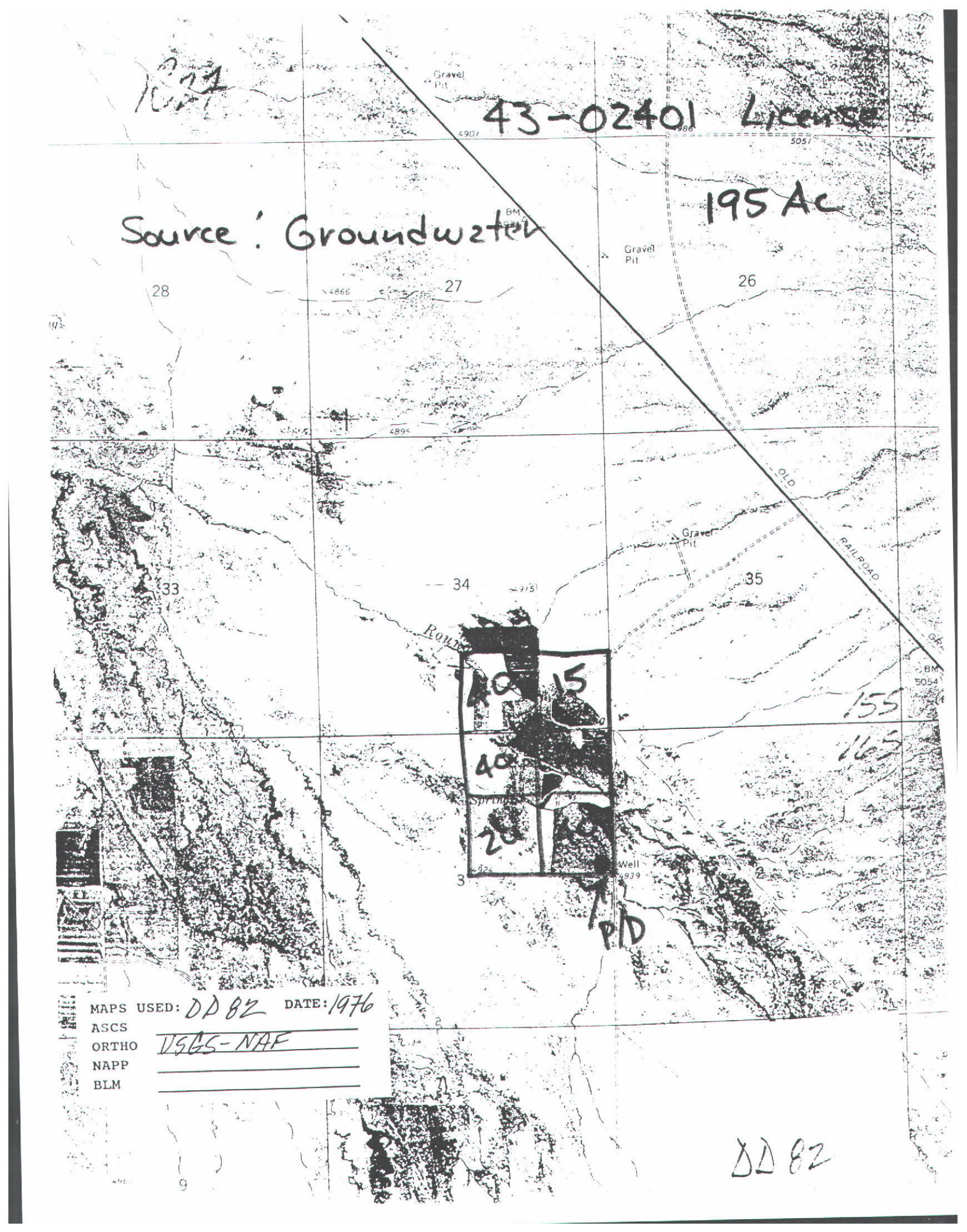
MAPS USED: DD 83 DATE: 1976
ASCS
ORTHO USGS-STREVELL SW
NAPP
BLM

R27E R26E

JONES HAROLD

43-00286A


A43-0240 SRBA Claim
195
Gravel Pit
4901
4986
5051
BM 4931
Gravel Pit
28
27
26
4866
4895
OLD RAILROAD
Gravel Pit
33
34
35
BM 5054
40
38
155
165
Well 4939
3
PD
MAPS USED:
DATE:
ASCS
ORTHO
NAPP
BLM
DD 82

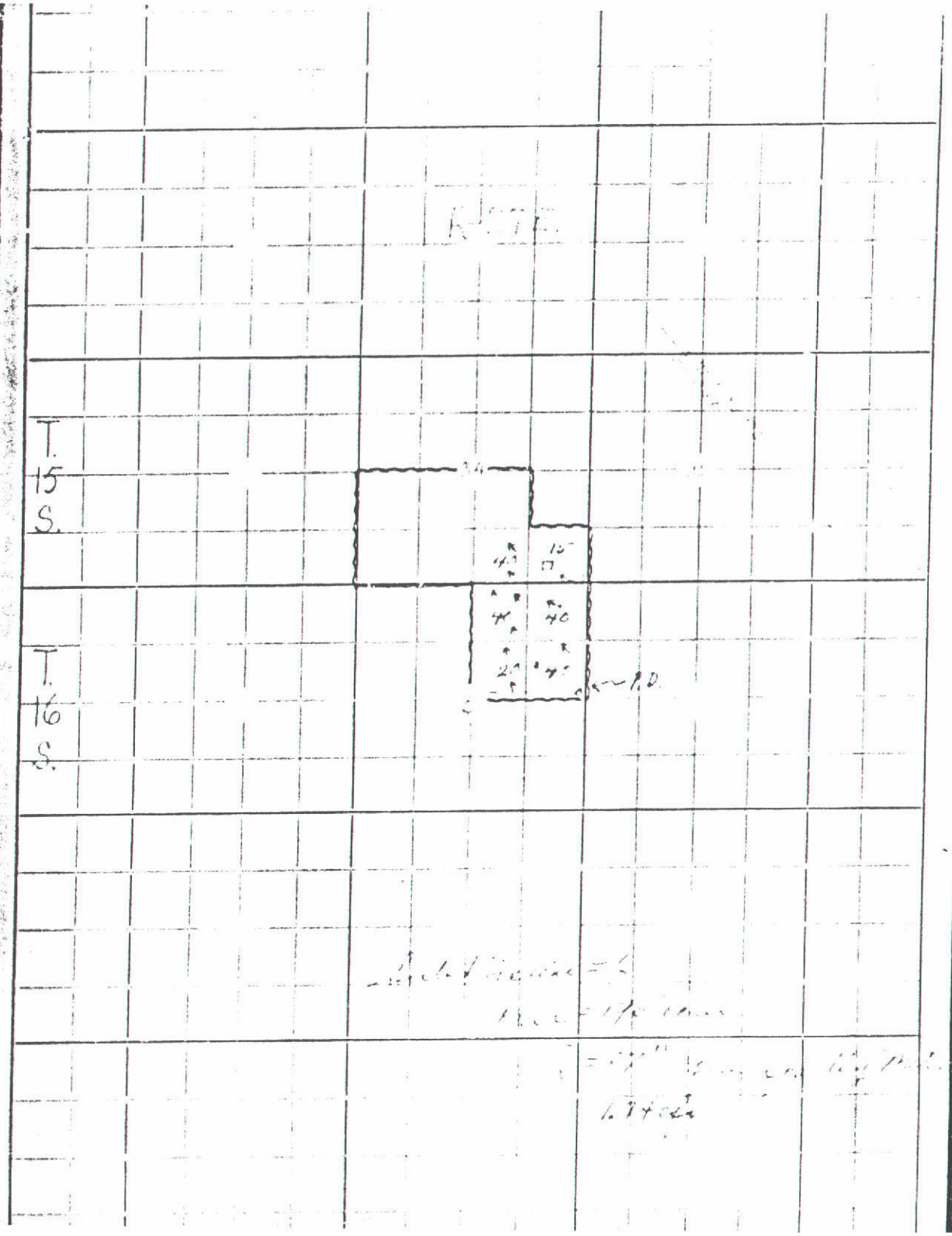

43-02401 Licensed
195 Ac
Source: Groundwater
Gravel Pit
Gravel Pit
Gravel Pit
28
27
26
33
34
35
OLD RAILROAD
Well
40
15
40
20
40
155
165
P/D
MAPS USED: DD 82 DATE: 1976
ASCS
ORTHO USGS-NAF
NAPP
BLM
DD 82

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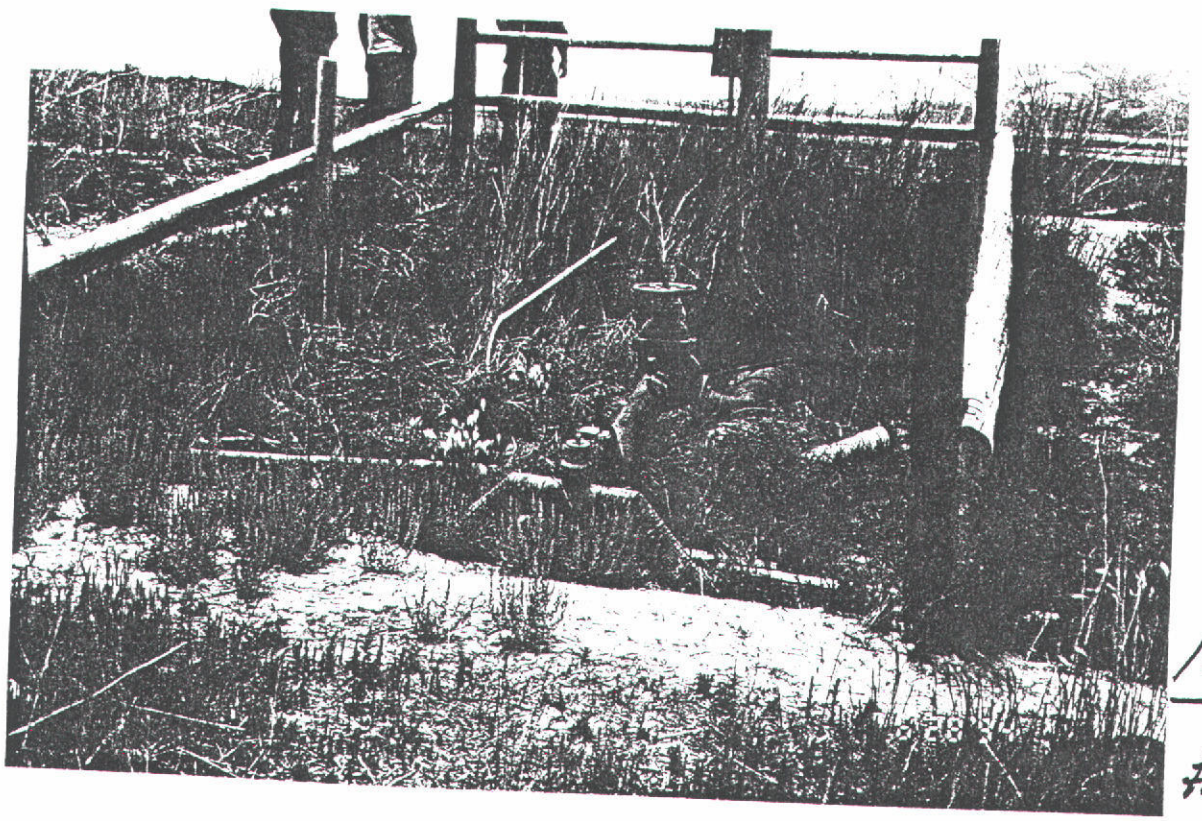
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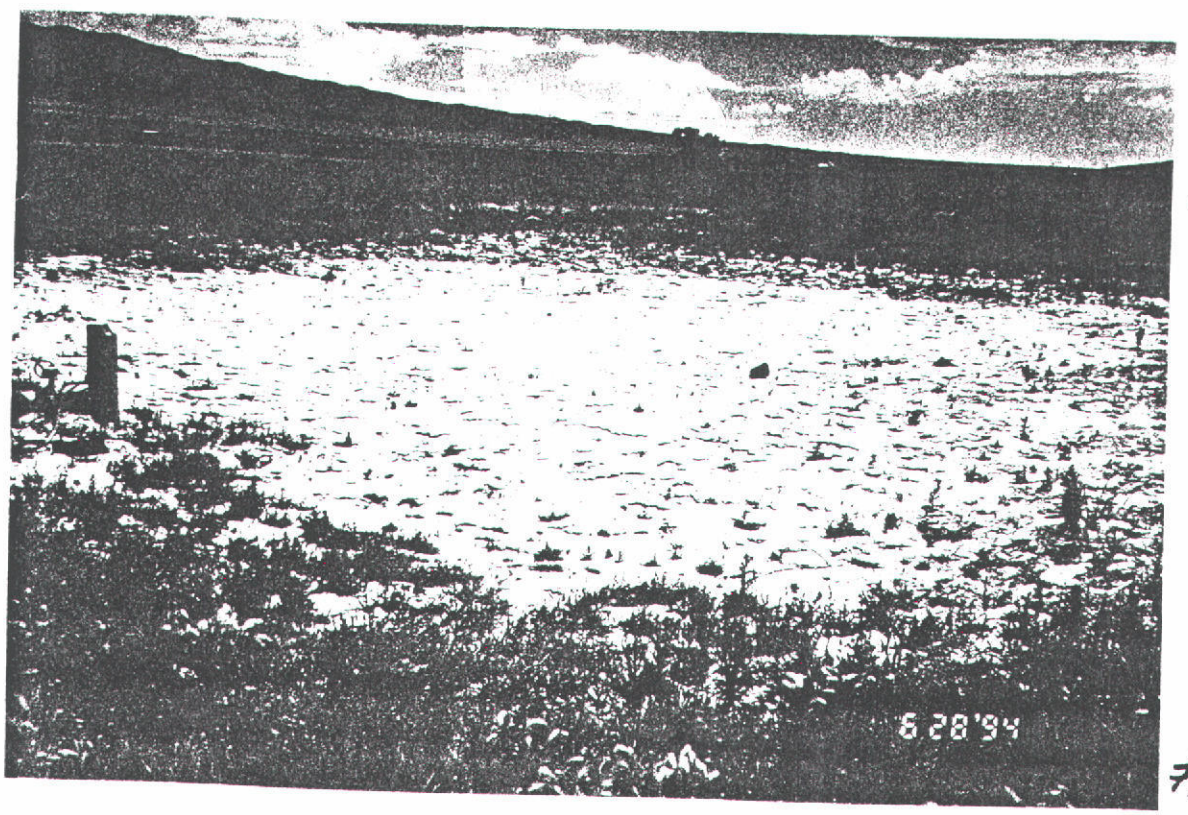
06-28-94



facing So. 934
NWSE pond

ROLL #1

#7



facing E 934
NWSE pond.

#6

DLR-00023 of

JONES HAROLD

06-28-94
1.40







#5
5,4,3

Panorama from N.E. along ditch to the transformer in the W. around to sewage collection & storage back down Diamond to S.

DU2-00033.jpg 1"

TAKEN HAROLD

06-28-94



facing No. along the ditch

#2



facing W. towards transformer on pole.

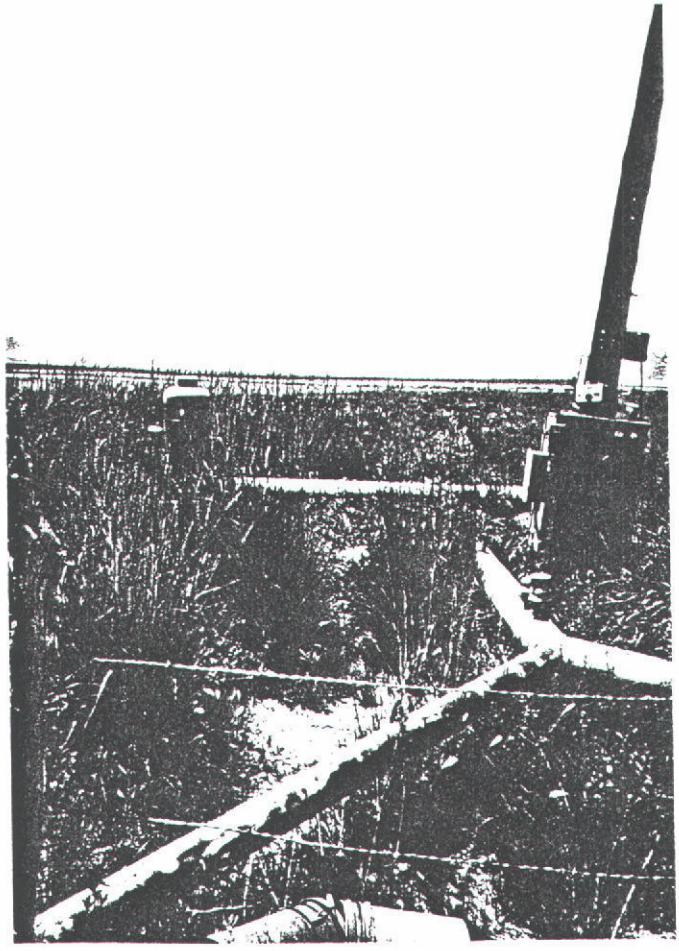
#1

A43-00037 et al

JAMES, HAROLD

06-28-94

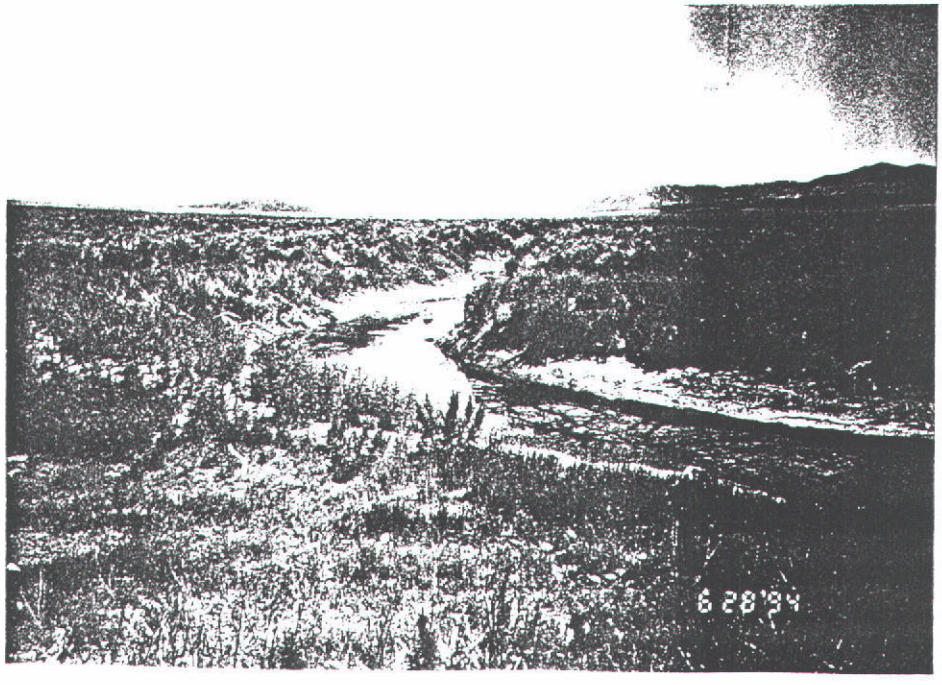
1.53



well/pump @ Clear Cr.
pmt # 3501 - buried line
looking W. over the set up
"Ledges" in background
@ W. edge of sprinkled
pasture per Kopin Wells
Locate @ blue dot on map
on 6 line btwn. 2+3.

#13

2:10



looking over the
Channel to the SO

#12

A43-[illegible]

JONES. HARRIS

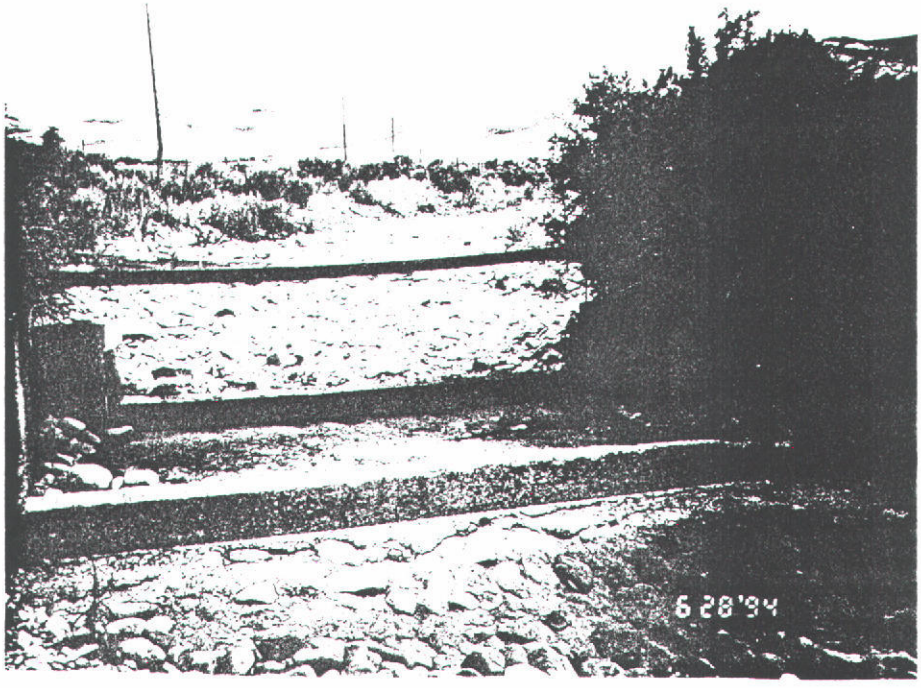
06-28-94



#11

2:10

Looking NE: stick in the ground to the right of Ray Jones is the previous height of water here - states that previously water used to go over top of the embankment.



#10

3:28

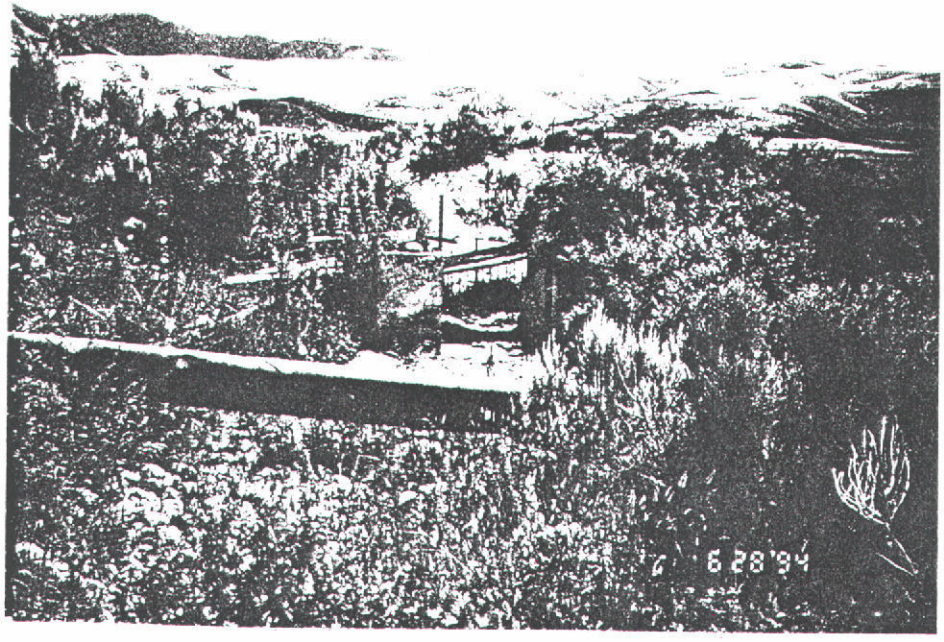
looking SE. from diversion below home place

443-

JONES, HAROLD

06-28-94

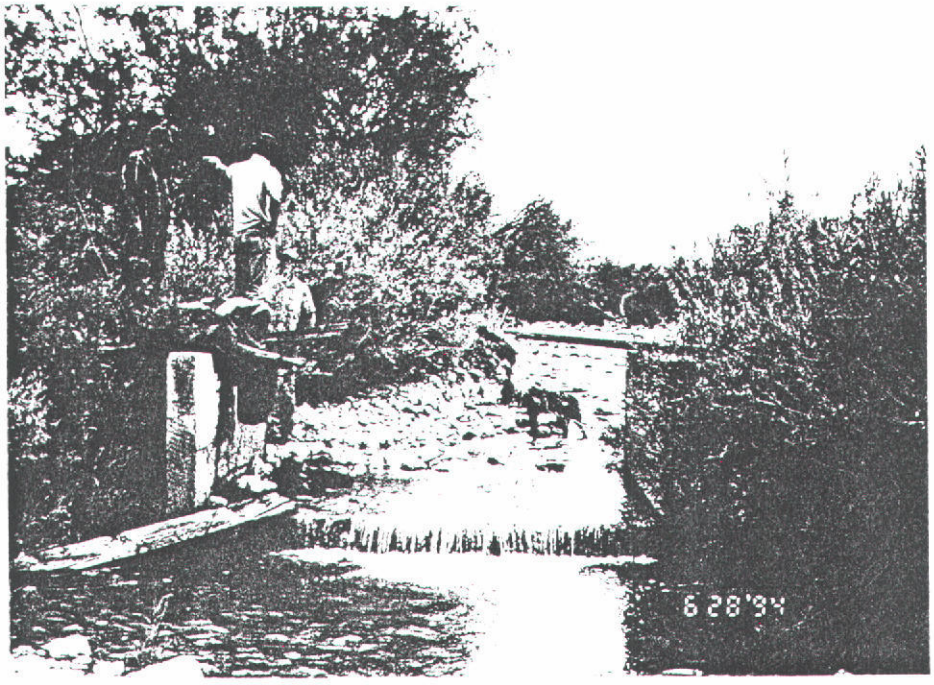
3.30



Looking So. into UTAH across the pipe for the UTAH water.
approx 1/4 mile So.

#9

3.50



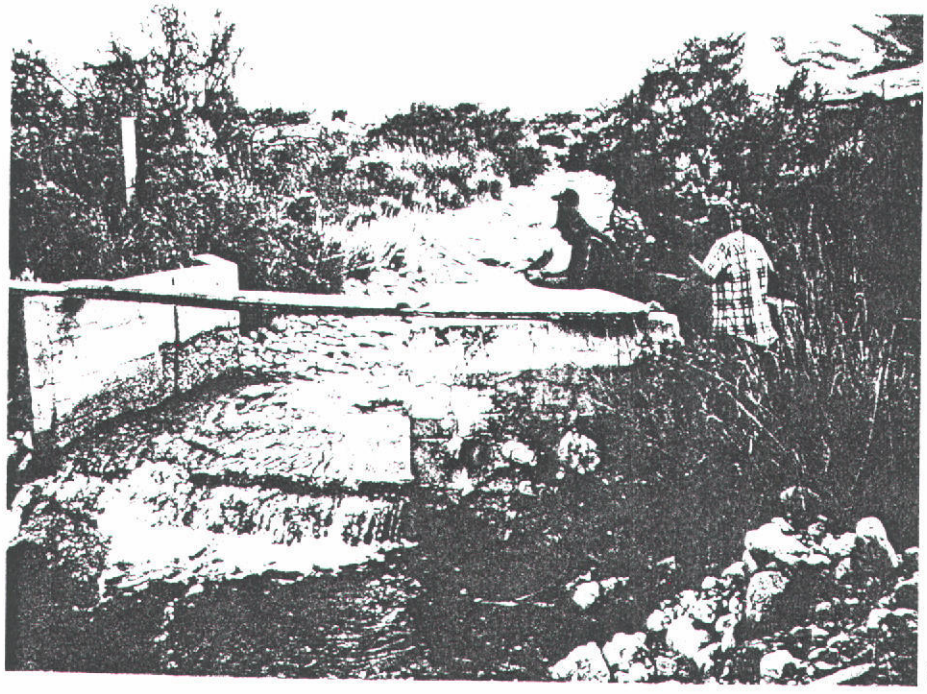
Looking So. into UTAH - diversion Channel just W. of intake site.

#8

A43-00027 of 61

JONES, HAROLD

06-28-94



4.00

in UTAH looking SO. over the diversion - note ADM in red cap standing in the diversion.

#7



4.05

looking NW from a distance of about 25 yards SO of the diversion above. This is described as PD #2.

#2

A43-10073 A 1

JONES HAROLD

T16S

SRBA Claim
266 acres



IDAHO-UTAH Boundary

R27E R28E

MAPS USED: DD 82 DATE: 1976
ASCS
ORTHO USGS-NAF
NAPP
BLM

MAPS USED: DD 83 DATE: 1976
ASCS
ORTHO USGS-STICEVELL SW
NAPP
BLM

A43-00045

JONES, MERLE

T16S

DECREE - pg 14

43-00045

Source: Clear Cr.

AMOUNT: 1.7 CFS

P/D: D

POU: W½ SE, SESE §13
NENE §24

T16S R27E

PRIORITY: 6-1-1882

MAPS USED: DD 82 DATE: 1976
ASCS
ORTHO USGS-NAF
NAPP
BLM

MAPS USED: DD 83 DATE: 1976
ASCS
ORTHO USGS-STREVELL SW
NAPP
BLM

R27E R28E

Produced by the Geological Survey
In cooperation with [illegible] Conservation Service

A43-00045

JONES MERLE

SRBA claim
266 acres

T16S

Round Mountain Spring

Round Mountain

Mountain Creek

Creek

Rice

Birch

Nar

IDAHO-UTAH BOUNDARY

MAPS USED: DD 82 DATE: 1976
ASCS
ORTHO USGS - NAF
NAPP
BLM

MAPS USED: DD 83 DATE: 1976
ASCS
ORTHO USGS - STREVELL SW
NAPP
BLM

R27E R28E

A43-01286B

JONES, MARLIE

T16S

DECREE Pg 34
43-00286
Source: Clear Cr.
Amount: 60 CFS
P/D: &
POU: Priority: 11-23-1911

Settlers Land & Water Company
1911-Nov. 23 00286 60 s.f.

To be diverted from Clear Creek for the irrigation of All of Sec. 2, S½ and NE¼, Sec. 3, S½ and W½NE¼, Sec. 4, S½, E½NW¼, S½NW¼, Sec. 5, all of Sec. 8, all of Sec. 9, E½NW¼, E½NE¼, SE¼SE¼, Sec. 10, all of Sec. 11, W½, W½NE¼, W½E½, E½SE¼, Sec. 12, W½NE¼, W½, W½SE¼, SE¼SE¼, Sec. 13, all of Sec. 14, S½SE¼, Sec. 15, all of Sec. 16, all of Sec. 17, SE¼, Sec. 21, all of Sec. 22, E½SE¼ and E½, Sec. 23, all of Sec. 24, N½, N½SE¼, E½SE¼, Sec. 27, E½NE¼, NE¼SE¼, Sec. 26, N½NE¼, Sec. 25, all in Twp. 16 S. R. 27 E.B.M. DECREE FILE: 43-A-1 (2)

MAPS USED: DD 82 DATE: 1976
ASCS
ORTHO USGS-NAF
NAPP
BLM

MAPS USED: DD 83 DATE: 1976
ASCS
ORTHO USGS-STREVELL SW
NAPP
BLM

R27E R28E

Produced by the Geological Survey
In cooperation with the Soil Conservation Service

43-00286B

JONES MERLE

SRBA claim
30 acres

165

Rodnit Mountain Creek

Round Mountain

Round Mountain Spring

Well

Spring

Creek

Rice Creek

Birch Creek

Strevell

Naf

IDAHO-UTAH BOUNDARY

R27E R28E

MAPS USED: DD 82 DATE: 1976
ASCS
ORTHO USGS-NAF
NAPP
BLM

MAPS USED: DD 83 DATE: 1976
ASCS
ORTHO USGS-STREVELL SW
NAPP
BLM

A43-02061

JONES MERLE

LICENSE
43-02061
Source: Round Mtn. Springs 1+2
Amount: .16 CFS
PRIORITY: 1-19-1910
P/D: NESE § 13 16S 27E
(see cc of microfiche of original exam.

16S

R27E R28E

MAPS USED: DD 82 DATE: 1976
ASCS
ORTHO USGS-NAF
NAPP
BLM

MAPS USED: DD 83 DATE: 1976
ASCS
ORTHO USGS-STREVELL SW
NAPP
BLM

Produced by the Geological Survey
in cooperation with the Soil Conservation Service

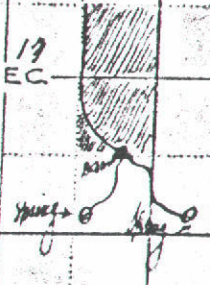
A43-02061

JAMES MERCE

T.16S. R.21E.B.M. T.16S. R.18E.B.M.

SEC. SEC. SEC. SEC. SEC. SEC.

SEC. SEC. SEC. 17 SEC. 18 SEC. SEC. SEC.



SEC. SEC. SEC. SEC. SEC. SEC.

5691

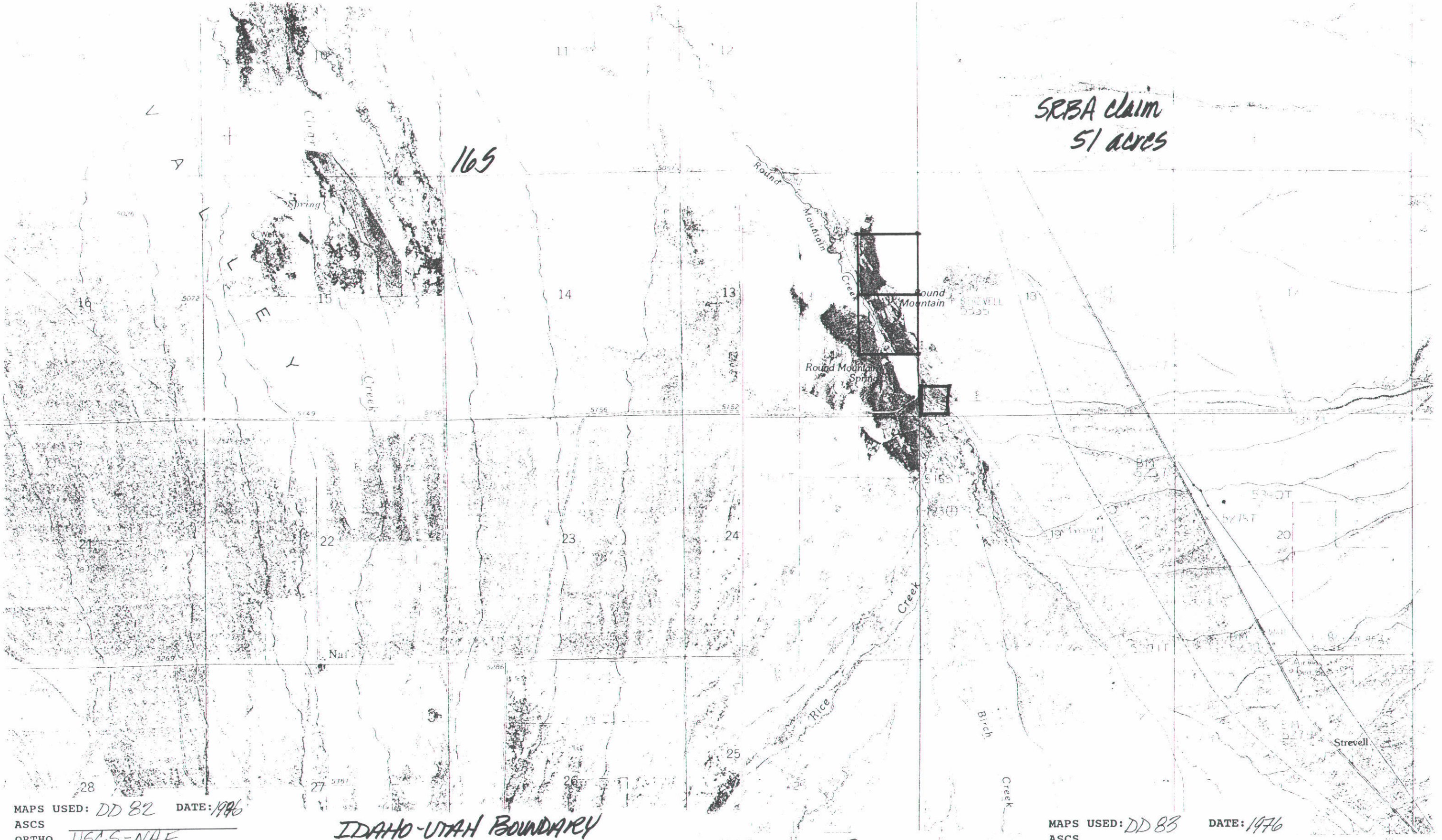
Permit 5691 - James Matthews

May 15, 1911

SCALE 2 INCHES=1 MILE DRAW PLAN IN INK

Printed and for Sale by the Secretary of State, Boise, Idaho

10-23-0241



MAPS USED: DD 82 DATE: 1976
ASCS
ORTHO USGS-NAF
NAPP
BLM

MAPS USED: DD 83 DATE: 1976
ASCS
ORTHO USGS-STREVELLSW
NAPP
BLM

A43-02110

JONES, MERLE

LICENSE
43-0210
Source: Round Mountain Spring
P/D: SWSWSW S18
T16S R28E
POU: SENE S13
NESE
T16S R27E
Priority: 5-23-1912
(see microfiche of exam attached)

T16S

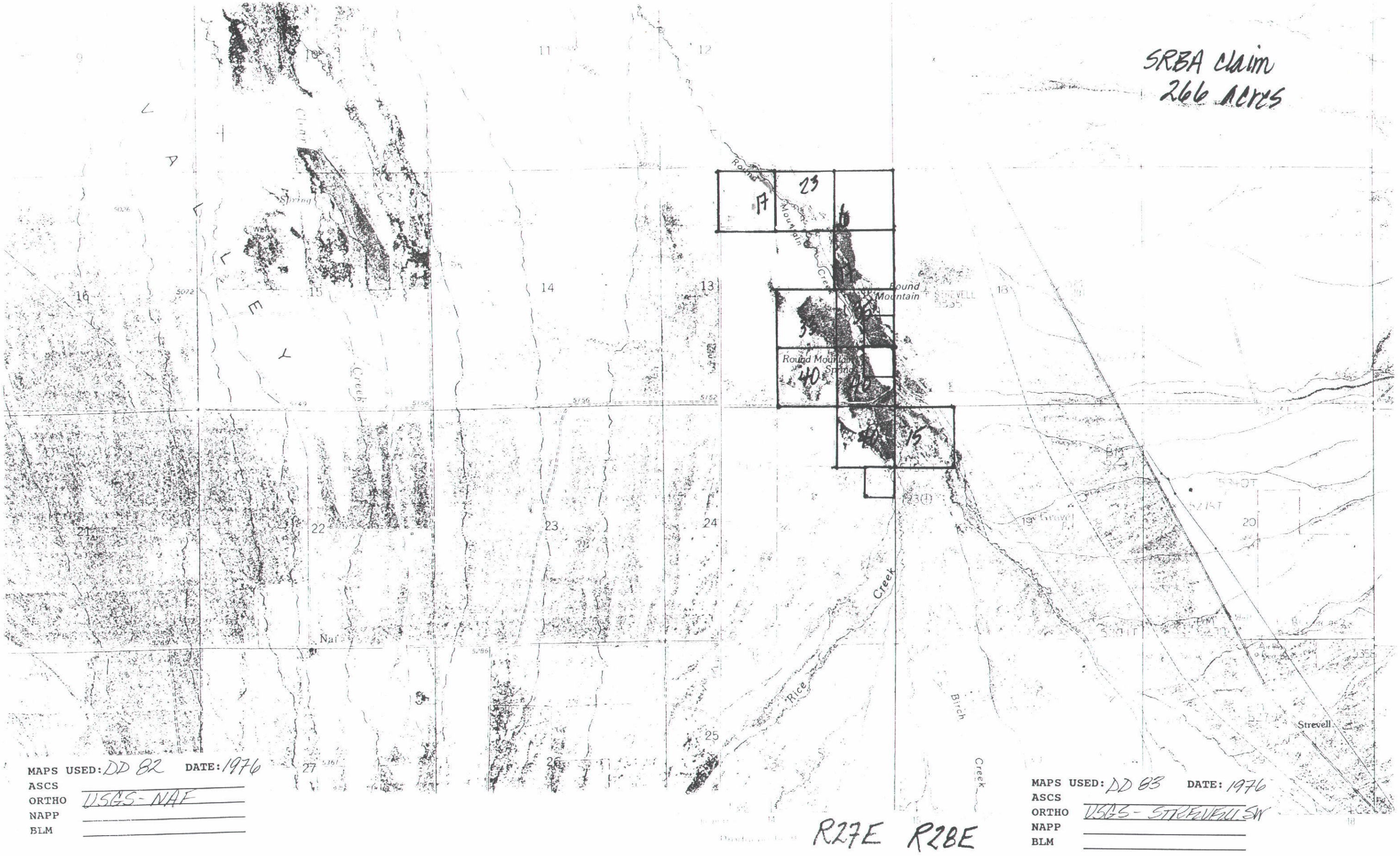
R27E R28E

Produced by the Geological Survey
In cooperation with the ... Conservation Service

A43-0210

JONES, MERLE

SRBA claim
266 acres



MAPS USED: DD 82 DATE: 1976
ASCS
ORTHO USGS - NAF
NAPP
BLM

MAPS USED: DD 83 DATE: 1976
ASCS
ORTHO USGS - STREVELL SW
NAPP
BLM

☐ POD

A43-10116

JONES MERLE

Name of Applicant

SEC. SEC. SEC.

SEC. SEC. SEC.

SEC. SEC. SEC.

SEC. SEC. SEC.

SEC. SEC. SEC.

SEC. SEC. SEC.

A03-02110

SRBA claim
266 acres

T16S

R27E R28E

MAPS USED: DD 82 DATE: 1976
ASCS
ORTHO USGS-NAF
NAPP
BLM

MAPS USED: DD 83 DATE: 1976
ASCS
ORTHO USGS-STREVELL SW
NAPP
BLM

POD

A43-10824

INFO NEEDED

T16S

12

Round Mountain

Round Mountain Spring

Round Mountain Creek

Rice Creek

Birch Creek

STREVELL 3355

Strevell

R27E R28E

DECREE(S)

43-001824
Source: Round Mountain Creek
Priority: 2-17-1912 Amount: 1.5 CFS
P/D: &
POU: SESW, SWSE §12
NWNE, NENW §13
T16S R28(orig) R27 (altered by hand)

43-00444
Source: Round Mountain Creek
Priority: 4-1-1909 Amount: .6 CFS
P/D: &
POU: NESE, E½NE §13
SESE §12
T16S R27

MAPS USED: DD 82 DATE: 1976
ASCS
ORTHO USGS-NAE
NAPP
BLM

MAPS USED: DD 83 DATE: 1976
ASCS
ORTHO USGS-STREVELL SW
NAPP
BLM

Produced by the Geological Survey
in cooperation with [illegible] Conservation Service

JONES MEDIA

07-07-94

ROLL 2A 2.45



looking E. over channel @ spill 1962 water @ house site.

#3



behind shed - looking W. over the channel.

#2



looking NW. to the reservoir from NW. of the shed.

#1

A43-00045 07-07-1994 JONES, MERLE

07-07-94
3:50
end of Round Mountain Creek



#2

the drain location looking W. into So. Field where the vertical culverts are spaced along the perimeter.



#1

A43-00045 et al

JONES, MEYER

07-07-94

3:45



#4

Looking No. towards mobile home @ entrance lane to homesite over the spring collection pipe in center of pool.



#3

Looking So. over both channels that come into the pool shown above.

A43- [illegible]

JONES, MERLE

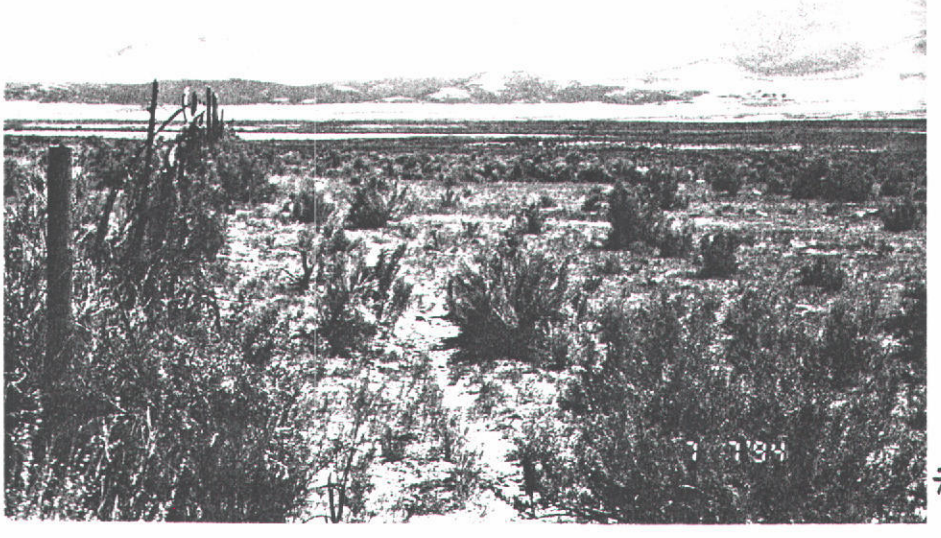
07-07-94

3.15



looking So. to the northeast - over the pipeline - tree said to be original POD.

#6

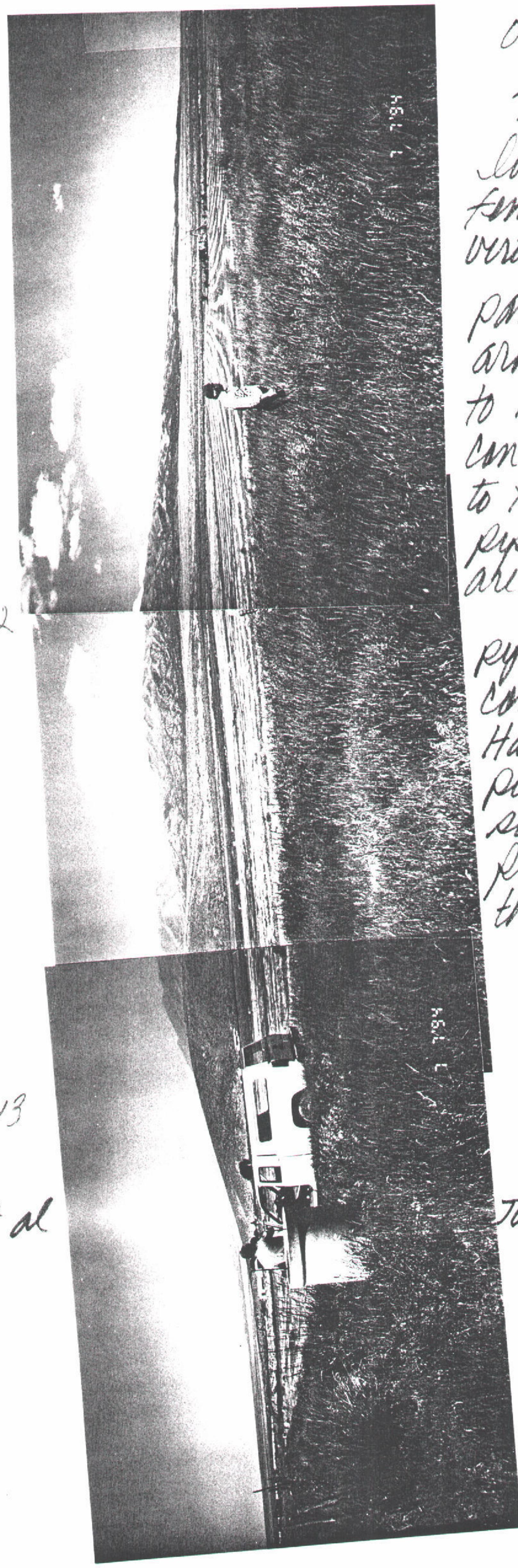


from bottom of the property, o. land, looking almost due So. - this is the corner of the high water fields claimed to be historically irrigated.

#5

Roll #4 #11

07-07-94
4.05



looking No. down fence line over vertical culvert.

panorama shot around from No. to E. - this ditch can serve field to the E. or to pipe line - there are 3 in this field.

#12

pipeline/ditch comes from the Harold Jones place near Nat stone No. of property under the E./W. Road.

#13

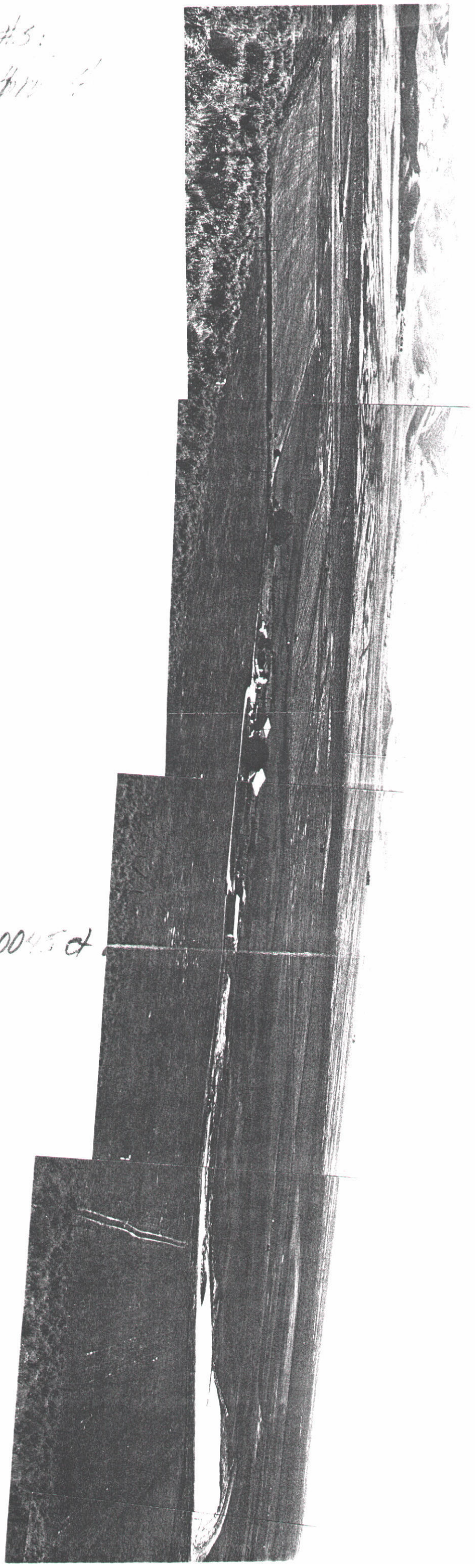
743-00045 et al

JONES, MERLE

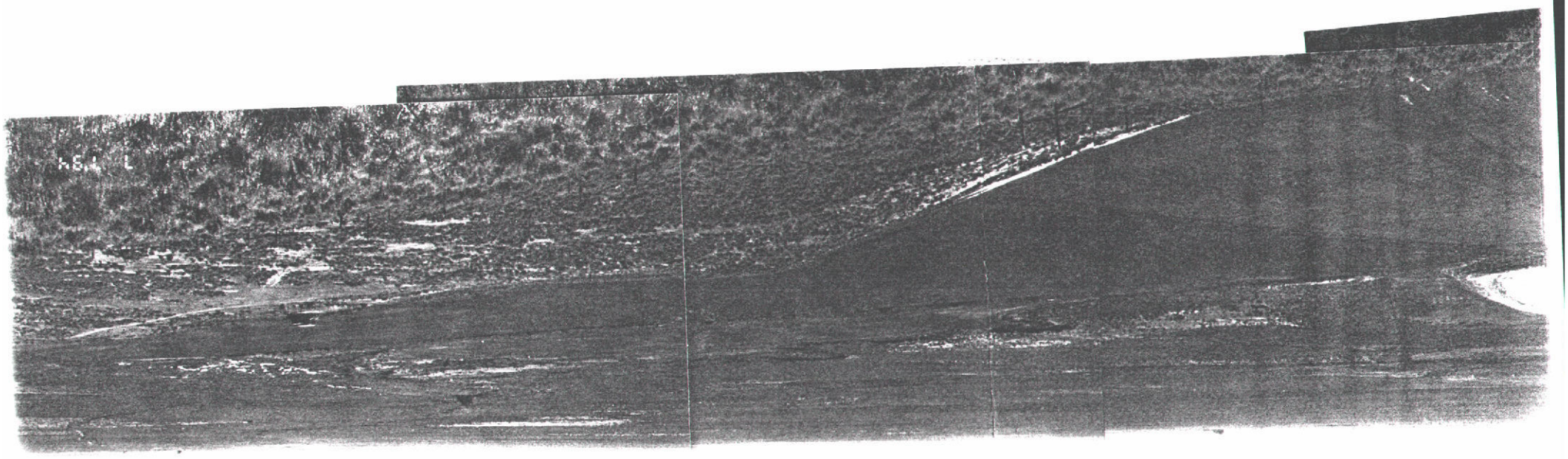
07-07-94

5.05

panorama shot going from So. to No. while facing W.



JONES,



07-07-94 2:55



looking SE – Round Mountain Spring flows into reservoir from behind shed.

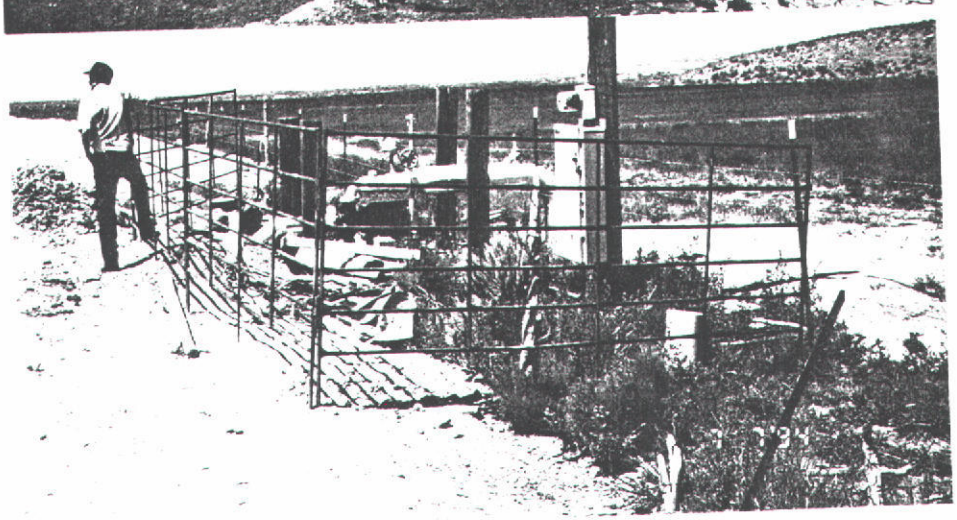
Roll 3

#13



looking NO. over the reservoir from pic #13

#12



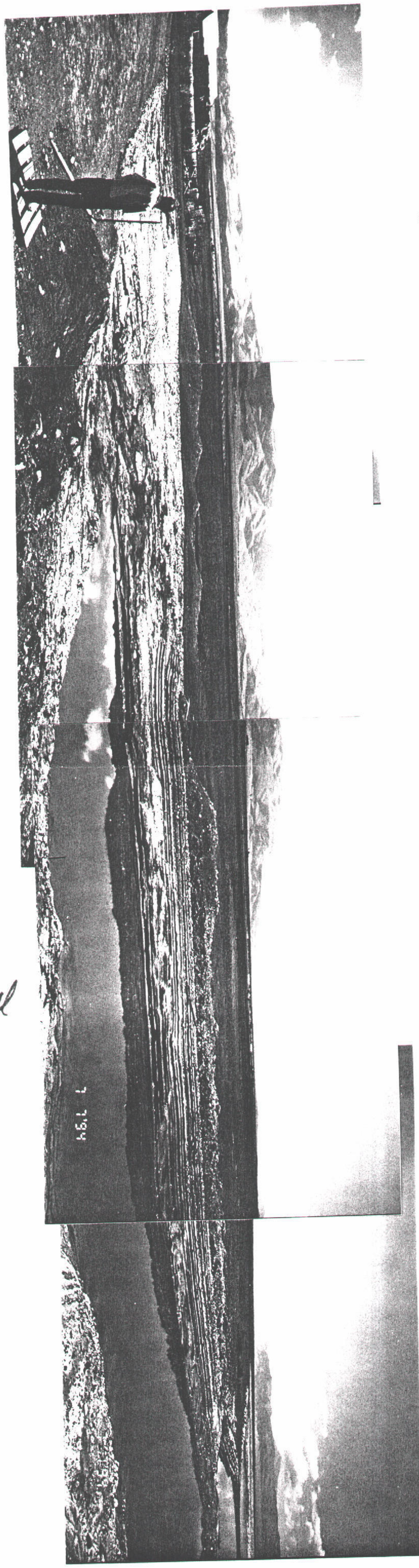
looking NO. over pump jist NO. of shed.

#11

A43-00045 et al

JONES, MERLE

Px #5:
0 thru 7



07-07-94
3.05

panorama shot from the So. end of the reservoir around to the W.

3-00045 et al

JONES, MCGUIRE

Form No. 217
7/94

RECEIVED
JUN 10 1999

Department of Water Resources

FOR OFFICE USE ONLY
Amt. of Fee $: 100.-
Receipt No. C045721
Receipt By: HWIL
Date Receipted: 6/11/99

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

PROOF OF BENEFICIAL USE

The Idaho Department of Water Resources considers this form a statement that the permit holder(s) has/have completed all development that will occur under this permit and that water has been applied according to the provisions of the permit for the beneficial use(s) described below. This form must be accompanied by a license examination fee, when necessary, or be accompanied by a completed field examination report prepared by a certified water right examiner who has been appointed by the department.

1. Permit No. 43-07321 Telephone No. 824-5721

2. Name(s) of Permit Holder(s): Round Mountain Ranch

3. Mailing Address: HC 72, Box 2346, Malta, ID 83342

4. Source of Water: Round Mountain Creek, Drain and Waste Water If GROUNDWATER (well), Date Drilled: mo._____ / yr._____

a. Well Driller: _____ Drilling Permit Number: ____ - ____ - ____ - ____

b. *OPTIONAL:*
Pump Horsepower: _____ Pressure (psi): _____ Dynamic pumping level (ft): _____

5. Use(s) (as authorized by the water right permit):

Domestic (No. of households): _____ Stockwater (No. and type of stock): _____

Irrigation (No. of acres): _____ Other: Storage for irrigation

6. Total rate of diversion and/or volume for which proof is submitted: _____ cfs OR 26 acre feet

7. Measuring Device Requirement: **(refer to the approval conditions on your permit and respond accordingly)**
(This question is not optional. Please check either yes or no. Proofs returned not checked accordingly, will be considered incomplete)

Measuring Device: Is a measuring device required? Yes X or No ____
Has the measuring device been installed? Yes X or No ____
Flow Measurement Port: Is a flow measurement port required? Yes ____ or No X
Has the measurement port been installed? Yes ____ or No X

8. Fee Enclosed: $ 100.00 (See Fee Schedule on back of the instructions for filing proof of beneficial use)

9. Person to contact to accompany the Department representative during field examination of the water system.

Name: Jeff Sessions Telephone Number: 824-5721

Address: HC 72, Box 2346, Malta, ID 83342

10. The information given on this form is my true statement of the extent to which the above numbered permit has been developed and I relinquish any undeveloped portion of the permit to the State of Idaho.

Signature of permit holder: Jeff Sessions MICROFILMED Date: June 8, 1999
(include your title, if on behalf of company of organization)

APR 18 2006

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE

STATE OF IDAHO

IN THE MATTER OF PERMIT NO. 43-07321	)	**ORDER EXTENDING PROOF OF BENEFICIAL USE**
	)	
IN THE NAME OF ROUND MOUNTAIN RANCH	)	
	)	

WHEREAS, the Department has issued the above-captioned permit with the condition that proof of construction of works and application of water to beneficial use be submitted on or before November 1, 1998; and,

WHEREAS, a proof due notice was not mailed to the permit holder sixty (60) days prior to the proof due date, pursuant to Section 42-204, Idaho Code.

IT IS THEREFORE HEREBY ORDERED that the time within which to submit the proof of beneficial use of water under Permit No. 43-07321 be extended to June 11, 1999.

Dated this 9th day of April, 1999.

L. GLEN SAXTON, Chief
Water Allocation Bureau

MICROFILMED
APR 18 2000

PETITION FOR JUDICIAL REVIEW (APPEAL) FILED IN THE FIFTH JUDICIAL DISTRICT COURT IN CASSIA COUNTY ON 12/9/97 REGARDING APPLICATION FOR PERMIT NO. 43-07321 & TRANSFER NO. 4640 IN THE NAME OF ROUND MOUNTAIN RANCH

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	tributary of	**CLEAR CREEK**
UNNAMED DRAIN	tributary of	**ROUND MOUNTAIN CREEK**
WASTE WATER	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	11/16 to 03/14		26.0 AF
DIVERSION TO STORAGE	11/16 to 03/14	1.00 CFS	
	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

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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

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change of irrigation of 23 acres in the NWNE[1] 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.

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[1]The absence of the 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.

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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.

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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

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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.

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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 NWNE and the NENW of Section 13, T16S, R27E. The other places of use described by water rights appurtenant to Round Mountain Ranch will be determined in the Snake River Basin Adjudication.

ORDER

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

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

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

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

2. This right only allows for the storage of a volume of water up to the maximum amount authorized once in each given year during the non-irrigation season. Once the authorized volume of water has been stored during the non-irrigation season in a given year, no additional water can be diverted to storage during the non-irrigation season of that year.

3. The right holder shall install suitable measuring devices to determine the amount of water diverted and shall report the information to the department annually.

4. Proof of construction of works and application of water to beneficial use shall be submitted to the department on or before November 1, 1998.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Signed this 7th day of November, 1997.

KARL J. DREHER
Director

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 10th 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	USE PERIOD 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				
			NENE	NWNE	SWNE	SENE	NENW	NWNW	SWNW	SENW	NESW	NWSW	SWSW	SESW	NESE	NWSE	SWSE	SESE	
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	Lt Ac	Lt Ac	Lt Ac	Lt Ac	SUM
16S	27E	13																	
16S	27E	24	1													1	1	1	

No. A43-00045 ADJUDICATION CLAIM PROFILE REPORT

OWNER CODE	NAME & ADDRESS	PRIORITY DATE	WATER USE	USE PERIOD FROM	USE PERIOD 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

			NE				NW				SW				SE				
			NENE	NWNE	SWNE	SENE	NENW	NWNW	SWNW	SENW	NESW	NWSW	SWSW	SESW	NESE	NWSE	SWSE	SESE	
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	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						01-15											15.0
																	TOTAL ACRES		266.0

No. 43-00286 WATER RIGHT PROFILE REPORT

OWNER CODE	NAME & ADDRESS	PRIORITY DATE	WATER USE	USE PERIOD FROM	USE PERIOD TO	DIVERSION RATE	DIVERSION VOLUME
C	SETTLERS LAND & WATER CO.	11/23/1911	IRRIGATION	00/00	00/00	60.000 CFS	

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

			NE				NW				SW				SE				
			NENE	NWNE	SWNE	SENE	NENW	NWNW	SWNW	SENW	NESW	NWSW	SWSW	SESW	NESE	NWSE	SWSE	SESE	
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	Lt Ac	Lt Ac	Lt Ac	Lt Ac	SUM
16S	27E	2	01-I	02-I	I	I	03-I	04-I	I	I	I	I	I	I	I	I	I	I	
16S	27E	4						04-I	I		I	I	I	I	I	I	I	I	
16S	27E	5	01-I	02-I	I	I	03-I			I	I			I	I	I	I	I	
16S	27E	8	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	
16S	27E	9	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	
16S	27E	10	I	I		I	I	I											
16S	27E	11	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	
16S	27E	13		I	I		I	I	I	I	I	I	I	I		I	I	I	
16S	27E	14	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	
16S	27E	15												I					
16S	27E	16	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	
16S	27E	17	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	
16S	27E	21													I	I	I	I	
16S	27E	22	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	
16S	27E	23					I	I	I	I	I	I	I	I	I				
16S	27E	24	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	
16S	27E	25						I											
16S	27E	26	I	I			I	I											
16S	27E	27	I				I	I	I	I						I	I		
16S	27E	12		I	I		I	I	I	I	I	I	I	I	I	I	I		
16S	27E	3					03-I	04-I	I	I	I	I	I	I	I	I	I	I	

No. A43-00286B ADJUDICATION CLAIM PROFILE REPORT

OWNER CODE	NAME & ADDRESS	PRIORITY DATE	WATER USE	USE PERIOD FROM	USE PERIOD TO	DIVERSION RATE	DIVERSION VOLUME
C	MERLE JONES	11/23/1911	IRRIGATION	04-01	11-01	4.30 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				
			NENE	NWNE	SWNE	SENE	NENW	NWNW	SWNW	SENW	NESW	NWSW	SWSW	SESW	NESE	NWSE	SWSE	SESE	
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	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						01-15											15.0
																	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

OWNER CODE	NAME & ADDRESS	PRIORITY DATE	WATER USE	USE PERIOD FROM	USE PERIOD 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 SENESE NESESE CASSIA County
S24 NESENE CASSIA County

			NE				NW				SW				SE				
T	R	S	NENE Lt Ac	NWNE Lt Ac	SWNE Lt Ac	SENE Lt Ac	NENW Lt Ac	NWNW Lt Ac	SWNW Lt Ac	SENW Lt Ac	NESW Lt Ac	NWSW Lt Ac	SWSW Lt Ac	SESW Lt Ac	NESE Lt Ac	NWSE Lt Ac	SWSE Lt Ac	SESE 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						01-15											15.0
																		TOTAL ACRES	266.0

No. 43-00182 WATER RIGHT PROFILE REPORT

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

Water Source: ROUND MOUNTAIN CREEK Tributary to: CLEAR CREEK Stage: DECREED

			NE				NW				SW				SE				
			NENE	NWNE	SWNE	SENE	NENW	NWNW	SWNW	SENW	NESW	NWSW	SWSW	SESW	NESE	NWSE	SWSE	SESE	
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	Lt Ac	Lt Ac	Lt Ac	Lt Ac	SUM
16S	27E	12												I			I		
16S	27E	13		I			I												

No. 43-00414 WATER RIGHT PROFILE REPORT

OWNER CODE	NAME & ADDRESS	PRIORITY DATE	WATER USE	USE PERIOD FROM	USE PERIOD 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

			NE				NW				SW				SE				
			NENE	NWNE	SWNE	SENE	NENW	NWNW	SWNW	SENW	NESW	NWSW	SWSW	SESW	NESE	NWSE	SWSE	SESE	
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	Lt Ac	Lt Ac	Lt Ac	Lt Ac	SUM
16S	27E	12																I	
16S	27E	13	I			I									I				

No. A43-10824 ADJUDICATION CLAIM PROFILE REPORT

OWNER CODE	NAME & ADDRESS	PRIORITY DATE	WATER USE	USE PERIOD FROM	USE PERIOD 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 Tributary to: CLEAR CREEK Stage: DECREED
ROUND MOUNTAIN SPRING ROUND MOUNTAIN CREEK

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

			NE				NW				SW				SE				
			NENE	NWNE	SWNE	SENE	NENW	NWNW	SWNW	SENW	NESW	NWSW	SWSW	SESW	NESE	NWSE	SWSE	SESE	
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	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						01-15											15.0
																	TOTAL ACRES		266.0

No. 43-02061 WATER RIGHT PROFILE REPORT

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

Water Source: SPRINGS Tributary to: ROUND MOUNTAIN CREEK Stage: LICENSE

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

			NE				NW				SW				SE				
			NENE	NWNE	SWNE	SENE	NENW	NWNW	SWNW	SENW	NESW	NWSW	SWSW	SESW	NESE	NWSE	SWSE	SESE	
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	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	PRIORITY DATE	WATER USE	USE PERIOD FROM	USE PERIOD TO	DIVERSION RATE	DIVERSION VOLUME
C	MERLE JONES	01/19/1910	IRRIGATION	04-01	11-01	0.16 CFS	

Water Source: SPRINGS Tributary to: ROUND MOUNTAIN CREEK Stage: LICENSE

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

P			NE				NW				SW				SE				
			NENE	NWNE	SWNE	SENE	NENW	NWNW	SWNW	SENW	NESW	NWSW	SWSW	SESW	NESE	NWSE	SWSE	SESE	
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	Lt Ac	Lt Ac	Lt Ac	Lt Ac	SUM
16S	27E	13				17									13				30.0
																		TOTAL ACRES	30.0

No. 43-02110 WATER RIGHT PROFILE REPORT

OWNER CODE	NAME & ADDRESS	PRIORITY DATE	WATER USE	USE PERIOD FROM	USE PERIOD TO	DIVERSION RATE	DIVERSION VOLUME
C	EMMA C. OLSON	05/23/1912	IRRIGATION	00/00	00/00	0.800 CFS	

Water Source: SPRING Tributary to: SINKS Stage: LICENSE

Point(s) of Diversion: T16S R28E S18 SWSW CASSIA County

			NE				NW				SW				SE				
			NENE	NWNE	SWNE	SENE	NENW	NWNW	SWNW	SENW	NESW	NWSW	SWSW	SESW	NESE	NWSE	SWSE	SESE	
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	Lt Ac	Lt Ac	Lt Ac	Lt Ac	SUM
16S	27E	13				16									35				51.0
																	TOTAL ACRES		51.0

No. A43-02110 ADJUDICATION CLAIM PROFILE REPORT

OWNER CODE	NAME & ADDRESS	PRIORITY DATE	WATER USE	USE PERIOD FROM	USE PERIOD TO	DIVERSION RATE	DIVERSION VOLUME
C	MERLE JONES	05/23/1912	IRRIGATION	04-01	11-01	0.80 CFS	

Water Source: ROUND MOUNTAIN SPRING Tributary to: ROUND MOUNTAIN CREEK Stage: LICENSE

Point(s) of Diversion: T16S R28E S18 SWSWSW CASSIA County

			NE				NW				SW				SE				
			NENE	NWNE	SWNE	SENE	NENW	NWNW	SWNW	SENW	NESW	NWSW	SWSW	SESW	NESE	NWSE	SWSE	SESE	
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	Lt Ac	Lt Ac	Lt Ac	Lt Ac	SUM
16S	27E	13				16									35				51.0
																	TOTAL ACRES		51.0

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 NWNE[1] 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.

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[1]The 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.

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	ADJUDICATION CLAIMS
43-00045	**A43-00045**
- Authorizes irrigation of, at most, 160 acres - Does not authorize irrigation of 40 acres from which water is proposed to be moved.	- Claims right to irrigate 266 acres - Claims 40 acres irrigated from which water is proposed to be moved.
43-00286	**A43-00286B**
- 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.	- 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.
43-00182 & 43-00414	**A43-10824**
- 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.	- 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	A43-02061
- Authorizes irrigation of 30 acres from springs.	- Claims irrigation of 30 acres from springs.
43-02110	**A43-02110**
- Authorizes irrigation of 51 acres from a spring.	- 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 NWNE, 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 D. Yarbrough

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	USE PERIOD 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				
T	R	S	NENE Lt Ac	NWNE Lt Ac	SWNE Lt Ac	SENE Lt Ac	NENW Lt Ac	NWNW Lt Ac	SWNW Lt Ac	SENW Lt Ac	NESW Lt Ac	NWSW Lt Ac	SWSW Lt Ac	SESW Lt Ac	NESE Lt Ac	NWSE Lt Ac	SWSE Lt Ac	SESE Lt Ac	SUM
16S	27E	13														I	I	I	
16S	27E	24	I																

No. A43-00045 — ADJUDICATION CLAIM PROFILE REPORT

OWNER CODE	NAME & ADDRESS	PRIORITY DATE	WATER USE	USE PERIOD FROM	USE PERIOD 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

			NE				NW				SW				SE				
T	R	S	NENE Lt Ac	NWNE Lt Ac	SWNE Lt Ac	SENE Lt Ac	NENW Lt Ac	NWNW Lt Ac	SWNW Lt Ac	SENW Lt Ac	NESW Lt Ac	NWSW Lt Ac	SWSW Lt Ac	SESW Lt Ac	NESE Lt Ac	NWSE Lt Ac	SWSE Lt Ac	SESE 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					01-15												15.0
																		TOTAL ACRES	266.0

No. 43-00286 WATER RIGHT PROFILE REPORT

OWNER CODE	NAME & ADDRESS	PRIORITY DATE	WATER USE	USE PERIOD FROM	USE PERIOD TO	DIVERSION RATE	DIVERSION VOLUME
C	SETTLERS LAND & WATER CO.	11/23/1911	IRRIGATION	00/00	00/00	60.000 CFS	

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

			NE				NW				SW				SE				
			NENE	NWNE	SWNE	SENE	NENW	NWNW	SWNW	SENW	NESW	NWSW	SWSW	SESW	NESE	NWSE	SWSE	SESE	
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	Lt Ac	Lt Ac	Lt Ac	Lt Ac	SUM
16S	27E	2	01-I	02-I	I	I	03-I	04-I	I	I	I	I	I	I	I	I	I	I	
16S	27E	4						04-I	I		I	I	I	I	I	I	I	I	
16S	27E	5	01-I	02-I	I	I	03-I			I	I			I	I	I	I	I	
16S	27E	8	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	
16S	27E	9	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	
16S	27E	10	I	I		I	I	I											
16S	27E	11	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	
16S	27E	13		I	I		I	I	I	I	I	I	I	I		I	I	I	
16S	27E	14	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	
16S	27E	15												I					
16S	27E	16	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	
16S	27E	17	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	
16S	27E	21													I	I	I	I	
16S	27E	22	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	
16S	27E	23					I	I	I	I	I	I	I	I	I				
16S	27E	24	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	
16S	27E	25						I											
16S	27E	26	I	I			I	I											
16S	27E	27	I				I	I	I	I						I	I		
16S	27E	12		I	I		I	I	I	I	I	I	I	I	I	I	I		
16S	27E	3					03-I	04-I	I	I	I	I	I	I	I	I	I	I	

No. A43-00286B ADJUDICATION CLAIM PROFILE REPORT

OWNER CODE	NAME & ADDRESS	PRIORITY DATE	WATER USE	USE PERIOD FROM	USE PERIOD TO	DIVERSION RATE	DIVERSION VOLUME
C	MERLE JONES	11/23/1911	IRRIGATION	04-01	11-01	4.30 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				
			NENE	NWNE	SWNE	SENE	NENW	NWNW	SWNW	SENW	NESW	NWSW	SWSW	SESW	NESE	NWSE	SWSE	SESE	
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	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						01-15											15.0
																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	USE PERIOD 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 SENESE NESESE CASSIA County
S24 NESENE CASSIA County

			NE					NW					SW					SE					
T	R	S	NENE Lt	NENE Ac	NWNE Lt	NWNE Ac	SWNE Lt	SWNE Ac	SENE Lt	SENE Ac	NENW Lt	NENW Ac	NWNW Lt	NWNW Ac	SWNW Lt	SWNW Ac	SENW Lt	SENW Ac	NESW Lt	NESW Ac	NWSW Lt	NWSW Ac	SWSW Lt	SWSW Ac	SESW Lt	SESW Ac	NESE Lt	NESE Ac	NWSE Lt	NWSE Ac	SWSE Lt	SWSE Ac	SESE Lt	SESE Ac	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

No. 43-00182 WATER RIGHT PROFILE REPORT

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

Water Source: ROUND MOUNTAIN CREEK Tributary to: CLEAR CREEK Stage: DECREED

			NE				NW				SW				SE				
			NENE	NWNE	SWNE	SENE	NENW	NWNW	SWNW	SENW	NESW	NWSW	SWSW	SESW	NESE	NWSE	SWSE	SESE	
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	Lt Ac	Lt Ac	Lt Ac	Lt Ac	SUM
16S	27E	12												I			I		
16S	27E	13		I			I												

No. 43-00414 WATER RIGHT PROFILE REPORT

OWNER CODE	NAME & ADDRESS	PRIORITY DATE	WATER USE	USE PERIOD FROM	USE PERIOD 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

			NE				NW				SW				SE				
			NENE	NWNE	SWNE	SENE	NENW	NWNW	SWNW	SENW	NESW	NWSW	SWSW	SESW	NESE	NWSE	SWSE	SESE	
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	Lt Ac	Lt Ac	Lt Ac	Lt Ac	SUM
16S	27E	12																I	
16S	27E	13	I			I									I				

No. A43-10824 ADJUDICATION CLAIM PROFILE REPORT

OWNER CODE	NAME & ADDRESS	PRIORITY DATE	WATER USE	USE PERIOD FROM	USE PERIOD 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 SPRING
Tributary to: CLEAR CREEK
ROUND MOUNTAIN CREEK
Stage: DECREED

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

			NE				NW				SW				SE				
			NENE	NWNE	SWNE	SENE	NENW	NWNW	SWNW	SENW	NESW	NWSW	SWSW	SESW	NESE	NWSE	SWSE	SESE	
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	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					01-15												15.0
																		TOTAL ACRES	266.0

No. 43-02061 WATER RIGHT PROFILE REPORT

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

Water Source: SPRINGS Tributary to: ROUND MOUNTAIN CREEK Stage: LICENSE

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

			NE				NW				SW				SE				
			NENE	NWNE	SWNE	SENE	NENW	NWNW	SWNW	SENW	NESW	NWSW	SWSW	SESW	NESE	NWSE	SWSE	SESE	
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	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	PRIORITY DATE	WATER USE	USE PERIOD FROM	USE PERIOD TO	DIVERSION RATE	DIVERSION VOLUME
C	MERLE JONES	01/19/1910	IRRIGATION	04-01	11-01	0.16 CFS	

Water Source: SPRINGS Tributary to: ROUND MOUNTAIN CREEK Stage: LICENSE

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

P			NE				NW				SW				SE				
			NENE	NWNE	SWNE	SENE	NENW	NWNW	SWNW	SENW	NESW	NWSW	SWSW	SESW	NESE	NWSE	SWSE	SESE	
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	Lt Ac	Lt Ac	Lt Ac	Lt Ac	SUM
16S	27E	13				17									13				30.0
																		TOTAL ACRES	30.0

No. 43-02110

WATER RIGHT PROFILE REPORT

OWNER CODE	NAME & ADDRESS	PRIORITY DATE	WATER USE	USE PERIOD FROM	USE PERIOD TO	DIVERSION RATE	DIVERSION VOLUME
C	EMMA C. OLSON	05/23/1912	IRRIGATION	00/00	00/00	0.800 CFS	

Water Source: SPRING Tributary to: SINKS Stage: LICENSE

Point(s) of Diversion: T16S R28E S18 SWSW CASSIA County

			NE				NW				SW				SE				
T	R	S	NENE Lt Ac	NWNE Lt Ac	SWNE Lt Ac	SENE Lt Ac	NENW Lt Ac	NWNW Lt Ac	SWNW Lt Ac	SENW Lt Ac	NESW Lt Ac	NWSW Lt Ac	SWSW Lt Ac	SESW Lt Ac	NESE Lt Ac	NWSE Lt Ac	SWSE Lt Ac	SESE Lt Ac	SUM
16S	27E	13				16									35				51.0
																		TOTAL ACRES	51.0

No. A43-02110

ADJUDICATION CLAIM PROFILE REPORT

OWNER CODE	NAME & ADDRESS	PRIORITY DATE	WATER USE	USE PERIOD FROM	USE PERIOD TO	DIVERSION RATE	DIVERSION VOLUME
C	MERLE JONES	05/23/1912	IRRIGATION	04-01	11-01	0.80 CFS	

Water Source: ROUND MOUNTAIN SPRING Tributary to: ROUND MOUNTAIN CREEK Stage: LICENSE

Point(s) of Diversion: T16S R28E S18 SWSWSW CASSIA County

			NE				NW				SW				SE				
T	R	S	NENE Lt Ac	NWNE Lt Ac	SWNE Lt Ac	SENE Lt Ac	NENW Lt Ac	NWNW Lt Ac	SWNW Lt Ac	SENW Lt Ac	NESW Lt Ac	NWSW Lt Ac	SWSW Lt Ac	SESW Lt Ac	NESE Lt Ac	NWSE Lt Ac	SWSE Lt Ac	SESE Lt Ac	SUM
16S	27E	13				16									35				51.0
																		TOTAL ACRES	51.0

BEFORE THE DEPARTMENT OF WTAER 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 MOUNTAIN RANCH.	)))))	**ORDER GRANTING RECONSIDERATION**

The petition for reconsideration filed by the applicant, Jeff Sessions, doing business as Round Mountain Ranch, is GRANTED.

The issues raised by the petition and other issues raised by the protestant in its response will be addressed within 21 days of the date of this order.

Dated this 19th day of November, 1996.

Gary Spackman

GARY SPACKMAN

CERTIFICATE OF SERVICE

I do hereby certify that on this 19th day of November, 1996, I mailed a true and correct copy, postage prepaid, of the foregoing ORDER GRANTING RECONSIDERATION to the following:

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

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

Harold & Ray Jones
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Malta, ID 83342

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

Deborah Drew Ellis

DEBORAH DREW-ELLIS
Legal Secretary

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 MOUNTAIN RANCH	)	**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. 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 NWNESE[1] 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

[1]The 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	ADJUDICATION CLAIMS
43-00045	**A43-00045**
- Authorizes irrigation of, at most, 160 acres - Does not authorize irrigation of 40 acres from which water is proposed to be moved.	- Claims right to irrigate 266 acres - Claims 40 acres irrigated from which water is proposed to be moved.
43-00286	**A43-00286B**
- 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.	- 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.
43-00182 & 43-00414	**A43-10824**
- 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.	- 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	**A43-02061**
- Authorizes irrigation of 30 acres from springs.	- Claims irrigation of 30 acres from springs.
43-02110	**A43-02110**
- Authorizes irrigation of 51 acres from a spring.	- 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 © 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.

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
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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	USE PERIOD 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				
			NENE	NWNE	SWNE	SENE	NENW	NWNW	SWNW	SENW	NESW	NWSW	SWSW	SESW	NESE	NWSE	SWSE	SESE	
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	Lt Ac	Lt Ac	Lt Ac	Lt Ac	SUM
16S	27E	13														I	I	I	
16S	27E	24	I																

No. A43-00045 ADJUDICATION CLAIM PROFILE REPORT

OWNER CODE	NAME & ADDRESS	PRIORITY DATE	WATER USE	USE PERIOD FROM	USE PERIOD 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

			NE				NW				SW				SE				
			NENE	NWNE	SWNE	SENE	NENW	NWNW	SWNW	SENW	NESW	NWSW	SWSW	SESW	NESE	NWSE	SWSE	SESE	
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	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						01-15											15.0
																	TOTAL ACRES		266.0

No. 43-00286 WATER RIGHT PROFILE REPORT

OWNER CODE	NAME & ADDRESS	PRIORITY DATE	WATER USE	USE PERIOD FROM	USE PERIOD TO	DIVERSION RATE	DIVERSION VOLUME
C	SETTLERS LAND & WATER CO.	11/23/1911	IRRIGATION	00/00	00/00	60.000 CFS	

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

			NE				NW				SW				SE				
			NENE	NWNE	SWNE	SENE	NENW	NWNW	SWNW	SENW	NESW	NWSW	SWSW	SESW	NESE	NWSE	SWSE	SESE	
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	Lt Ac	Lt Ac	Lt Ac	Lt Ac	SUM
16S	27E	2	01-I	02-I	I	I	03-I	04-I	I	I	I	I	I	I	I	I	I	I	
16S	27E	4						04-I	I		I	I	I	I	I	I	I	I	
16S	27E	5	01-I	02-I	I	I	03-I			I	I			I	I	I	I	I	
16S	27E	8	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	
16S	27E	9	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	
16S	27E	10	I	I		I	I	I											
16S	27E	11	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	
16S	27E	13		I	I		I	I	I	I	I	I	I	I		I	I	I	
16S	27E	14	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	
16S	27E	15												I					
16S	27E	16	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	
16S	27E	17	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	
16S	27E	21													I	I	I	I	
16S	27E	22	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	
16S	27E	23					I	I	I	I	I	I	I	I	I				
16S	27E	24	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	
16S	27E	25						I											
16S	27E	26	I	I			I	I											
16S	27E	27	I				I	I	I	I						I	I		
16S	27E	12		I	I		I	I	I	I	I	I	I	I	I	I	I		
16S	27E	3					03-I	04-I	I	I	I	I	I	I	I	I	I	I	

No. A43-002868 ADJUDICATION CLAIM PROFILE REPORT

OWNER CODE	NAME & ADDRESS	PRIORITY DATE	WATER USE	USE PERIOD FROM	USE PERIOD TO	DIVERSION RATE	DIVERSION VOLUME
C	MERLE JONES	11/23/1911	IRRIGATION	04-01	11-01	4.30 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				
			NENE	NWNE	SWNE	SENE	NENW	NWNW	SWNW	SENW	NESW	NWSW	SWSW	SESW	NESE	NWSE	SWSE	SESE	
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	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						01-15											15.0
																TOTAL ACRES			266.0

No. 43-00182 WATER RIGHT PROFILE REPORT

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

Water Source: ROUND MOUNTAIN CREEK Tributary to: CLEAR CREEK Stage: DECREED

			NE					NW					SW					SE					
			NENE		NWNE		SWNE		SENE		NENW		NWNW		SWNW		SENW		NESW		NWSW		SWSW		SESW		NESE		NWSE		SWSE		SESE		
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	Lt	Ac	Lt	Ac	Lt	Ac	SUM
16S	27E	12																						I									
16S	27E	13				I						I																I					

No. 43-00414 WATER RIGHT PROFILE REPORT

OWNER CODE	NAME & ADDRESS	PRIORITY DATE	WATER USE	USE PERIOD FROM	USE PERIOD 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

			NE					NW					SW					SE					
			NENE		NWNE		SWNE		SENE		NENW		NWNW		SWNW		SENW		NESW		NWSW		SWSW		SESW		NESE		NWSE		SWSE		SESE		
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	Lt	Ac	Lt	Ac	Lt	Ac	SUM
16S	27E	12																															
16S	27E	13		I						I																I							

No. A43-10824 ADJUDICATION CLAIM PROFILE REPORT

OWNER CODE	NAME & ADDRESS	PRIORITY DATE	WATER USE	USE PERIOD FROM	USE PERIOD 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 SPRING
Tributary to: CLEAR CREEK
ROUND MOUNTAIN CREEK
Stage: DECREED

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

			NE					NW					SW					SE					
			NENE		NWNE		SWNE		SENE		NENW		NWNW		SWNW		SENW		NESW		NWSW		SWSW		SESW		NESE		NWSE		SWSE		SESE		
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	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										01-15																					15.0
																																TOTAL ACRES	266.0

No. 43-02061 WATER RIGHT PROFILE REPORT

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

Water Source: SPRINGS Tributary to: ROUND MOUNTAIN CREEK Stage: LICENSE

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

	NE				NW				SW				SE				
T R S	NENE Lt Ac	NWNE Lt Ac	SWNE Lt Ac	SENE Lt Ac	NENW Lt Ac	NWNW Lt Ac	SWNW Lt Ac	SENW Lt Ac	NESW Lt Ac	NWSW Lt Ac	SWSW Lt Ac	SESW Lt Ac	NESE Lt Ac	NWSE Lt Ac	SWSE Lt Ac	SESE 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	PRIORITY DATE	WATER USE	USE PERIOD FROM	USE PERIOD TO	DIVERSION RATE	DIVERSION VOLUME
C	MERLE JONES	01/19/1910	IRRIGATION	04-01	11-01	0.16 CFS	

Water Source: SPRINGS Tributary to: ROUND MOUNTAIN CREEK Stage: LICENSE

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

P		NE				NW				SW				SE				
T R S		NENE Lt Ac	NWNE Lt Ac	SWNE Lt Ac	SENE Lt Ac	NENW Lt Ac	NWNW Lt Ac	SWNW Lt Ac	SENW Lt Ac	NESW Lt Ac	NWSW Lt Ac	SWSW Lt Ac	SESW Lt Ac	NESE Lt Ac	NWSE Lt Ac	SWSE Lt Ac	SESE Lt Ac	SUM
16S 27E 13					17									13				30.0
															TOTAL ACRES			30.0

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

OWNER CODE	NAME & ADDRESS	PRIORITY DATE	WATER USE	USE PERIOD FROM	USE PERIOD 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 SENESE NESESE CASSIA County
S24 NESENE CASSIA County

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

No. 43-02110 WATER RIGHT PROFILE REPORT

OWNER CODE	NAME & ADDRESS	PRIORITY DATE	WATER USE	USE PERIOD FROM	USE PERIOD TO	DIVERSION RATE	DIVERSION VOLUME
C	EMMA C. OLSON	05/23/1912	IRRIGATION	00/00	00/00	0.800 CFS	

Water Source: SPRING Tributary to: SINKS Stage: LICENSE

Point(s) of Diversion: T16S R28E S18 SWSW CASSIA County

			NE				NW				SW				SE				
			NENE	NWNE	SWNE	SENE	NENW	NWNW	SWNW	SENW	NESW	NWSW	SWSW	SESW	NESE	NWSE	SWSE	SESE	
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	Lt Ac	Lt Ac	Lt Ac	Lt Ac	SUM
16S	27E	13				16									35				51.0
																	TOTAL ACRES		51.0

No. A43-02110 ADJUDICATION CLAIM PROFILE REPORT

OWNER CODE	NAME & ADDRESS	PRIORITY DATE	WATER USE	USE PERIOD FROM	USE PERIOD TO	DIVERSION RATE	DIVERSION VOLUME
C	MERLE JONES	05/23/1912	IRRIGATION	04-01	11-01	0.80 CFS	

Water Source: ROUND MOUNTAIN SPRING Tributary to: ROUND MOUNTAIN CREEK Stage: LICENSE

Point(s) of Diversion: T16S R28E S18 SWSWSW CASSIA County

			NE				NW				SW				SE				
			NENE	NWNE	SWNE	SENE	NENW	NWNW	SWNW	SENW	NESW	NWSW	SWSW	SESW	NESE	NWSE	SWSE	SESE	
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	Lt Ac	Lt Ac	Lt Ac	Lt Ac	SUM
16S	27E	13				16									35				51.0
																	TOTAL ACRES		51.0

Please note
Allen's memo
dated 5-24-95
about advertising
and processing.

RECEIVED
Form 202
10/92
MAY 24 1995
Department of Water Resources
Southern Region

Ident. No. 43-07321

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES
APPLICATION FOR PERMIT

Amended 6/8/95

To appropriate the public waters of the State of Idaho

1. Name of applicant Round Mountain Ranch Phone (208) 824-5727

   Post office address HC 72, Box 2346 Malta, Idaho 83342

2. Source of water supply Private drain water, surface runoff and Round Mountain Creek which is a tributary of Clear Creek

3. Location of point of diversion is NW ¼ of NE ¼ of SE ¼, Govt. Lot NE NW SE

   Sec. 13 Township 16S Range 27E B.M. Cassia County; additional points of diversion if any:

4. Water will be used for the following purposes: * May be emptied & refilled as needed. JS 5-24-95

   Amount ~~20 cfs~~ 26 ~~15 AF~~ for storage purposes from Jan. 1 to Dec. 31 (both dates inclusive)
   (cfs or acre-feet per annum)

   Amount ~~15 a/f~~ 26 for irrigation/from storage purposes from April 1 to Nov. 1 (both dates inclusive)
   (cfs or acre-feet per annum)

   Amount ~~15 a/f~~ 26 for stockwater storage purposes from Jan. 1 to Dec. 31 (both dates inclusive)
   (cfs or acre-feet per annum)

   Amount 1.0cfs for div. to storage purposes from Jan. 1 to Dec. 31 (both dates inclusive)
   (cfs or acre-feet per annum)

5. Total quantity to be appropriated is (a) ~~11~~ 1.0cfs and/or (b) 15 *
   cubic feet per second acre feet per annum

6. Proposed diverting works:

   a. Description of ditches, flumes, pumps, headgates, etc. field tile drains and surface runoff directed to and stored behind dam during non-irrigation season. Irrigation water stored during irrigation season to enhance water use and conservation.

   b. Height of storage dam 11 feet; active reservoir capacity ~~15~~ 26 acre-feet; total reservoir capacity ~~15~~ 26 acre-feet; period of year when water will be diverted to storage: Jan. 1 to Dec. 31 inclusive.

   c. Proposed well diameter is _____ inches; proposed depth of well is _____ feet.

   d. Is ground water with a temperature of greater than 85°F being sought? _____

   e. If well is already drilled, when? _____; Drilling firm _____;

   Well was drilled for *(well owner)* _____

7. Time required for the completion of the works and application of the water to be proposed beneficial use is one (1) years *(minimum 1 year)*.

8. Description of proposed uses (*if irrigation only, go to item 9*):

a. Hydropower; show total feet of head and proposed capacity in KW. _____

b. Stockwatering; list number and kind of livestock. 400 beef cows

c. Municipal; show name of municipality. _____

d. Domestic; show number of households. _____

e. Other; describe fully. _____

9. Description of place of use:

a. If water is for irrigation, indicate acreage in each subdivision in the tabulation below.

b. If water is used for other purposes, place a symbol of the use (*example: D for Domestic*) in the corresponding place of use below. See instructions for standard symbols.

TWP	RANGE	SEC.	NE¼				NW¼				SW¼				SE¼				TOTALS
			NE¼	NW¼	SW¼	SE¼	NE¼	NW¼	SW¼	SE¼	NE¼	NW¼	SW¼	SE¼	NE¼	NW¼	SW¼	SE¼	
16S	27E	13	S 6			S 17					40				S 35	S 33	40	40	211
		24	40																40
	28E	19						15											15
16S	27E	13													X	X			
											Location of Reservoir								

Total number of acres to be irrigated 266

10. Describe any other water rights used for the same purposes as described above. 43-00182, 43-00414, 43-02061, 43-10116, 43-02110, 43-00286B, 43-00045, 43-10118, 43-10119

11. a. Who owns the property at the point of diversion? Round Mountain Creek

b. Who owns the land to be irrigated or place of use? Round Mountain Creek

c. If the property is owned by a person other than the applicant, describe the arrangement enabling the applicant to make this filing. _____

12. Remarks: This is an expansion of an existing dam in existence in 1911 and used as part of irrigation system. Developed water from drain tiles on property fills reservoir during non-irrigation season in approximately 44 days. Storage during irrigation season allows irrigation water to be better utilized, as sprinkler system capacity exceeds natural flow at many times. During irrigation season the reservoir is emptied & filled as needed with the private drain water as needed. TS 5-24-94

Reservoir is constructed on old Round Mountain Creek channel but water mainly stored [redacted] private drain & seep [redacted]ter which originates on ranch and does not flow off of ranch.

13. Map of proposed project: show clearly the proposed point of diversion, place of use, section number, township and range number.

SEE ATTACHED MAP

Scale: 2 inches equal 1 mile.

BE IT KNOWN that the undersigned hereby makes application for permit to appropriate the public waters of the State of Idaho as herein set forth.

[redacted]

(Applicant)

ADm 5/24/95 1:00 pm

Received by ADm Date 5/24/95 Time 2:00 pm Preliminary check by MTS

Fee $ 100.00 Receipted by ADm # 5018126 Date 5/24/95

Publication prepared by MB Date 6/13/95 Published in So. Id. Press

Publication approved _____ Date _____

ACTION OF THE DIRECTOR, DEPARTMENT OF WATER RESOURCES

This is to certify that I have examined Application for Permit to appropriate the public waters of the State of Idaho No. _____, and said application is hereby _____.

1. Approval of said application is subject to the following limitations and conditions:

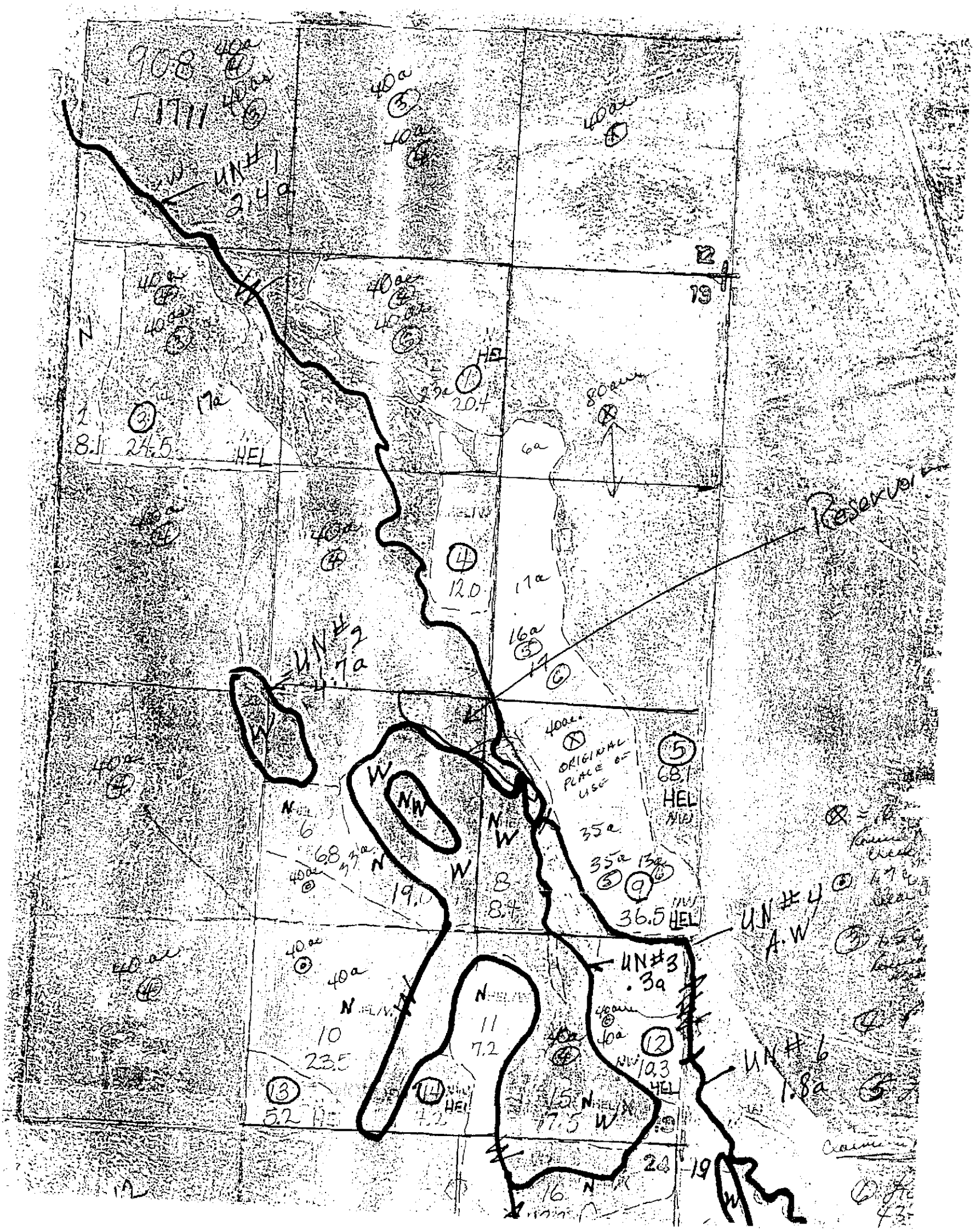
   a. SUBJECT TO ALL PRIOR WATER RIGHTS.

   b. Proof of construction of works and application of water to beneficial use shall be submitted on or before _____, 19____.

   c. The rate of diversion, if water is to be used for irrigation under this permit, when combined with all other water rights for the same land shall not exceed 0.02 cubic feet per second for each acre of land.

   d. The water right acquired under this permit if for hydropower purposes shall be junior and subordinate to all rights to the use of water, other than hydropower, within the State of Idaho that are initiated later in time than the priority of this permit and shall not give rise to any right or claim against any future rights to the use of water, other than hydropower, within the State of Idaho initiated later in time than the priority of this permit.

   e. Other:


UN #1
2.4a
UN #2
7a
UN #3
.3a
UN #4
A.W
UN #6
1.8a
Reservoir
ORIGINAL PLACE OF USE
HEL
40a
80a
6a
17a
16a
35a
13a
68.1
36.5
20.4
12.0
19.0
8.4
23.5
7.2
10.3
7.5
5.2
8.1
24.5
68.
Kanaka Creek

State of Idaho
DEPARTMENT OF WATER RESOURCES
1301 North Orchard Street, P.O. Box 83720, Boise, Idaho 83720-0098
Phone: (208) 327-7900 FAX: (208) 327-7866

January 10, 2000

DIRK KEMPTHORNE
GOVERNOR

KARL J. DREHER
DIRECTOR

ROUND MOUNTAIN RANCH
HC 72, BOX 2346
MALTA, ID 83342

PROOF ACKNOWLEDGMENT LETTER

RE: PERMIT NO. 43-07321

Dear Permit Holder:

The department acknowledges receipt of the proof of beneficial use form submitted for the above referenced permit. The next step in the process of developing a water right is for the department to conduct a field examination to determine and confirm the use being made of the water.

Be advised that Section 42-248, Idaho Code, requires you or the owner of this water right to maintain current ownership and address records on file with the department. Forms to file a change of ownership of a water right and/or a change in the address of the water right owner are available from any department office.

If you have questions concerning the field examination, please contact the **SOUTHERN** Regional Office of the department in Twin Falls at (208) 736-3033.

Sincerely,

L. GLEN SAXTON, Chief
Water Allocation Bureau

c: IDWR - Regional Office

MICROFILMED

ANALYSIS SHEET FOR PROOF OF BENEFICIAL USE

Permit No. 43-07321 Reviewed by YES Date 1-07-00

GENERAL CONSIDERATIONS

yes Name same as permit?

yes Address same as permit?

yes Proof timely received?

If not, complete calculation below.

TYPES OF USE

Stor for irr

Correct Uses? yes

SOURCE OF WATER

✓ Surface water source

_____ Ground water source

_____ Drilling permit required?

_____ Copy in the file? Drilling Permit No. _____

_____ Amount paid for permit _____ Correct?

_____ Well log in the file?

LICENSE EXAMINATION FEE

yes Required?

100.00 Amount Submitted

yes Correct?

MEASURING DEVICE

yes Required?

yes Installed?

— Waiver requested?

PRIORITY CALCULATION

Date proof received		
Date proof due	-	
No. of days late	=	
Priority Date	+	
New Priority Date		

DEFICIENCIES OR ACTION ITEMS

OK - acres proof

DATA ENTRY

New Address _____

Proof Made 6-10-99

RECEIVED
JUN 10 1999
Department of Water Resources

LING, NIELSEN & ROBINSON
ATTORNEYS AT LAW
615 "H" STREET
P. O. BOX 396
RUPERT, IDAHO 83350-0396

ROBERT M. NIELSEN
BRENT T. ROBINSON
BRENT C. TINGEY

AREA CODE 208
TELEPHONE 436-4717
FAX 436-6804

June 8, 1999

Julie L. Yarbrough
Water Allocation Bureau
Idaho Department of Water Resources
P. O. Box 83720
Boise, ID 83720-0098

RE: **Proof of Beneficial Use - Permit No. 43-07321**

Dear Ms. Yarbrough:

Enclosed herewith are a duly executed Proof of Beneficial Use form and a check in the amount of $100.00 for submittal on behalf of Jeff Sessions for Round Mountain Ranch.

Very truly yours,

Roger D. Ling

RDL/jb

enclosures

Is your RETURN ADDRESS completed on the reverse side?

SENDER:

- Complete items 1 and/or 2 for additional services.
- Complete items 3, 4a, and 4b.
- Print your name and address on the reverse of this form so that we can return this card to you.
- Attach this form to the front of the mailpiece, or on the back if space does not permit.
- Write "*Return Receipt Requested*" on the mailpiece below the article number.
- The Return Receipt will show to whom the article was delivered and the date delivered.

I also wish to receive the following services (for an extra fee):

1. ☐ Addressee's Address
2. ☐ Restricted Delivery

Consult postmaster for fee.

3. Article Addressed to:

Round Mountain Ranch
HC 72 Box 2346
Malta Id 83342

4a. Article Number
Z 433 942 683

4b. Service Type
☐ Registered ☑ Certified
☐ Express Mail ☐ Insured
☐ Return Receipt for Merchandise ☐ COD

7. Date of Delivery
4-14-99

5. Received By: *(Print Name)*
Shirley HARRIS

8. Addressee's Address *(Only if requested and fee is paid)*
MICROFILMED
APR 18 2000

6. Signature: *(Addressee or Agent)*
X Shirley Harris

PS Form **3811**, December 1994 Domestic Return Receipt

Thank you for using Return Receipt Service.

UNITED STATES POSTAL SERVICE

First-Class Mail
Postage & Fees Paid
USPS
Permit No. G-10

• Print your name, address, and ZIP Code in this box •

APR 14 1999
3 P.M.

MICROFILMED
APR 18 2000

Water Allocation Bureau
Department of Water Resources
1301 N. Orchard St.
Boise, ID 83706

RECEIVED
APR 15 1999
Department of Water Resources

49

Julie

State of Idaho
DEPARTMENT OF WATER RESOURCES
1301 North Orchard Street, P.O. Box 83720, Boise, Idaho 83720-0098
Phone: (208) 327-7900 FAX: (208) 327-7866

DIRK KEMPTHORNE
GOVERNOR

KARL J. DREHER
DIRECTOR

April 13, 1999

ROUND MOUNTAIN RANCH
HC 72 BOX 2346
MALTA ID 83342

PROOF DUE NOTICE

RE: Permit No. 43-07321

Dear Permit Holder:

One of the conditions of approval of the above referenced water permit was that proof of the extent of your beneficial use must be submitted to this office on or before June 11, 1999. (See Order Extending Proof of Beneficial Use dated April 9, 1999.) Enclosed is a form which when accompanied by the license examination fee or a complete field examination report prepared by a certified water right examiner may be used to submit the required proof.

If you have not fully completed your project, and you or a previous owner of this permit have not received a prior extension of time, you may request an extension of time if the delay is for reasonable cause as provided in Section 42-204, Idaho Code. If you have been prevented from proceeding by a governmental agency or by litigation which might bring title to the water in question, more than one extension of time can be granted. An extension of time request from is enclosed for your convenience.

Either an acceptable proof of beneficial use submittal or an acceptable request for an extension of time must be received by this department on or before the above described proof due date. If neither is received, the department will send you a lapse notice. Within sixty days of the mailing of the lapse notice, the permit will no longer be of any force nor effect.

Sincerely,

Julie L. Yarbrough

JULIE L. YARBROUGH
Senior Secretary, Water Allocation Bureau

Enclosures

CERTIFIED MAIL
NO. 243 942 683

MICROFILMED
APR 18 2000

State of Idaho
DEPARTMENT OF WATER RESOURCES
1301 North Orchard Street, P.O. Box 83720, Boise, Idaho 83720-0098
Phone: (208) 327-7900 FAX: (208) 327-7866

DIRK KEMPTHORNE
GOVERNOR

KARL J. DREHER
DIRECTOR

April 12, 1999

RE: In the Matter of Permit No. 43-07321 in the name of Round Mountain Ranch

Dear Permit Holder:

I have enclosed a copy of an order which extends the date in which to submit proof of beneficial use for the above referenced permit. The department will be mailing you a proof due notice and forms to file proof within the week.

If you have any questions concerning the enclosed document, please contact me directly at (208)327-7953.

Sincerely,

JULIE L. YARBROUGH, Senior Secretary
Water Allocation Bureau

Enclosure

MICROFILMED
APR 18 2000

Luke, Tim

From: Luke, Tim
Sent: Friday, April 02, 1999 11:15 AM
To: Yarbrough, Julie
Cc: Keen, Shelley
Subject: BU Proof: 43-07321

Julie,
Roberta will hand carry and barcode a file to you, 43-07321, Round Mtn Ranch. This permit apparently never had a proof date assigned to it in the water rights database, and therefore it was never called up for proof notice. the order approving the permit had an 11/1/98 proof due date. I think Roberta discussed this with you about a week ago. Will you make sure a date is entered and do the necessary call ups, send out notices for proof etc? I stumbled on to this proof problem while researching the file to respond to correspondence regarding other conditions of the permit.

Thanks

Tim

MICROFILMED

APR 1 8 2000

Hurlbutt

re 43-07321

Post-it® Fax Note 7671	Date	# of pages ▶ 3
To Norm & Neil	From Allen M
Co./Dept.	Co.
Phone #	Phone #
Fax #	Fax #

MEM(

TO: Allen Merritt

FROM: Corey Skinner CS

DATE: July 10, 1998

SUBJECT: Field Visit at Round Mountain Ranch

Yesterday evening, I visited Round Mountain Ranch to determine if the pivot sprinkler located in the NESW ¼ of Section 13 (T16S, R27E) was being operated. Upon arrival, I was greeted by Jeff Sessions who is the owner/operator of Round Mountain Ranch. Allen Merritt had called earlier in the day and spoke to Jeff's wife and told her that I would be coming out.

I discussed with Mr. Sessions why I was visiting, and gave him some copies of some information. I gave him copies of pages 15 and 16 of the 11/07/1997 order regarding his water right application (43-07321) and transfer application (#4640). I explained to Mr. Sessions that, according to the order, the land located in the NESW ¼ of Section 13 was to be irrigated with reservoir water only when Clear Creek water was being delivered to the reservoir apparently under right 43-00286 (part).

I also gave Mr. Sessions a copy of the June 3, 1998 order from Judge Hurlbutt and pointed out that the judge had ordered that the Round Mountain Ranch right no. 43-00286B shall not be delivered. Mr. Sessions said he was under the understanding that when there was excess Clear Creek water he would receive Clear Creek water and was entitled to use it. Note that Mr. Sessions' understanding of the situation coincides with modification #5 on the last page of the Hurlbutt order.

In addition, I gave Mr. Sessions copies of the revised Sections of §42-1701B, and explained how this law "streamlines" the enforcement process and could potentially increase the possible civil penalties for the illegal use of water. I also gave Mr. Sessions a copy of a GIS generated aerial photo of the irrigated portions of his ranch.

Mr. Sessions proceeded to tell me what has been recently happening regarding his irrigation from Clear Creek. He said that since May 26th he has been receiving a "full ditch" of water from Clear Creek. This would mean that Mr. Sessions was being delivered in excess of his normal Clear Creek water right. He said that on Wednesday (07/08/98) he was still receiving a "full ditch" of water from Clear Creek at the top end of his field(s). Yesterday (07/09/98), Mr. Sessions said that he did not check the water he was receiving from Clear Creek until just before my arrival, since he was working on his ranch in Utah. Upon his checking, he said

MICROFILMED

APR 1 8 2000

that he observed that he was no longer receiving water at the top of his field(s) and that apparently the water master had quit delivering the excess water. Mr. Sessions said that he assumed that he was now supposed to rotate the Clear Creek water use. He said that he had just recently began irrigating the NESW ¼ of Section 13 with the pivot sprinkler and that the system was still running. Mr. Sessions said that the pivot sprinkler had gone around 1½ times and he estimated that the pivot had been running for about 60 hours. He said that he had done no early watering, and up until a few days ago he had hay cut on the ground served by the pivot sprinkler. I asked Mr. Sessions if I could go around and take some pictures of his place. Mr. Sessions and I proceeded to drive and walk around his place and I made the following observations:

The reservoir (D43-07321) was full and water was running out of the spillway. The land located in the NESW ¼ of Section 13 is irrigated by pumping water from the reservoir. It seems that if water was flowing out the reservoir spillway, that more water has been coming into the reservoir than what has been pumped out. If the land located in the NESW ¼ of Section 13 had been irrigated for some amount of time while excess Clear Creek water was not flowing (as waste water) into the reservoir, one would expect the reservoir level to be dropping. It should be noted that water from a spring and tile drains also flow into the reservoir, but this contribution is less than what would be pumped out for irrigation.

The pivot sprinkler was irrigating the land located in the NESW ¼ of Section 13. I observed that alfalfa was growing on this land, and that the alfalfa was quite short, indicating that a crop of hay had recently been harvested off of this land.

The tail end of the ditch, below the pipeline, that delivers Clear Creek water to Mr. Sessions' place still had puddles of water in it, indicating that water was in the ditch in the recent past. Mr. Sessions said that the puddles of water I observed were from a few days ago, since he had been recently diverting the Clear Creek water from the pipe line further up the delivery system, near the top end of his place.

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I took some photographs to document my observations and the photos should be developed early next week. Mr. Sessions said that he had not recently heard from the watermaster, and that he had just recently observed that he was no longer being delivered excess Clear Creek water. On our way out, Mr. Sessions turned off his pivot sprinkler.

After meeting with Mr. Sessions, I attempted to contact the watermaster by phone, and by stopping by his place, but was unable to reach him.

I recommend that the Department send a letter to Mr. Sessions, informing him exactly if/when he can operate the pivot sprinkler and irrigate the land located in the NESW ¼ of Section 13.

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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	)	**ORDER SETTLING TRANSCRIPT**

TO: ALL PARTIES OR THEIR COUNSEL OF RECORD

YOU ARE HEREBY NOTIFIED, That pursuant to I.R.C.P. 84(o), the transcript of the testimony and proceedings of the hearing before the Department of Water Resources in this matter has been lodged with the Department and made available to the parties on February 25, 1998. No timely objections to the transcript were filed before the Department.

NOW, THEREFORE, IT IS HEREBY ORDERED that no objections being made to the transcript in this proceeding before the Department; the transcript is hereby settled pursuant to the provisions of I.R.C.P. 84(o).

DATED This 17th day of March, 1998.

KARL J. DREHER
Director

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CERTIFICATE OF SERVICE

I hereby certified that I served a true and correct copy of the following described document on the persons listed below by mailing in the United States mail, first class, with the correct postage affixed thereto on the 17th day of March, 1998.

Document served: ORDER SETTLING TRANSCRIPT

Persons served:

Roger D. Ling, Esq.
Brent C. Tingey, Esq.
LING NIELSEN & ROBINSON
P.O. Box 396
Rupert, ID 83350

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

Deborah Drew-Ellis
Legal Secretary

C:\DATA\WPDOCS\RNDMTN\SETTLE.ORD

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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	)	**NOTICE OF LODGING OF TRANSCRIPT**

TO: ALL PARTIES OR THEIR COUNSEL OF RECORD

YOU ARE HEREBY NOTIFIED, pursuant to I.R.C.P. 84(o), that the transcript of the testimony and proceedings of the hearing before the Department of Water Resources in this matter has been lodged with the Department in accordance with I.R.C.P. 84(k)(1).

YOU ARE FURTHER NOTIFIED, that the appellant, Jeff Sessions dba Round Mountain Ranch, has paid the transcript preparation fee, and that the Department is enclosing with this notice a copy of the transcript to each counsel of record;

THAT the parties have fourteen (14) days from the date of this notice in which to file any objection to the transcript;

THAT any objections to the transcript shall be made in writing to the Department and shall be determined thereby;

THAT upon failure of the parties to file any objection within such 14-day period, the transcript shall be deemed settled; and,

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THAT upon the settlement of the transcript, the Department shall file with the district court to which appeal has been made the original of the transcript together with a copy of the agency record and all exhibits offered or admitted in the proceeding.

DATED this 25th day of February, 1998.

KARL J. DREHER
Director

CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the following described document on the persons listed below by mailing in the United States mail, first class, with the correct postage affixed thereto on the 25th day of February, 1998.

Documents served: NOTICE OF LODGING OF TRANSCRIPT
TRANSCRIPT OF AGENCY PROCEEDING, Vols. I & II

Persons served:

Roger D. Ling, Esq.
Brent C. Tingey, Esq.
LING NIELSEN & ROBINSON
P.O. Box 396
Rupert, ID 83350

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

Deborah Drew-Ellis
Legal Secretary

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Filed 12/9/97

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Departm

Judge Granata

Roger D. Ling, Esq.
LING, NIELSEN & ROBINSON
Attorneys at Law
P.O. Box 396
Rupert, Idaho 83350
Telephone: (208) 436-4717

Attorneys for Petitioner

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

- - - - - - -

JEFF SESSIONS, d/b/a MOUNTAIN ROUND RANCH,

Petitioner.

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

Case No. CV-97-1044

PETITION FOR JUDICIAL REVIEW

Fee Category: R-2
Fee: $72.00

- - - - -

COMES NOW the Petitioner, Jeff Sessions doing business as Round Mountain Ranch, and respectfully petitions the Court pursuant to I.C. § 67-5270 et seq. and § 42-1701A(4), for a review of the FINAL ORDER issued by the Director of the Idaho Department of Water Resources (hereinafter "IDWR") dated November 7, 1997, regarding the Petitioner's application for Permit No. 43-0731 and application for Transfer No. 4640. In support of this Petition, Petitioner alleges:

1. Petitioner resides in County of Cassia, State of Idaho and the real property that was the subject of the IDWR's FINAL ORDER is located in the County of Cassia, State of Idaho.

2. The IDWR is a state agency as defined by I.C. § 67-5201.

3. Petitioner was the applicant in the below-described proceedings before the IDWR, and is aggrieved and

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ATTORNEYS AT LAW
RUPERT, IDAHO 83350-0396

directly affected by the IDWR's FINAL ORDER dated November 7, 1997. Said FINAL ORDER was served on the Petitioner by placing it in the U. S. mail, postage prepaid, addressed to Petitioner and his attorney on November 12, 1997.

4. Application for permit no. 43-07321 was filed by Petitioner with the IDWR on May 24, 1995, proposing the storage of 26 acre feet of water to be diverted from Round Mountain Creek, drain water, and surface runoffs at points of diversion located within Section 13, T16S, R27E, B.M., Cassia County, State of Idaho.

5. Application for transfer no. 4640 was filed by Petitioner with the IDWR on May 24, 1995 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. This application specifically proposes a change in the place of use of 40 acres of the 266 acres claimed in the SRBA as irrigated lands.

6. The Director of the IDWR entered the FINAL ORDER, a copy of which is attached hereto as Exhibit "A" and incorporated herein by said reference, after a contested hearing conducted by the Idaho Department of Water Resources on February 21 and 22, 1996. Said hearing was held in the County of Cassia, State of Idaho and was recorded by recording equipment. Said recording is in the possession of the Idaho Department of Water Resources.

7. The Petitioner has exhausted all administrative remedies available to him.

8. The Petitioner requests that the IDWR's FINAL ORDER be reviewed by the District Court based on the following grounds:

(a) That the findings of fact in the FINAL ORDER are not supported by substantial and competent evidence on the record as a whole.

(b) That the conclusions of law in the IDWR's FINAL ORDER contain various errors of law and violate various statutory provisions.

(c) That the decisions contained in the FINAL ORDER were arbitrary, capricious and constitute an abuse of discretion, all of which have prejudiced substantial rights of the Petitioner.

9. Petitioner will file a separate statement of issues asserted for judicial review within fourteen (14) days

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of the filing of this petition as provided on I.R.C.P. 84(f)(5).

10. The Petitioner requests that a transcript of the hearing before the IDWR be prepared pursuant to I.R.C.P. 84(k) and the petitioner will pay the estimated fee within fourteen days of the filing of this Petition.

WHEREFORE, Petitioner requests that the Court review the proceeding conducted by the IDWR, the evidence taken therein, and the FINAL ORDER entered therein, and enter judgment vacating or modifying the FINAL ORDER of the Director of the IDWR as the facts may warrant, and remanding for further proceeding if determined necessary.

DATED this 8th day of December, 1997.

Jeff Sessions, Petitioner

STATE OF IDAHO)
) ss.
County of Minidoka)

Jeff Sessions, being first duly sworn on his oath, deposes and states:

That he is the Petitioner in the above entitled action, that he has read the above and foregoing *Petition for Judicial Review*, knows the contents thereof, and the facts stated he believes to be true.

Jeff Sessions

SUBSCRIBED AND SWORN to before me this 8th day of December, 1997.

Notary Public for Idaho
Residing at Burley, ID
My Comm. Expires: 4-29-2002

(SEAL)

ATTORNEYS AT LAW
RUPERT, IDAHO 83350-0396

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CERTIFICATE OF MAILING

I hereby certify that on the 8th day of December, 1997, I served a copy of the foregoing ***Petition for Judicial Review*** upon:

Karl J. Dreher, Director
Idaho Department of Water Resources
P. O. Box 83720
Boise, ID 83720-0098

Harold and Ray Jones
HC 72
Malta, ID 83342

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

by depositing a copy thereof in the United States mail, postage prepaid, in an envelope addressed to said persons at the foregoing addresses.

Brent C Ingey
Roger D. Ling for

ATTORNEYS AT LAW
RUPERT, IDAHO 83350-0396

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State of Idaho
DEPARTMENT OF WATER RESOURCES
1301 North Orchard Street, P.O. BOX 83720, Boise, Idaho 83720-0098
Phone: (208) 327-7900 FAX: (208) 327-7866

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.

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(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

L. GLEN SAXTON, Chief
Water Allocation Bureau

Enclosure

c: Inter-Office Distrubution

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11/97

APPLICATION FOR PERMIT
STATE OFFICE REVIEW

by Cindy Lou

No.: 43-07321 Name: Round Mountain Ranch Date: 11/4/97 Ad OK? ✓ ✓Gvmt Lts: ✓

AREA OF CONCERN: - No/Yes: ESRP Mor / Raft R. CGWMA / Trust / Non-trust
PROTESTED: - 020 (Protest Agreement) or *W19 (Order)
SYSTEM COMPLETED:
1 year/no proof - (P16)
>1 year - 26A-**P17**
GROUNDWATER: (✓ FLO-CH)
WMD (✓ MAP)
>0.24 cfs/5 acres - 067 or No MD (in-stream stock or power)
≤ 0.24 cfs/5acres - No MD
~~WMD~~ >0.24 cfs - 01M (report when notified)
>5 a. - 01M; 065-079 (if GW use SW 1st-statewide)-(cannot move SW off)
≤ 0.24 cfs/5acres - No MD
DRILLING PERMIT:
Existing well - NA (pre 7/1/87; ✓ WDQ3)
Included w/permit - Permit No. _____-_____-_____-_____-_____, **P99**
No drilling permit? - 046-46B-**P23** (post 7/1/87)
irr. in WD - **P05** (new well location)
SURFACE WATER: (✓FLO-CH) (Surface water that *doesn't sink* is regulated):
IN/ABOVE MIN. STR. FLOW (✓ MAP) - *WB9 _____
WD (✓ MAP & LISTING) - R04 (WD # 43B)~~-01-(P08)~~(MD) T17 pg 16 #4
Pumped >0.20 cfs - 01H-**P01** (LD & MD) or No MD (in-stream stock)
storage WMD (✓ MAP)
* in denied
> 0.24 cfs/5 acres - 067 or No MD (in-stream stock or power)
≤ 0.24 cfs/5acres - No MD
SPRINGS/SINK, INACTIVE WD & REST OF STATE
> 0.24 cfs/5 acres - 01M or No MD (in-stream stock or power)
≤ 0.24 cfs/5acres - No MD
RIVER BASINS: (*Surface water):
Snake R (01) - *W22 -**P04**, NA
(02/03-irr) - 007-**P07** (w/ remark *WB9 if above Weiser), NA
Payette R(65) - *W22 (regulated uses), 047-**P04** (Payette Lake), NA
Salmon R (70's) - 029 (fish screens), NA
USE:
Domestic surface - *WB5 (Big Wood R or Boise R ↑ Star Bridge); 27A (Payette River); NA
>1 in rest. area - 071-070-**P53**
Fish Propagation - 029-007-042*(req)*-081-R07 (WQ)-**P10**; ~~044 (N of 1000 Springs)~~
Heating/Cooling - R07 (injection well)
Irr ≤ 5 acres - R49/R50/R51/R52 (0.03 cfs/acre + 3.0/3.5/4.0/4.5 AF)
> 5 acres - R29/R30/R31/R32 (0.02 cfs/acre + 3.0/3.5/4.0/4.5 AF)
Mining - 054*(req)* -081-R07-**P10**
Muni (in restricted areas) - 022, 075, 004 (+memo?), NA (not in restricted area)
Power - 17H/17K(+uses)-08A-025-01N(**P19**)-028-081-R07(**P10**); 027 (if no other cons. use); 17G (FERC) or 17M (~~FERC~~); 18B-**P09**; >25 cfs-**P18**
Stock - R37 (BLM/USFS); NA
Storage (✓3 compo.) - 18A (in & out MD for on-stream storage), 18B-~~P09~~(>10' dam), NA
LOCATION:
42-248 area - (**P84**)(in 20/30/40/50/60/70/80 (~~87~~) basin)
Boise Front LoGeo - 058 (<85° GW temp only)
In-stream dev. - **P52** (stream channel alteration)
Irr Dist/Canal Co. - 023 (Twin Falls area)
SWAN FALLS FLAG (See Code Chart) - 9
Trust - 051-052-053-**P74** (Consumptive Uses), NA
Non-Trust (1) - 048-049 (Consumptive Uses), NA
OWNERSHIP: - 004 (PD/PU) _____
OTHER CONDITIONS: - _____ _____ _____
STANDARD REMARKS: - _____
_____
BENEFICIAL USE DUE: - 12/1/ 1998
COMMENTS: - _____

WR0749NP | IDAHO DEPARTMENT OF WATER RESOURCES | DATE: 11/04/97
No. P43-07321 | WATER RIGHT PROFILE REPORT | PAGE: 1

OWNER CODE	NAME & ADDRESS	PRIORITY DATE	WATER USE	USE PERIOD FROM	USE PERIOD TO	DIVERSION RATE	DIVERSION VOLUME
C	ROUND MOUNTAIN RANCH	05/24/1995	IRRIGATION STORAGE	11/16	03/14		26.00 AFA
	HC 72 BOX 2346		DIVERSION TO STORAGE	11/16	03/14	1.000 CFS	
	MALTA ID 83342					---	
	(208) 824-5727			TOTAL DIVERSION:		1.000 CFS	

Water Source: ROUND MOUNTAIN CREEK — Tributary to: CLEAR CREEK — Stage: PERMIT
UNNAMED DRAIN — ROUND MOUNTAIN CREEK
WASTE WATER — ROUND MOUNTAIN CREEK

Point(s) of Diversion: T16S R27E S13 NESE NWSE CASSIA County

Place of use Legal Description for: IRRIGATION STORAGE

			NE				NW				SW				SE			
			NENE	NWNE	SWNE	SENE	NENW	NWNW	SWNW	SENW	NESW	NWSW	SWSW	SESW	NESE	NWSE	SWSE	SESE
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	Lt Ac	Lt Ac	Lt Ac	Lt Ac
16S	27E	13													1	1		

Pou County: CASSIA

Other Water Rights with Same Point(s) of Diversion with Stage (Includes All Sources):
43-02061

Other Water Rights Listing Overlapping Place(s) of use:
43-00045 43-00286 43-00414 43-02061 43-02110 T43-00045 T43-00182 T43-00286A T43-00286B T43-00414 T43-10116

Conditions of Approval:

188 - 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.

028 - After specific notification by the department, the right holder
- shall annually report the amount of water diverted to the
- department.

Suggest adding → R04 - Use of water under this water right will be regulated by the
- watermaster of State Water District No. 43B.

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

FINAL ORDER 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

Remarks: 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: 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.
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.
The right holder shall install suitable measuring devices to determine the amount of water diverted and shall report the information to the department annually.

Dates: App. Received: 05/24/1995 Priority Date: 05/24/1995
Proof Due Date: 11/01/1998 Proof Made Date:
Exam Made Date: Exam Sent to S.O.:
Licensed Date:

Misc: Water District Number: 43B Field Exam Fee:

Audit: 09/20/96 CZIMMERM 04/03/97 CZIMMERM 11/04/97 CZIMMERM

RIDRM —

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

In Re: SRBA **Case No. 39576**	**SRBA Case No. 92-00014** **ORDER FOR DIRECTOR'S REPORT**
HAROLD JONES and RAY JONES **Plaintiffs,** **v.** **NAF IRRIGATION COMPANY,** a Utah Corporation; **LARRY KEMPTON** in his capacity as an individual and as president of **NAF IRRIGATION COMPANY; LAVERNE KEMPTON,** individually and in his capacity as Water Master and Ditchrider for **NAF IRRIGATION COMPANY; MONTE CAMBELL** as an individual; and **JEFF SESSIONS** doing business as **ROUND MOUNTAIN RANCH,** **Defendants.**	

This case is a dispute between several water rights holders on Clear Creek in the state of Idaho. The SRBA court has jurisdiction because the case requires a determination of one or more elements of the disputed water rights. *Young Harvey Walker v. Big Lost River Irrigation District*, 856 P. 2d 868, 124 Idaho 78 (1993). During the course of litigation, it has become apparent that trial

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of the several water rights at issue is likely to result in duplicative litigation when the Clear Creek Stream System is reported in a Director's Report as part of the SRBA.

To avoid a multiplicity of litigation between these and other parties on Clear Creek, this court enters the following order:

1. The Idaho Department of Water Resources shall prepare a preliminary Director's Report for all, approximately thirty, water rights claimed in the Snake River Basin Adjudication on Clear Creek. This report shall be prepared and submitted to the court on or before February 27, 1998.

2. The court will serve copies of the preliminary Director's Report on each claimant included in the report.

3. All claimants included in the Director's Report for Clear Creek shall file objections to the report on or before March 27, 1998.

4. Any party wishing to file a response to an objection to the preliminary Director's Report shall file the response with the court on or before April 10, 1998.

5. A scheduling conference on all objections and responses filed to the preliminary Director's Report for Clear Creek will be held on Monday, April 13, 1998 at 10 a.m. in the district courthouse for the Snake River Basin Adjudication located at 253 3rd Avenue North, Twin Falls, Idaho. All parties and counsel are required to be personally present at this scheduling conference.

6. Parties in the *Jones v. NAF Irrigation Company et al* case pending before the court shall be allowed to continue discovery on issues raised in the pleadings.

7. The prior scheduling order and trial setting in *Jones v. NAF Irrigation, et al* is hereby vacated in favor of the schedule set forth in this order.

IT IS SO ORDERED.

DATED October 24, 1997.

DANIEL C. HURLBUTT, JR.
Presiding Judge
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the **ORDER FOR DIRECTOR'S REPORT** was mailed on October 24, 1997, with sufficient first-class postage to the following:

Patrick D Brown
Hepworth, Lezamiz & Hohnhorst
PO Box 389
Twin Falls, ID 83303-0389

Roger D Ling
Ling, Nielson & Robinson
PO Box 396
Rupert, ID 83350

Deputy Clerk

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APR 1 8 2000

1998 MAY 15 PM 4:56

DISTRICT COURT-SREA
TWIN FALLS COUNTY IDAHO
FILED

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

* * * * * * * * * * *

In Re the General Adjudication of Rights to the Use of Water from the Snake River Basin Water System.	
HAROLD JONES and RAY JONES, Plaintiffs, vs. NAF IRRIGATION COMPANY, a Utah Corporation; LARRY KEMPTON in his capacity as an individual and as president of NAF IRRIGATION COMPANY; LAVERNE KEMPTON, individually and in his capacity as Water Master and Ditchrider for NAF IRRIGATION COMPANY; MONTE CAMPBELL as an individual; and JEFF SESSIONS doing business as ROUND MOUNTAIN RANCH, Defendants.	CASE NO. 92-00014 ORDER PROVIDING FOR PRELIMINARY INJUNCTIVE RELIEF

* * * * * * * * * * *

Counsel for the plaintiffs, Patrick D. Brown of Hepworth, Lezamiz & Hohnhorst, Chtd.

Counsel for the defendants, Boyd L. Baggett and Roger D. Ling of Ling, Nielsen & Robinson.

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APR 18 2000

11/03/1997 13:29 2087363037 IDWR SOUTHERN REGION PAGE 02
MAY-15-98 MON 11:02 SRBA DIST CT PAGE 02

On Wednesday, May 8 and Thursday, May 9, 1996, the court conducted a hearing on the plaintiffs' Application and Motion for Entry of a Preliminary Injunction. On Friday, May 10, 1996, and before completing the evidentiary hearing, this court entered an oral ruling granting preliminary injunctive relief. The oral ruling and this written Order, which is based on the oral ruling, are necessary in order to most fairly and expeditiously provide immediate and necessary interim relief, to avoid waste and irreparable injury, and to preserve the status quo to the greatest extent possible given the facts presented to date.

IT IS THEREFORE ORDERED, under I.R.C.P. 65 and this court's inherent equitable powers, that the following shall occur:

1. Counsel for the plaintiffs, Patrick D. Brown, and counsel for the defendants, Boyd Baggett and Roger Ling, shall immediately contact the appropriate personnel at the Idaho Department of Water Resources and the Utah Division of Water Resources for the purpose of immediately attempting to convene a joint meeting and in order to put together a plan for the comprehensive distribution of the waters of Clear Creek, among and between those having rights to use the waters of Clear Creek in Box Elder County, Utah, and Cassia County, Idaho. The plan shall include provisions to have one or more persons act as watermaster to distribute water among the users of Clear Creek for the 1996 irrigation season, and it is preferred that such person or persons shall not be the parties to this lawsuit, unless by agreement between the parties to this lawsuit. Counsel for the parties shall keep the court informed about progress towards reaching a plan and shall diligently strive to have a plan in place by no later than Friday, May 17, 1996 at 5:00 p.m.

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MAY-15-96 WED 11:05 SKBH 0151 01

2. Until a plan is in place and operating, Laverne Kempton is ordered to act as watermaster and to administer the distribution of water among the rightholders on Clear Creek according to all applicable court decrees, including the decree entered by Judge Christensen concerning the Utah water rights, the decree entered by Judge Cavannah concerning the Idaho water rights, and the decree entered by Judge Johnson concerning the distribution of water among the Utah and Idaho water rights and water users on Clear Creek. During the 1996 irrigation season, the terms of the decrees shall be followed except: (a) by consent of the parties, if Clear Creek declines to 9 cfs after July 1, 1996, measured at a point known to the court and the parties as "Monte's Shop" or the "Old Stage Crossing," it shall be distributed on turns; and (b) as otherwise provided in this Order.

3. Laverne Kempton shall keep written records of his activities as watermaster. Laverne Kempton shall communicate with individual water users on Clear Creek in order to give the particular user notice about when water will be delivered, adjusted and curtailed for that user's rights or shares, and in order to otherwise operate the water system according to the decrees and this Order. Laverne Kempton shall not communicate with one water user about another user's rights except to the extent necessary to fulfill his duties under this Order and the decrees. The parties and the witnesses listed below shall be entitled to contact Laverne Kempton in order to inform him of their needs with regard to delivery, curtailment and adjustment of their particular rights and shares. The parties and witnesses shall not deliver, curtail or adjust their own diversions or those of other users and shall have all such work done by Laverne Kempton, unless there is an emergency.

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NAT-13-90 MED 11:05

4. On reasonable request, Laverne Kempton shall provide, and Dave Sundberg shall have, all reasonable access to review and observe how Laverne Kempton is administering the waters on Clear Creek and to check diversions, measurements, and other matters relating to the administration of water on Clear Creek. Dave Sundberg shall be allowed to contact Laverne Kempton and to review, observe, check diversions, and measurements only for the purpose of obtaining information about the administration of the water resources on Clear Creek but shall not administer the resource himself. If discrepancies, disputes or concerns arise about how Laverne Kempton is administering the resource, Laverne Kempton shall not attempt to resolve the discrepancies with Dave Sundberg but shall inform counsel for the defendants of the problems and allow counsel to handle the situation. In the same manner, Dave Sundberg shall not attempt to resolve disputes or discrepancies with Laverne Kempton but shall contact counsel for plaintiffs in order to allow counsel to handle the situation.

5. During the 1996 irrigation season, the Idaho water rights shall be delivered according to the Cavannah decree except as follows:

a. The plaintiffs shall be allowed to use the 70" of their water right dated June 14, 1911, measured at the point where water is diverted, either upon their property known as the Upper Place, or they may elect to divert the water at a place known as the Idaho Weir for use upon their property known as the Lower Place;

b. Of the water decreed with a priority date of November 23, 1911, and known to the parties as the "Settler's" water, the first 320" of water

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MAY-15-96 WED 11:04 SNAKE DIST 01

available under the November 23, 1911 priority date shall be divided equally between the Naf Store and the plaintiffs. The plaintiffs shall be entitled to use up to 160" of that water. 80" of the 160" for the plaintiffs shall be used on the Upper Place and the other 80" shall be used on the Lower Place by diversion through the Idaho Weir;

c. After the above water with a November 23, 1911 priority date is filled, defendant Jeff Sessions shall be entitled to 80" of water for use on Round Mountain Ranch by diversion through the Idaho Weir;

d. After the above water is filled, the plaintiffs shall be entitled to 90" of water with a priority date of July 14, 1912, which may be used on either the Upper Place or Lower Place.

e. After the above water is filled, defendant Jeff Sessions shall be entitled to 80" of water diverted at the Idaho Weir for use on Round Mountain Ranch.

f. Plaintiffs have the right to 70" of water decreed to the Lower Place with priority of June 1, 1881, and defendant Jeff Sessions has the right to 85" of water, with priority of June 1, ~~1992~~ 1892, for use on the Round Mountain Ranch, both of which are diverted through the Idaho Weir. Plaintiffs and Sessions shall continue to combine the 70" and 85," as they have done in the past, and rotate the use of those rights on turns of three (3) equal days a piece on the Lower Place and on Round Mountain Ranch.

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MAY-15-98 MED 11:05 FAX NO. COUNSEL

6. The plaintiffs are enjoined from seeking interim relief from the Idaho Department of Water Resources to curtail the use of the dam on Round Mountain Ranch. This Order does not enjoin the plaintiffs or defendants from pursuing the ordinary course of reconsideration or appeals of decisions by the Idaho Department of Water Resources concerning defendant Jeff Sessions' Application for a Dam Permit or Application to Transfer Water Rights.

7. The plaintiffs, and the witnesses for the plaintiffs, are hereby enjoined and restrained from having any contact with the defendants ~~or one another~~ except as provided in this Order. Likewise, the defendants are hereby enjoined and restrained from having any contact with the plaintiffs and the plaintiffs witnesses ~~or one another~~, except as provided by this Order. Contact with Laverne Kempton may occur and Laverne Kempton may contact the plaintiffs and the plaintiffs' witnesses as provided in paragraph No. 2, above. For the purpose of this paragraph, the plaintiffs shall be considered Harold Jones and Ray Jones and their spouses, Beth Jones and Karen Jones respectively. The plaintiffs' witnesses are Dave Sundberg and Nadyne Sundberg. The defendants are Laverne Kempton, Larry Kempton, Mont Campbell and Jeff Sessions.

8. Larry Kempton shall deliver Nadyne Sundberg's horses to the property of Dave Sundberg and put them in the corral on Dave Sundberg's property on Monday, May 13, 1996.

9. Mont Campbell shall be given access across the property of Dave Sundberg to put in a replacement weir. The replacement weir shall be in place and in operating order by Friday, May 17, 1996. In the event Mont Campbell is unable to have

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MAY-15-96 WED 17:05 FAX NO. 2087363037 PAGE 07

the replacement weir in by that time, counsel for the defendants shall contact counsel for the plaintiffs to attempt to agree about access after that time.

10. The parties are enjoined and restrained from contacting the Idaho Department of Water Resources or the Utah Division of Water Resources about distribution on Clear Creek, except through their respective counsel.

11. The parties and witnesses are not enjoined and restrained under this Order from having contact with one another in order to accomplish the objectives set forth in paragraph No. 1 of this Order, but such contact shall occur only in the presence of, and with the consent of, counsel for the respective parties.

12. Nothing in this Order shall constitute a waiver of any claim or defense previously asserted in this case. Further this Order and water use hereunder, shall not be used or considered as a basis for asserting any claim or defense, or waiver thereof, relating to rights in or the use of water.

13. Counsel for the respective parties shall serve this Order upon their clients and return affidavits to the court proving such service as soon as possible.

IT IS SO ORDERED.

Dated this 15 day of May, 1996.

Honorable Daniel C. Hurlbutt
District Judge

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APR 18 2000

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MAY-15-96 WED 11:00 AM NO. 001 P.01

CLEAR CREEK WATER RIGHTS

Ray Jeff

PRIORITY	ID	HOLM	STEW	JONES	SES	ARIMO	HOS	TOTAL CK
06/01/1881	43-00033	2.40						
06/01/1881	43-00034	5.4 3.00						
06/01/1881	43-00035	8.4 3.00						
06/01/1881	43-00036	10.6 2.20						
06/01/1881	43-00039	11.1 0.50						11.10
06/01/1881	43-00037			1.40				12.50
01/02/1882	43-00116		2.00					14.50
06/01/1882	43-00045				1.70			16.20
01/31/1884	43-00117		4.0 2.00					18.20
06/05/1886	43-00206					2.00		20.20
06/15/1886	43-00038	12.8 1.70						21.90
06/15/1886	43-00042	15.0 2.20						24.10
06/01/1887	43-00040	17.2 2.20						26.30
06/01/1887	43-00041	19.9 2.70						29.00
06/01/1887	43-00044	24.3 4.40						33.40
06/11/1897	43-00118		6.8 2.80					36.20
05/01/1906	43-00043	26.9 2.60						38.80
05/21/1910	43-00347	28.1 1.20						40.00
01/17/1911	43-00349	28.63 0.53						40.53
06/14/1911	43-00084			2.8 1.40				41.93
11/23/1911 1	43-00286 P			6.0 3.20			3.20	48.33
11/23/1911 2	43-00286 P				3.30 1.60			49.93
07/14/1912 1	43-00085			7.8 1.80				51.73
07/14/1912 2	SY HURLB				4.90 1.60			53.33
07/14/1912	43-00350	30.13 1.50						54.83
04/10/1914	43-00119		8.4 1.60					56.43
04/01/1921	43-00415					4.8 2.80		59.23
TOTAL DECREE		30.13	8.40	7.80	4.90	4.80	3.20	

Norm Young

Post-it® Fax Note 7671 | Date | # of pages ▶ 8

To Gary Spackman | From Allen Merritt

Co./Dept. | Co.

Phone # | Phone #

Fax # MICRO | Fax #

APR 18 2003

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

PHILIP E. BATT
GOVERNOR

KARL J. DREHER
DIRECTOR

May 14, 1997

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

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 Mr. Brown:

The department has received and reviewed the exceptions which both you and Roger Ling filed in the above referenced matter. The Director intends to issue a Final Order in the matter as required in Section 67-5246, Idaho Code.

Please feel free to contact the department if you have additional questions.

Sincerely,

L. GLEN SAXTON, Chief
Water Allocation Bureau

c: IDWR - S. Region
Gary Spackman
Allen Merritt

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APR 18 2000

LAW OFFICES

Hepworth, Lezamiz & Hohnhorst

- Established 1952 -

May 6, 1997

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MAY 12 1997
Department of Water Resources

TWIN FALLS OFFICE

John C. Hepworth
John T. Lezamiz
John C. Hohnhorst
Jeffrey J. Hepworth
Penelope Parker**
Eileen A. McDevitt*
Patrick D. Brown

Wm. L. Nungester
of Counsel

BOISE OFFICE

J. Charles Hepworth*
John J. Janis

*Member CA Bar
**Member UT Bar

Karl J. Dreher, Director
Idaho Department of Water Resources
1301 N. Orchard
Boise, ID 83706

RE: IN THE MATTER OF APPLICATION FOR PERMIT NO. 43-07321 AND APPLICATION FOR TRANSFER NO. 4640 IN THE NAME OF ROUND MOUNTAIN RANCH
Harold Jones/Jeff Sessions
Our File No. 95-1-125

Dear Mr. Dreher:

Both Mr. Ling and I have taken exceptions to the Amended Recommended Order dated December 31, 1996. Please let me know whether the Director intends to take any further action.

Thank you for your attention to this matter.

Very truly yours,

HEPWORTH, LEZAMIZ & HOHNHORST, CHARTERED

By: _____
Patrick D. Brown

PDB/llm

cc: Roger Ling
Harold Jones

/0506KD.llm

HL&H Chartered

TWIN FALLS OFFICE
208-734-7510
Blick Building
133 Shoshone St. N.
P.O. Box 389
Twin Falls, ID 83303-0389
FAX-208-734-4115

Boise Office
208-343-7510
537 West Bannock
P.O. Box 2582
Boise, ID 83701-2582
FAX: 208-342-2927

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APR 18 2006

From: DWR03::DWR60::AMERRITT 29-JAN-1997 12:00
To: DWR03::GSAXTON,DWR80::GSPACKMA
CC: AMERRITT
Subj: REVIEW OF ROUND MOUNTAIN PROTESTANT'S EXCEPTION

PAGE 4 IN THIRD PARAGRAPH DOWN MR. BROWN INFERS THAT I DUG THIS PAPER RIGHT UP AND TOLD SESSIONS TO FILE ON IT.

THE FACT IS THAT I HELPED MR. MERL JONES IN 1989 PREPARE HIS AJ CLAIMS. WE REVIEWED THE HISTORICAL RECORD AND HE INDICATED THAT IN ADDITION TO HIS 85" EARLY DECREE FROM CLEAR CREEK HE ALSO DIVERTED ADDITIONAL HIGH FLOWS. THESE HIGH FLOWS WERE CLAIMED UNDER A43-00286B BY MR. MERL JONES. I BELIEVE THE CLAIM SPEAKS FOR ITSELF.

ALLEN

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APR 16 2008

MEMORANDUM

To: Gary Spackman

From: L. Glen Saxton LGS

RE: **EXCEPTIONS TO PERMIT NO. 43-07321 AND TRANSFER APPLICATION NO. 4640 - ROUND MOUNTAIN RANCH**

Date: January 28, 1997

On January 27, 1997, the department received from Pat Brown exceptions to the Amended Recommended Order issued by the department on December 31, 1996. You may have previously received a copy of the exception by FAX. You also advised that Roger Ling filed some exceptions.

Responses to the exceptions are due within 21 days after the exceptions are filed with the director. Please plan your work activity so that you can timely review the exceptions and prepare a draft response for the Director to make. We are keeping the file in Julie's area so you can locate it for this review.

c: Norm Young
IDWR - S. Region
~~43~~-07321
43-00045

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APR 18 2000

LAW OFFICES

Hepworth, Lezamiz & Hohnhorst

- Established 1952 -

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JAN 27 1997
Department of Water Resources

TWIN FALLS OFFICE

John C. Hepworth
John T. Lezamiz
John C. Hohnhorst
Jeffrey J. Hepworth
Penelope Parker**
Eileen A. McDevitt*
Patrick D. Brown

Wm. L. Nungester
of Counsel

BOISE OFFICE

J. Charles Hepworth*
John J. Janis

*Member CA Bar
**Member UT Bar

January 22, 1997

Director of IDWR
Karl J. Dreher
1301 North Orchard
Boise, ID 83720-9000

Re: Protestants' Exceptions to Findings, Conclusions: Amended Recommended Order
Harold Jones/Jeff Sessions/Round Mountain Ranch
Our File No. 95-1-125

Dear Director Dreher:

Enclosed for your consideration is an original Protestant's Exceptions to Findings, Conclusions Amended Recommended Order and Affidavit of LeAnn L. McMillan.

Thank you for your attention to this matter.

Very truly yours,

HEPWORTH, LEZAMIZ & HOHNHORST, CHARTERED

By: Patrick D. Brown

PDB/llm

cc: IDWR/Twin Falls Office
Roger Ling

/0122KD.llm

HL&H
Chartered

TWIN FALLS OFFICE
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Boise, ID 83701-2582
FAX: 208-342-2927

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JAN 27 1997
Department of Water Resources

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.	**PROTESTANTS' EXCEPTIONS TO FINDINGS, CONCLUSIONS AMENDED RECOMMENDED ORDER**

COME NOW the Protestants, Harold Jones and Ray Jones, and take exception to "Amended Recommended Order," dated December 31, 1996. The findings of fact, conclusions and provisions of that order to which exception is taken are as follows:

Findings: paragraphs 4, 6, 11, 26, 27, 28, 30, 32, 33, 41, 48, 49, 50, 51 and 52;

Conclusions: paragraphs 9, 10, 11, 12, 14, 16 and 19;

The reasons the protestants respectfully take exception to those provisions, and the order are as follows:

1. Several findings and conclusions about historically irrigated acres rest on nothing more than unproven assumptions rather than evidence put before the hearing officer. Consequently, the applicant has failed to meet his burden of showing that no enlargement in use or injury to other rights will result from the granting of the transfer and application to the extent the hearing officer recommends.

Findings 4, 26, 27, 28, and 33 assume the applicant has historically irrigated 266 acres. Findings 26 through 28, for example, state that the 266 acres alleged to have been irrigated and, more particularly, the acreages with the NWNE and NENW of Section

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APR 16 2000

13, T16S, R27E "may have been" irrigated. Such findings about what may have occurred, as opposed to an affirmative finding of what did occur based on the evidence, do not support the conclusions. Similarly, from these assumptions, one may not properly find the applicant has "diverted and beneficially used" water under right 43-00286B or other claims. Finding 33.

Conclusion 11 purports to apply the criteria for establishing an exception to the Moratorium and the elements of I.C. § 42-222 and § 42-203A to those insufficient findings in order to partially approve the applications. Conclusion 11 allows for irrigation of 5 acres all year and 35 acres while right no. 43-00286B and junior rights from Clear Creek are "on." Conclusion 12 allows for "temporary retention" of those irrigation waters, while Conclusion 14 purports to protect prior rights. Each of those conclusions fail to follow from those findings, which in turn, fail to follow from the evidence presented at the hearing.

The evidence, which is set for in the attachment, shows only that Merle Jones, who operated Round Mountain Ranch from 1952 until 1992, irrigated about 184 acres somewhere on the ranch, with the possibility that some unspecified acreage in excess of the 184 acres were watered on a one-time basis. The record may not be fairly construed to establish that 266 acres were "simultaneously irrigated," as Finding 26 suggests.

The only witness other than Merle Jones who testified in that regard was the applicant. The applicant admitted he had never irrigated the full acreage claimed during years he has knowledge of, which began in 1992. The hearing officer appears to have overlooked the need for evidence concerning the total acreage, as he specifically found:

"This decision does not verify the entire place of use proposed

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by the applicant's adjudication claims [266 acres]. The extent of beneficial use is only being evaluated for the NWNE and the NENW of Section 13 . . .."

Conclusion 19.

Therefore, the amended recommended order should be amended to deny the transfer and application in their entirety because the applicant failed to meet his burden of proving no injury or enlargement, as required by statute 42-222 and 42-203A.

2. The protestants believe the hearing officer erred by recommending approval of the application under water right no. 43-00286B, a water right for which no evidence of historical use was offered. The hearing officer found that the former watermaster's records did not show delivery of the right, but that did not mean the right was abandoned. Finding 32. He found the applicant proved water in excess of right no. 43-00045 "was diverted and beneficially used on Round Mountain Ranch during periods of very high water." Finding 33. He found that no right other than 43-00286B authorized diversion of that water. Finding 33. Therefore, he concluded the right had been used in some unstated amount on some unspecified place during some unspecified time, and had not been forfeited or abandoned. Findings 30, 33, Conclusion 10, 11, 12, 14, and 16.

The findings and conclusions are inconsistent with one another, (see Finding 6, stating 43-00286B does not authorize irrigation within the sections from which the transfer is being allowed and Conclusion 17), and are not properly drawn from the record.

The entire relevant record about 43-00286B is attached. It shows Jeff Sessions did not know 43-00286B existed, nor has he ever "diverted" Clear Creek water, as Finding 33 suggests, under any right other than 43-00045. The high water use was of "waste water" coming off properties upgradient under rights held by those property owners, not Clear

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APR 18 2000

Creek diversions under 43-00286B.

Similarly, Merle Jones, the operator of Round Mountain Ranch from 1952 through 1992, testified his only right on Clear Creek was 43-00045. Jones testified that other than the use of 43-00045 water from Clear Creek, only flood waters and waste waters may have "gotten into his ditches." It is an improper reach to infer an intentional diversion from Clear Creek under 43-00286B, rather than waste water use from that testimony.

Combined with the above, i.e. more than 40 years where the owner, water users and the watermaster did not know of the existence of the right, is testimony by Sessions and Jones that the ditch from Clear Creek to Round Mountain did not have the capacity to carry the 43-00286B water along with the senior rights which were undisputably using the ditch.

It is error to find right 43-00286B had some historical use upon which to base the transfer based on that testimony. It is error to hold there was not clear and convincing evidence of forfeiture and abandonment, given no testimony was presented as to the right's use, and its existence was admittedly unknown until IDWR personnel Allen Merritt uncovered this paper right when an amended SRBA claims was recently filed, and told Sessions he could claim the right because of the paper, despite abandonment.

3. Finding 11 is plainly erroneous, in that it holds there is no defined creek channel on the Round Mountain Ranch property. Among others, Merle Jones testified there was such a channel, the aerial photos show a channel, and even the applicant identified the channel in the photos and located the dam directly in the channel. See Finding 41 (there are "regular and perennial flows" between the Round Mountain Ranch and Kelso); Finding 50 (construction of the dam "probably prevents the flow of groundwater" downgradient to

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APR 18 2000

supply the Kelso Springs rights); Finding 49 (the reservoir stores commingled water including groundwater); and Finding 52 (diversion of additional water will affect the availability to other users). Only by disregarding the defined channel, the surface and groundwater connection with Kelso, the admitted interference with flows and the failure to meaningfully segregate the groundwater and other water supplying Kelso from other water in the reservoir has the hearing officer been able to erroneously conclude (a) the moratorium exception applied; (b) no injury will result; and (c) there will be no enlargement. See, Conclusion 8 (storage will not injure other rights); and Conclusion 9 (the conditions on the right protect other rightholders).

The law requires the applicant to prove no injury, and does not allow IDWR's hearing officer to discount the injury as "insignificant." The burden of proving no injury and no enlargement is on the applicant , have not been met, and may not be circumscribed by finding waste water may have been used previously, groundwater flows in a critical groundwater area will be impeded, and the full extent of beneficial use claimed in the SRBA will not be evaluated. The evidence shows first, 43-00286B was abandoned at least 40 years ago, and second, even if not abandoned, there has been no quantifiable use of the right in 40 years.

Therefore, concluding the use may be now resurrected undeniably constitutes an enlargement, and admittedly affects other rights. Therefore, the hearing officer should be reversed on the portion of the application and transfer which were granted.

4. Finally, the hearing officer erred by failing to address the local public interest criteria of § 42-222 and § 42-203A. Because the applicant put on no evidence to satisfy the criterium and because the protestants showed the transfer would directly and

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APR 18 2008

immediately impact them, as well as the water supply in this critical groundwater area, the applications should be denied in their entirety.

Therefore, the protestants respectfully request the Director to reverse the amended recommended order and deny the applications in all regards.

Respectfully submitted this 22nd day of January, 1997.

HEPWORTH, LEZAMIZ & HOHNHORST,
CHARTERED

By: _____
Patrick D. Brown
Attorneys for Protestants

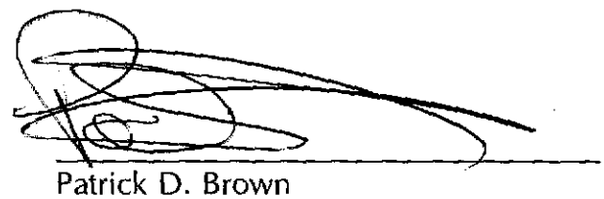
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APR 18 2000

CERTIFICATE OF SERVICE

The undersigned, a resident attorney of the State of Idaho, with offices at 133 Shoshone Street North, Post Office Box 389, Twin Falls, ID, 83303, and one of the attorneys for the protestants in this matter, certifies that he caused to be served a copy of the above and foregoing RESPONSE TO PETITION FOR RECONSIDERATION on the 22nd day of January, 1997, as follows:

Roger D. Ling
Ling, Nielsen & Robinson
615 H. Street
P. O. Box 396
Rupert, ID 83350

X U.S. Mail
___ Hand Delivered
___ Overnight Mail
___ Telecopy (Fax)



Patrick D. Brown

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APR 18 2000

RECEIVED
JAN 27 1997
Department of Water Resources

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.	)	**AFFIDAVIT OF LeANN L. McMILLAN**

STATE OF IDAHO)
) ss.
County of Twin Falls)

LeAnn L. McMillan, being first duly sworn upon oath, deposes and says:

1. This Affidavit is made and based upon my personal knowledge and belief.

2. I am an employee of the Hepworth, Lezamiz & Hohnhorst law firm.

3. In April, 1996, I received from Kris Rhodes, an employee of IDWR, six cassette tapes that had been copied from the Administrative Hearing held in the above matter on February 21 and February 22, 1996.

4. On November 4, 1996, I provided the six cassette tapes to Ms. Ellie Motzner, a person known to me to be a transcriber.

5. Attached are true and correct copies of portions of the transcript that I copied from Ms. Motzner's transcript.

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APR 18 2006

Dated this 22nd day of January, 1997.

LeAnn L. McMillan

LeAnn L. McMillan

SUBSCRIBED and SWORN to before me this 22nd day of January, 1997.

JOHN T. LEZAMIZ NOTARY PUBLIC STATE OF IDAHO

NOTARY PUBLIC FOR IDAHO
Residing at: Twin Falls, ID
My Commission Expires: 2/2/2000

CERTIFICATE OF SERVICE

The undersigned, a resident attorney of the State of Idaho, with offices at 133 Shoshone Street North, Post Office Box 389, Twin Falls, ID, 83303, and one of the attorneys for the protestants in this matter, certifies that he caused to be served a copy of the above and foregoing RESPONSE TO PETITION FOR RECONSIDERATION on the 22nd day of January, 1997, as follows:

Roger D. Ling
Ling, Nielsen & Robinson
615 H. Street
P. O. Box 396
Rupert, ID 83350

X U.S. Mail
___ Hand Delivered
___ Overnight Mail
___ Telecopy (Fax)

Patrick D. Brown

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APR 16 1997

VOLUME I

ORIGINAL

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 MOUNTAIN RANCH.)
) TAPED TRANSCRIPT
)
)
)
)

BEFORE HONORABLE GARY SPACKMAN

Taped Transcript of hearing held February 21 and February 22, 1996

APPEARANCES:

For the Applicant:

Roger D. Ling
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channel in that photograph?

A: Yes.

Q: And can you tell me how far towards the bottom of the photograph the Round Mountain Creek channel would be defined or be visible to you?

A: This whole thing is a channel, but then there were dikes and ditches across the channel to turn out the flood water in this area here. Now, the water never had free access to run all the way down the smaller springs, only when there were a lot of water.

Q: Please tell me how far towards the bottom of the photo the channel is that you can see? Does it come to the house?

A: Oh yes, it comes to the house and then comes in below the house.

Q: Okay, does it come up above the house?

A: Ah, yes, this would be the channel on this area up in here? Yes.

Q: Okay, do you know where Round Mountain Spring would be in that photograph?

A: Right in that area right there somewhere.

Q: Could you circle where Round Mountain Spring is with the red pen? Okay. Now can you explain to me whether it would be possible -- did you ever observe water traveling from where Round Mountain Spring is down below the house?

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A: Yes.

Q: And did it travel in the Round Mountain Creek channel below the house?

A: Yes.

Q: And it would travel down to where the present reservoir is?

A: Yes.

Q: When water would flow off the north end of the Round Mountain property, where would it go?

A: It would go down this Round Mountain Creek channel.

Q: Okay, do you know where it would go once it got into the channel?

A: If there was enough it would go to the Harold Jones place.

Q: Did you ever observe it flow down to the Harold Jones place? Yes

A: Yes.

Q: I have no more questions, thank you.

MR. SPACKMAN: Mr. Ling, redirect?

MR. LING: Yes.

REDIRECT EXAMINATION BY MR. LING:

Q: Yeah, Mr. Jones, when you observed flows that got to the Harold Jones place, was that when there was water coming ah, from a melt into Round Mountain Creek?

A: It would be that and then maybe high water years, possibly like last year when there's a high water flow from maybe Clear Creek and all different sources, it would be quite a bit of water in the channel.

Q: No further questions.

MR. SPACKMAN: Mr. Brown, further questions? Mr. Jones, just a minute.

MR. BROWN: I actually have --

MR. SPACKMAN: Not that easy to get away.

RECROSS EXAMINATION BY MR. BROWN:

Q: You referred in your testimony to Clear Creek water being used on Round Mountain Ranch, correct?

A: Yes.

Q: And you referred -- you said there was a right that was used, correct?

A: Yes.

Q: And what was the quantity of that right to cfs?

A: Ah, 85 inches.

Q: Okay. Is that the only Clear Creek right you used on the property?

A: There were additional water on the high years

that it came. Probably waste water from everybody that had a surplus of water, we were lower down and as they had waste water, it would get into my ditches and there were times when there were a lot of water by the time it reached my place.

Q: Okay, but you used --

A: The claims were well beyond the 85 inches 3 or 4 times, I don't know.

Q: But you never used water under any other creek rights from Clear Creek?

A: Ah, not regularly, no. There were ah, some other (inaudible) rights that were supposed to have been water rights out of ah, some of the other creeks, the water did come occasionally, but it wasn't regular enough to really make adequate use out of it.

Q: When you say out of other creeks, what other creeks?

A: In the abstracts there's a water right that said high water from Rice Creek, but we never -- it wasn't regular enough to really use or depend on.

Q: I have no further questions.

MR. LING: I have no further questions.

MR. SPACKMAN: I have a couple of questions, just for clarification. There is a drain that's shown on the adjudication map, the one that we were consulting, and it showed a pipe line, I think you're looking at the photocopy and

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A: If the dam was full.

Q: -- and there's no way to --

A: -- if it wasn't full.

Q: Excuse me. There's no way to prevent it from going into the dam?

A: It gets (inaudible) if there was 20 second feet you'd (inaudible) it, wouldn't even make it to the dam it would go on the other side of the dam and down through the fields. It would have no way of dumping into it. When it comes out of the channel and spreads out naturally everything that goes to the west would go in the dam. Everything that goes to the east or straight down would go around the dam and through the fields and eventually make it back into the channel.

Q: How do you propose to keep it out of the dam during the non-irrigation season?

A: I don't. The dam would be full and it'll go straight through it.

Q: May I approach the witness?

MR. SPACKMAN: Yes.

Q: Looking into your amended transfer application again, if you could look at the water rights section, Section B. You see the right which is numbered 286B?

A: Yeah.

Q: You understand that to be a Settler's Land and Livestock decreed right?

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MR. LING: I'm going to object to reference of the right and left. If counsel wants to provide him a copy so he can look at it, I don't think anybody should have to be able to respond to a document without looking at it.

MR. SPACKMAN: Are we not looking at the application for transfer itself?

MR. LING: Yes -- no, he asked for if he's aware of the right number and gave the right number and I think that is a document such as a decree that he's entitled to look at it.

MR. BROWN: If he doesn't know, he can simply state so.

A: I do not know what it is.

MR. SPACKMAN: Yeah, I -- well, let me -- you've answered the question, I guess, but I think I'd overrule the objection. And I'm late, but go on. I think, Mr. Brown, you got the answer that you prompted him for so --

[redacted]

Q: And that right is claimed to be for 4.3 cfs out [redacted] tler's Land and Livestock [redacted] cfs, correct?

A: I'm not aware -- **I do not know the facts on that.**

Q: If you've got -- may I approach the witness?

MR. SPACKMAN: Yes.

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Q: If we could look back several pages in the Application for Amended Transfer, I guess it would be --

MR. SPACKMAN: I think I show page 5 of 12, is that what you're looking at?

MR. BROWN: I counted six. It is the page which says Application for Transfer, part 2 and the right is 286 is written in the first paragraph, correct.

A: Correct.

Q: (inaudible) -- understand that refers to what is on the front page of your transfer application and labeled right 286B, correct?

A: Correct.

Q: And that water, it says in your application that that water was decreed to Settler's Land and Water Co.,

[redacted]

[redacted]

Q: By 1928 court decree called *Albion Land and* [redacted]

[redacted]

Q: What's the source of that water right?

[redacted]

Q: Look down the page to number 3.

A: Clear Creek. Clear Creek water source.

Q: You ever use 4.3 cfs diverted out of Clear Creek under this right on Round Mountain Ranch?

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A: I don't think my ditch would even hold 4.3, but I don't know I don't measure water.

Q: Have you ever used 4.3 on Round Mountain Ranch under this right?

A: I couldn't answer it, 'cause I don't know. I don't know the amount of water that I have had at one time. I know what my right is as far as what I thought it was, but whether I've been delivered 4.3 cfs, I couldn't tell you that.

Q: Let me skip down for a moment. You would again look at the first page of the transfer application. The last right, the one that ends in 45?

A: Um hum.

Q: Is for 1.7 cfs?

A: Yep.

Q: You understand that to be a Clear Creek right?

MR. LING: Your Honor, I, again I -- I hesitate to object because I think the reason to cross examine ought to be liberally construed, but it's impossible for him to visual -- to refer to what you're talking about without look at the right itself. For instance, on this particular right under -- in the decree it says Rice or Round Mountain Tract, whatever that means, and then to the right it has diverted from Clear Creek, but then it describes the property that's here. Also I don't know how an individual can explain that when the document speaks for itself.

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MR. SPACKMAN: Okay. Mr. Brown?

MR. BROWN: Your Honor, I first think it's improper to have speaking objections. If the witness does not know what his own water right is, he can simply say he does not know.

MR. SPACKMAN: I'll overrule the objection because I think there is a representation of that right on the application for transfer of which Mr. Sessions at least signed, I think, and purportedly knows the contents thereof and, and at least with respect to the information that's on -- that's a description of those rights, there is information about the questions that are being asked. So I'll overrule the objection because the application, I think, contains much of that information. Mr. Brown.

Q: Mr. Sessions, let me ask you a different question. Before when Merle Jones testified, he testified that he only had one water right for Round Mountain Ranch out of Clear Creek and that was a right in the amount of 1.7 cfs or 85 inches. Did you hear that testimony?

A: I did.

Q: Do you understand that testimony to be accurate?

A: I believe that he feels that's the right he felt he had.

Q: Do you believe you have more rights to divert water from Clear Creek for use on Round Mountain Ranch?

A: I am not aware of any right, but I feel that

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should give me more water.

Q: Would your ditch, or ditches, that bring water from Clear Creek to Round Mountain Ranch hold 4.3 cfs of water?

A: I do not believe it could.

Q: And certainly you don't believe it could hold the 4.3 plus the 1.7?

A: I don't think.

Q: Have you ever used, to your knowledge, any part of the right which is on your application and labeled [redacted] on Round Mountain Ranch?

A: Not that I'm aware of.

Q: Has the water master ever delivered that water into a ditch for you to your knowledge?

A: Not that I'm aware of.

Q: You ever paid an assessment for delivery of that right to your knowledge?

A: Not that I'm aware of.

Q: And water users who take water from Clear Creek in that area generally pay assessments for delivery of their right by the water master, correct?

A: Correct.

Q: You would look at -- may I approach the witness?

MR. SPACKMAN: Yes. By the way, Mr. Brown, I'm not -- we have to be a little more informal, I don't have a bailiff to deliver these things, so I appreciate you and Mr. Ling doing

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some of the leg work, maybe I ought to put Allen to work, but -- I don't mind your going back and forth, but I like to have you at the microphone if possible so.

Q: Okay, if you could turn to the page in the application which is the description of the right labeled 286. Okay. Now that has a second page to it, does it not?

MR. LING: Refer to 286B?

MR. BROWN: It is labeled in the decree, or in the application, the 7th page to the right is labeled as 43-00286 to Settler's Land and Water Co.

MR. SPACKMAN: Mr. Brown, my copy shows page 5, I don't know why there's a discrepancy. Mine is the amended application for transfer.

MR. BROWN: Maybe we could compare --

MR. SPACKMAN: Yeah, I may have an old copy. Well, I have pages written in. Are the pages written in here? I'm looking at the original, so page 5 -- yeah, page 5 is the part 2 portion that refers to right 43-00286 and maybe when you received yours they were mixed somehow. I just thought we ought to clarify that so that somebody reading or looking at it wasn't confused, but at least as they're numbered 43-00286 part 2 that describes that right as page 5 and then, of course, the back page is 6 of that particular page.

MR. BROWN: Okay, if we could look at the back page of (inaudible) labeled as page 6, (away from microphone) the

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top of page part 2 in item number 10 states, to your knowledge has any portion of this water right undergone a period of five or more consecutive years of non-use? Do you see where I'm referring?

A: I do.

Q: How did you respond to that question?

A: I wrote no. But when I wrote that application, I hadn't been around for five years.

Q: [redacted] application?

A: Well, no, as far as I knew it hadn't went a five year period without being used. I don't know when the period of use was.

Q: You understand that Mr. -- you don't dispute Mr. Merle Jones' testimony that he --

A: Right.

Q: -- only used one water right from Clear Creek and that was a right to 85 inches?

A: I don't dispute that.

Q: Let me have you look at the front page of the transfer application again. There is a water right in section B numbered 10824, do you see which right I'm referring to?

A: I do.

Q: That right is described to be in the amount of 2.1 cfs, correct?

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APR 18 2007

17th, you were able to continue to irrigate by utilizing water out of the reservoir?

A: Of course I was. I didn't drain it in 2 days.

Q: You testified earlier that 1995 you had all kinds of water coming on to your property from the south from waste water above you, correct?

A: Correct.

Q: Where was that water coming from?

A: From down -- I would have to say the -- the wash that gathers water from -- from properties more to the southwest of my property.

Q: Properties to the southwest of your property. Do you know who owns any of those properties?

A: Yeah, there's a lot of people that own it. Steve Hollengrain owns a lot, Larry Kempton owns a lot and probably Marv Keigler and Steve Scowfield own some up towards the canyon.

Q: Do you know who was using water which was wasting off their property and flowing down to Round Mountain Ranch?

A: I know who was using water?

Q: Yes.

A: Flowing off from where?

Q: The property to the southwest.

A: I'm sure everybody that it flowed on to probably used it. It come down to me even though I didn't want it, I --

I was stuck with it. It flowed across me.

Q: Do you know who was wasting -- or was having waste water run off their property?

A: I know who couldn't contain it and he let it flow.

Q: Was Larry Kempton using water that was wasting off his property during the summer of 1995?

A: I'm sure he was using it and what he couldn't contain or couldn't use it was flowing off his property.

Q: Isn't it true that you know he was using it?

A: Well, it's his water, he should of had a right to use it.

Q: Do you know whether he had a right to use it?

A: No.

Q: Do you know how big the flows he was using were?

MR. LING: Your Honor, I'm going to object to this is outside of the scope of any direction and the use by Larry Kempton is not within the scope of this proceeding.

MR. BROWN: It's directly relevant to the testimony that will be upcoming. Mr. Chapman is an expert who testified that the water doesn't flow from Clear Creek to Round Mountain Ranch (inaudible).

MR. SPACKMAN: Well, it clearly, I think it is beyond the scope of direct examination. It's an issue that I failed to discuss with the attorneys and that is ah, (inaudible) limit

Mr. Sessions' testimony to only those matters which have been raised in direct examination, but I suppose Mr. Brown has the opportunity to recall Mr. Sessions during those particular matters to light and develop a case, and I can, I guess I can rule either way. It seems to me to be more efficient once he's here to have him testify regarding these matters, but sometimes that may dilute your presentation of information, Mr. Ling, so --

MR. LING: But I -- I'll withdraw -- in an interest in economy that is, I'll withdraw that objection as far as not being on direct, but it is not relevant to the issues on this case. Ah, there is no indication that -- that the testimony of somebody's use of water from Clear Creek proves that the water from Clear Creek flows on to the Round Mountain Ranch. I mean that is, obviously, we know we irrigate with Clear Creek water and I don't think that is what anybody's ever testified to, so, I think, for the record we ought to know there's a civil case pending between the protestants and this applicant and other water users of Clear Creek. And to me this is getting into a discovery of that case and has nothing to do with the application in this case. If there's some relevancy, ah, certainly there's no relevancy as it's going to be evidence to dispute or contradict something that Mr. Chapman might say. He hasn't even testified yet in this case. He -- they took his deposition as to what he knew, but that doesn't mean that's

testimony in this case.

MR. SPACKMAN: Mr. Brown, I'll allow you to just speak, then I'll rule on the objection.

MR. BROWN: It -- one of the issues in this case raised by the applicants is a claim of private water. In order to make a claim of private water, my understanding is not only do you have to show it's private, but you have to be able to separate it from other water. You have to be able to identify that portion which is private. It's perfectly relevant to talk about where all the water on the property is coming from. Secondly, Mr. Chapman, in his deposition, testified that the sources of the flow from the Clear Creek area, in his opinion, would not ah, go eastward to Round Mountain Ranch. And I think this -- this is directly goes to where waters coming from and how it gets to Round Mountain Ranch and whether it's private or not.

MR. SPACKMAN: Well, I struggle with the question of relevancy [redacted] that there is waste water that comes onto his property and he's testified generally where that water comes from and, Mr. Brown, I guess I don't know how much more testimony Mr. Seekins needs to give regarding the waste water and from whose property that waste water is coming. I -- I'll allow you to question a little more, but I want to limit how much of that we'd get into, because I think we need to move along and I think then your

subsequent witnesss, if they differ with Mr. Sessions, and point out those differences. But I don't know how important it is for Mr. Sessions to testify who has water rights and what that quantity is and I just question the relevance at all of that coming from Mr. Sessions. So you may proceed and I'll -- I'll keep in mind your objection, Mr. Ling, and I think we will limit the ah, the questioning (inaudible) on that subject. Go forward if you will, Mr. Brown.

MR. BROWN: Okay, so you indicated that you thought water was coming from land owned by Larry Kempton, correct?

A: (no audible response).

Q: And that land, do you know -- does that water that gets to Mr. Kempton's land come from Clear Creek?

A: He's got water out of Clear Creek and Rice Canyon and springs off his own property.

Q: Okay, when you saw water flowing to your property, do you know whether it was coming from Rice Creek or from Clear Creek?

A: I don't, but I know what happened. He had a diversion break and there was so much water coming down out of all the sources that he couldn't control it and so it came to me and I couldn't control it and it was just there.

Q: Do you know how much water flowed on to your property, or how long it flowed?

A: I wouldn't guess on the amount 'cause I'd just be

run-off in '94? I mean, how many days did that last, or months?

A: If I remember right, that flood was maybe 10 hours. 10, 12 hours.

Q: And ah, from your experience, is that the normal duration of large run-offs out of Round Mountain Creek and Rice Creek?

A: That was the largest I've seen. Most amount of water and probably the longest amount of time.

Q: Do you occasionally get flood waters that are flowing in Clear Creek and allowed to bring those to your property for irrigation?

A: Ask the question again?

Q: Are you allowed to receive Clear Creek water considered as flood waters, in other words, unregulated waters?

A: When the Clear Creek channel gets so high, from my experience, they -- all the decrees are filled and they have allowed water to go, if you can take it in your ditch or you can handle it you're allowed to take whatever you can take.

Q: You were asked a question about assessments from Clear Creek deliveries. Are you charged assessments when you're receiving flood waters?

A: I'm -- not that I'm aware of.

Q: So if you receive flood waters assessments you might have paid -- would not show up because it's an

come in the spring or maybe even earlier than that from Round Mountain Creek ah, and if that water were to get into your reservoir and fill it, where would your water from your drain tile go after the reservoir is full?

A: Ah, with the overflow and down the Round Mountain channel.

Q: So if you used flood waters and that got into a reservoir that wasn't full and filled it, you would -- there would be that much more of your waste water from your drain it would go downstream?

MR. BROWN: I object. He's continuing to lead the witness and continuing to ask the witness to speculate. Not about what's happened, but what about what could happen some time in the future.

MR. SPACKMAN: I don't have a problem with the questions, Mr. Brown. Overruled and continue.

Q: Are you aware of whether or not 4.3 cfs has been available [illegible] Reservoir?

A: I wasn't aware of that water right until this protest stuff was brought up and we went to the Water Resources and somehow it got brought up in that, in them findings.

Q: But for the questions is, have you ever received it?

A: Not that I'm aware of.

Q: Is it possible for you to divert Clear Creek water and receive it on Round Mountain Ranch without bringing it through your ditch?

A: It is not.

Q: Have you ever measured the capacity of your ditch?

A: Ah, no, but I have been told that --

Q: Well, I just -- you have not measured it?

A: I haven't.

Q: Did you receive more than 4.3 cfs flows that came down from, you indicated the Kempton diversion of Clear Creek water?

A: I -- the channel it came down was the Rice Creek channel and where the water came from, I have no idea. But as far as the amount of water it was a large stream, but I have no idea what it would have been.

Q: I think you testified that it -- you believe it came from Clear Creek or that area?

A: Well, it come down the Rice Creek channel, but Clear Creek water could have dumped in it up higher, I'm not sure.

Q: My question is, did that come down your ditch then?

A: It come down the Rice Creek channel and just dumped in my fields, there's no ditch it just dumped --

Q: It did not come from the Clear Creek ditch --

A: No, no.

Q: -- that you get Clear Creek water from?

A: No.

Q: So that would be another way Clear Creek water could get to you?

A: Yeah. Well, I can't verify that, I don't know --

Q: You don't know for sure?

A: I don't know what's up there, I've never been up there.

Q: Okay. Exhibit B ah, Protestant's Exhibit B was -- and on page 2 of that, do you -- do you have, hearing officer, have that exhibit? It's the aerial photos?

MR. SPACKMAN: I do not.

Q: Well, excuse me, but Exhibit ah, Protestant's Exhibit A --

MR. BROWN: Mr. Ling, I believe that's in front of Mr. Sessions.

WITNESS: Yeah, I --

Q: Okay, let me hand that to the hearing officer so he can follow it. Referring you to page 2 of that exhibit and the lower photograph, I direct your attention again, we have made reference to a thumb that comes up, and I'll represent to you in looking at the adjudication map ah, the thumb comes up in the NE¼ of the NE¼ of Section 13, do you see that area?

Q: You stated that you had no intention to abandon the 4.3 cfs of Clear Creek water, correct?

A: If that's a right that I'm entitled to then I don't know, I don't -- I don't know nothing about it and I don't know what'll happen.

Q: You have no idea then whether it was abandoned long before you owned the property?

A: I don't. I wasn't even aware of it until last fall.

Q: I have no further questions, thank you.

MR. LING: No questions.

MR. SPACKMAN: May I? I just want to ask a couple of questions again. Mr. Sessions, you testified that the flow from your tile drain and also from the springs where the flows were measured in 1994, the flow from the drain was measured at 75 gallons per minute, is that correct?

A: Ah, the Water Resources measured it, I believe that's what they measured.

Q: Okay, and I wrote down, and I'm not sure this number was correct. I wrote down 65 gallons per minute out of the spring, now it may be 63 or some other number, but I wrote down 65.

A: I believe that (inaudible).

Q: Can you tell me --

MR. LING: 68 is, I believe, what I saw on a memo.

for me?

A: Ah, it is only probably about 100 feet.

Q: And you also stated that the two parcels of property that were planted into crested wheat grass which would be at the north end -- yes, the north end of Round Mountain Ranch, one of them in the NW of the NE of Section 13 and the other would be the NE of the NW. Ah, those lands which were planted into crested wheat grass were only irrigated in real high water years and I'd like you to explain for me if you could where the water that irrigated those lands came from.

A: They probably came out of Clear Creek or ah, waste water from the Clear Creek area.

Q: So those lands were not irrigated with water from Round Mountain Springs?

A: No, I didn't get the Round Mountain Spring over in that area.

Q: Or your drain water?

A: No.

Q: Now have I added any other questions to be asked?

MR. LING: Yes, you have, I guess a couple.

STEVE SUNBERG:

Q: Mr. Sunberg, where do you live?

A: (inaudible), Utah.

Q: Which is where?

A: 25 miles south of Malta.

Q: You live essentially by the town of Naf?

A: Yes.

Q: On the map? Okay. So you live just to the southwest of Round Mountain Ranch?

A: Yes.

Q: Okay. Ah, you were here during the testimony yesterday, is that correct?

A: Yes.

Q: And you were here today?

A: Yes.

Q: And have you heard the testimony about ah, which pertained to whether or not there was a water right in the amount of 4.5 cfs?

A: Yes, I heard that.

Q: And do you have -- are you familiar with the water rights out of Clear Creek?

A: That's all we fight about up there. Yes.

Q: Yes. And when did you first become familiar with the water rights up there?

A: Well, you could kind of gradual like, 'cause my

father was the water master since 1959 until two years ago.

Q: He was the water master from 1959 until when?

A: Until 1993.

Q: And why did he -- why is he no longer the water master?

A: He died.

Q: Okay. Did you accompany your dad when he distributed water out of Clear Creek?

A: Quite often.

Q: Okay. Are you familiar with what has been referred to as the 4.3 cfs under the Settlers Land and Water Company right?

A: Since last fall.

Q: You're -- you're --

(inaudible, both talking at once)

A: -- suggest until last fall as far as I know.

Q: Okay. Do you know whether it was ever delivered by your father?

A: No, he did not.

Q: Do you know whether it was ever delivered at all to Round Mountain Ranch?

A: I'm not sure, 40 years.

Q: And 40 years, you're referring to what time frame?

A: Well, since the '50's.

of it.

Q: That's an accurate copy of the original document?

A: Yes.

Q: And you understand the original document was given to your father?

A: Yes.

Q: And it was a ah, list of the rights which were entitled to have water delivered --

A: Right.

Q: -- out of Clear Creek?

A: Okay, now that's what the second and third page is ah, yes, is a list of the rights -- the Idaho rights.

Q: Okay.

A: This is not a list of the Utah rights, it's a list of the Idaho water rights.

Q: Okay, and would that include -- if the Settlers Land and Water right -- was that an Idaho water right?

A: Um, it was. There is still parts of it.

Q: Okay.

MR. LING: Pardon? I didn't hear that.

A: Said there are still parts of it.

Q: And -- and who are parts of it delivered to?

A: On this list, Mary Iverson and oh, what's his name. I just told you his name. Erhart, Walter Erhart.

Q: Neither of those two who receive water receive

water for use on Round Mountain Ranch?

A: No.

Q: I offer Exhibit K.

MR. SPACKMAN: Mr. Ling?

MR. LING: Are you, was there testimony that is part of the official records of the water master of -- of ah, that and this gentleman is not the water master, I think we need some foundation of how he got ahold of it.

MR. BROWN: He stated that they were given to his father by the water master before his father.

MR. LING: That's true, but he's not the father. I just wondered how did he get ahold of it.

MR. BROWN: That's fine.

A: Well, my father had a family on part of it.

MR. SPACKMAN: Let's let Mr. Brown establish that foundation if we can, Mr. Sunberg, I think he's agreed to do that.

Q: Mr. Sunberg, when -- when did you come in to possession of this document? So, this was your father's document, correct? Which had been given to him from the previous water master?

A: I guess that's who gave it to him. I wasn't very big at the time.

Q: Okay. But you know that that was the basis for your --

A: This was the basis, one of the basis that he started out his -- as water master. This is what they gave him and told him this --

Q: And is that what he continued to follow to deliver water as you accompanied him?

A: Um, pretty much with one -- with a couple of additions. There's a couple of Holmgren water rights that are not on this list.

Q: Okay.

A: But they don't pertain to this as far as I know.

Q: Okay, and then I assume when your father died you took possession of your father's records?

MR. LING: That's really leading, I --

A: His wife did.

MR. LING: -- have to object to that.

A: His wife did.

MR. SPACKMAN: Just -- just a moment. It is leading question. That there have been many leading questions, this one is -- this is leading, but -- how do I get to this? Ah, I think the records are coming in anyway. I don't know, but I assume that they are. Rephrase the question if you will, Mr. Brown.

Q: When you father died, what happened to his records? Including this document?

A: Some of them were lost and some of them up --

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okay, two years before he died, or he died two years ago, and the summer before his house burned down, okay? So, a lot of the records were a mixed up mess. Okay, now I moved into a house which he had built, it was a shop, he built it for me and I moved in there and I have found a variety of records throughout the place in (inaudible), books and whatnot that he has had.

Q: And those were the -- in the books where he kept his portions of his water records?

A: Some -- yeah.

Q: I would move to admit Exhibit K.

MR. SPACKMAN: Mr. Ling?

MR. LING: May I inquire?

MR. SPACKMAN: Sure.

MR. LING: Ah, Mr. Sunberg, ah, when you father ceased -- and died and no longer was a water master, was somebody else elected up there by the water users to take his place?

A: Loren Kempton.

Q: And did the records get transferred from your father to him?

A: Quite a few that I don't have were, yes.

Q: Do you know how this happened to remain in your father's possession and your -- ultimately you found in the house?

A: His died from cancer and he was sick for a long time and things got scattered out quite a bit.

Q: So this wasn't with all of the records, it was in another area that you found it.

A: Yes.

Q: I guess you have no recollections of whether or not this Exhibit K had been discarded by your father, or was a part of his records that he was attempting to keep and it just got separated or what?

A: Well, he -- I don't know what he gave Vern because I've never seen it, but he had loose leafs and he had manilla envelope and I think this was in one of them if I remember right.

Q: I'm not going to pursue the objection. I guess it goes to the weight of what it is. I just not really satisfied it's from the official record because we don't -- he didn't have the official records, another successor has those. But rather than take time to try to figure that out, I --

MR. SPACKMAN: Yeah, let's --

Q: Well now in the first place when he died Vern had not been elected water master. He died in the fall and Vern was water master next spring.

MR. SPACKMAN: Okay, rather than any more explanations, and I appreciate your attempts to try to help us, but I think I need to follow some order of the testimony in

terms of (inaudible). I guess of all of the documents that we've discussed so far, this one probably concerns me as much as any. I guess the reason is that I -- I sense that it's being offered as proof that the 4.3 cfs water right numbered on the application for transfer as 43-00286B was never delivered. And I guess my concern is that I have seen summaries of water rights that are delivered, various abstracts from water masters and those abstracts are not always complete. And I'm a little concerned about how I view this particular document without some -- some corroborating testimony regarding the actual deliveries of water by the water master.

So, I guess, with that suspicion voiced ah, Mr. Ling, I'm willing to accept it into the records, but I'm a little suspicious about the document and how complete it really is. So, what that reservation, I think that goes to the weight, Mr. Ling, I'll admit it, but --

Q (by Mr. Brown): To you knowledge a water right never been delivered in the amount of 4.3 cfs to under the Settlers right to Round Mountain Ranch since when?

A: To my knowledge, it has never been.

Q: No further questions.

MR. SPACKMAN: Mr. Ling?

TRANSCRIBER'S CERTIFICATE

State of Idaho)
)ss.
County of Twin Falls)

I, ELLIE MOTZNER, do hereby certify:

That the foregoing was transcribed by me from tape recorded cassettes, and that the transcript is true and correct to the best of my ability from the portions of the proceedings that could be heard on the tapes, consisting of pages 1 through 578 inclusive;

I further certify that I have no interest in the event of this action.

DATED this 9th day of December, 1996.

Ellie Motzner

Ellie Motzner

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Department of Water Resources

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BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE

STATE OF IDAHO

AS SHOWN BY THE AMENDED RECOMMENDED ORDER

IN THE MATTER OF APPLICATION FOR PERMIT NO. 43-07321 AND TRANSFER NO. 4640 IN THE NAME OF ROUND MOUNTAIN RANCH.	**EXCEPTIONS TO AMENDED RECOMMENDED ORDER AND MEMORANDUM IN SUPPORT OF EXCEPTIONS**

COMES NOW Jeff Sessions, d/b/a Round Mountain Ranch, by and through his attorney of record, and makes certain exceptions to the Amended Recommended Order dated December 31, 1996, of Gary Spackman, Hearing Officer.

EXCEPTIONS

The applicant hereby files exceptions to Findings of Fact and Conclusions of Law made by the Hearing Officer, including the narrative of facts and law preceding the specific Findings of Fact and Conclusions of Law. The first exceptions to the Amended Recommended Order involved the Hearing Officer's purported application of the SRBA Court's decision in Basin

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Wide Issue No. 10 dealing with partial forfeiture, the decision of Special Master Fritz X. Hammerle of September 10, 1996, and the Idaho Supreme Court's Decision in Basin Wide Issue No. 4. Before discussing this legally binding precedent, certain undisputed facts must be restated. The applicant has numerous rights, both decreed and licensed, for the irrigation of Round Mountain Ranch. The sources of water are Clear Creek, Round Mountain Creek, Rice Creek (a tributary of Round Mountain Creek), irrigation waste water, drain water, and springs. Since 1952, all of the water from all of the sources, when available, has been used to irrigate lands within Round Mountain Ranch. It is also undisputed that water is not available from all the rights for the purpose of irrigation during the entire irrigation season. As a result, all the lands being irrigated are not irrigated throughout the irrigation season, but for the sole reason that water is not available for such irrigation. From these facts, it is absolutely clear that there has not and could not be an abandonment of any part of the water rights appurtenant to the lands of Round Mountain Ranch. There cannot be an abandonment of the place of use when the place of use is only limited by reason of the limited water supply. This is consistent with the conclusions of the Hearing Officer. (Conclusions of Law Nos. 15 and 16). Another undisputed fact is that the protestants to the application for change in the place of use had no water rights to any of the flows of Round Mountain Creek, Rice

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Creek, springs arising on Round Mountain Ranch, waste or seepage water on Round Mountain Ranch, or the portion of Clear Creek diverted to Round Mountain Ranch on a continuous basis during the irrigation season, when the water is available.

From these undisputed facts, it is necessary to question whether or not the issue of partial forfeiture is an issue in this case. Without regard to the above undisputed facts, it is clear that partial forfeiture is not an issue as there is no statutory authority for the doctrine of partial forfeiture in Idaho. (Memorandum Decision of the Honorable Daniel C. Hurlbutt, Jr., in the SRBA dated April 26, 1996, Basin Wide Issue No. 10). Whether or not the Department, under Judge Hurlbutt's decision, has the authority to meaningfully review an application for transfer is immaterial and irrelevant. This would be so, even if there were any facts in this case upon which one could, if there was statutory authority to do so, find a partial forfeiture. Notwithstanding these undisputed facts in the law of the case, the Hearing Officer did in fact declare a partial forfeiture of the applicant's water rights, although not stated in those terms by the Hearing Officer. This will be clearly pointed out in specific exceptions hereinafter made.

The Hearing Officer also acknowledged that he considered the Amended Order on Summary Judgment issued by Special Master Hammerle in numerous consolidated subcases, dated September 10, 1996. These subcases involved the

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recommendations of the Director in his Director's Report, recommending that each of the claimants in the subcases should receive a rate of diversion below that amount provided in their decreed rights. Again, the Hearing Officer, after recognizing that he is bound by such decision, ignores this legal precedent in his Conclusions of Law. In support of his decision to narrowly construe Special Master Hammerle's decision, and in fact to ignore it, the Hearing Officer stated:

> "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." (Pg. 2, Amended Recommended Order).

What the Hearing Officer meant by "traditionally irrigated" is unclear. What is clear, as will be more fully demonstrated hereafter, the Hearing Officer seems to be saying, and his opinion reflects this view, that improvements in an irrigation system which provides a more efficient application of water can detrimentally affect other water rights. It is respectfully submitted that this reasoning is legally flawed and absurd.

Justice Hammerle quoted from McGinness v. Stanfield, 6 Idaho 372, 55 P. 1020 (1898), where the Idaho Supreme Court stated:

> "Priority of appropriation having been established, as well as the amount of the water appropriated, and the beneficial use thereof, it seems to us that the functions of the court under the statute have reached their limit. For the court to dictate the manner in which the appropriator shall use the water so appropriated, so long it is adapted to a useful or

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> beneficial purpose, is going beyond its province. It is an interference with the right conferred by the statute....
>
> We are of the opinion that, so long as the appropriator of water applies the same to a beneficial or useful purpose, he is the judge, within the limits of his appropriation, of the times when and the place where the same shall be used."

Whether the Hearing Office approves of Special Master Hammerle's decision or not, he is bound by the same. Special Master Hammerle rejected the state's proposition that beneficial use alone constitutes a limit of a decreed right. It would have been useful for the Hearing Officer to review the reasons for Special Master Hammerle's decision. He noted there are numerous reasons why a water right may not be used to the full extent of an appropriation. The Special Master noted that any one or all of the numerous factors mentioned in his opinion would necessarily change the amount of water actually and beneficially used when compared to the amount of the original appropriation. It is respectfully submitted that the same analogy must be applied in determining the place of use. In Joyce v. Murphy Land & Irrigation Co., 35 Idaho 549, 208 P. 241, 243 (1922), the Idaho Supreme Court reviewed a decision approving a change of place of use of a decreed water right to lands other than those upon which such water right was formerly used. The Idaho Supreme Court stated:

> "Neither do we think that there is any merit in appellants' contention that respondent corporation abandoned their right to the use of the 80 inches of water

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> decreed to it in the former decree by reason of the storage of the same and the subsequent diverting of the waters to other lands.
>
> Since this court affirmed the decree of the trial court awarding to respondent corporation a priority to 80 inches of the waters of Sinker creek, as long as the natural flow of the stream amounted to 80 inches it would have a right to use that amount of water for a beneficial use, either upon the Matthew's and Dupont ranches or upon any other lands susceptible of irrigation from its system...."
>
> "...Respondent corporation has a vested right in the waters decreed, as well as a right to apply the same to a beneficial use upon any lands available under its system."

This decision is particularly applicable to the facts before the Director. In Joyce, supra, it was noted that the eighty inches had historically been diverted, when available. In an attempt to improve the water system and the intermittent supply of water available, a dam was constructed which flooded the area where the eighty inches had previously been used for irrigation. The owner of the water right had thus changed the place of use and made a better application of the water, resulting in a more efficient water system. No injury occurred by the change of use, as a full eighty inches had always been diverted and used. There has never been a case to the knowledge of applicant that has held that by improving the irrigation system in the efficiency of the application of water, that a person must reduce the number of acres to which

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he is entitled to apply the water. However, this is the exact result of the Recommended Order of the Hearing Officer.

SPECIFIC FACTS

Jeff Sessions, the applicant, is the owner of Round Mountain Ranch. Numerous water rights are appurtenant to lands within Round Mountain Ranch. The Hearing Officer in Findings of Fact Nos. 2-6 partially described these rights, but fails to set forth all elements of the rights, including a description contained in Attachment A of the water rights.

Water Right No. 43-00045--This is a decreed right to divert 1.7 c.f.s from Clear Creek with a priority of June 1, 1882. The Decree provides:

> "To be diverted from Clear Creek for the irrigation of W½SE¼, SE¼SE¼, Sec. 13, NE¼NE¼, Sec. 24, Twp. 16 S., R. 27 E.B.M." (160 acres)

Water Right No. 43-00286B--A portion of Water Right No. 43-00286, a decreed right to divert 60 c.f.s. from Clear Creek with a priority of November 23, 1911. The place of use in the Decree is described as:

> "To be diverted from Clear Creek for the irrigation of All of...."

Within the place of use described in the Decree are 520 acres in Sec. 13 and 640 acres in Sec. 24, all within Round Mountain Ranch, which legal descriptions include the proposed place of use under the application for transfer.

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Water Right No. 43-00182[1] for 1.5 c.f.s. from Round Mountain Creek, for the irrigation of the SE¼SW¼ and the SW¼SE¼ in Sec. 12 and NW¼NE¼ and NE¼NW¼ in Sec. 13, all in Round Mountain Ranch. (160 acres.)

Water Right No. 43-00414[2] for the diversion of .6 c.f.s. from Round Mountain Creek with a priority of April 1, 1909, for the irrigation of the NE¼SE¼ and the E½NE¼ of Sec. 13, and the SE¼SE¼ of Sec. 12. (160 acres).

Claim No. 43-10116--This is a claim for the flood waters of Rice Creek and Round Mountain Creek for the irrigation of all of the irrigated lands of Round Mountain Ranch. (266 acres irrigated.)

Water Right No. 43-02061[3]--This is a licensed water right for the diversion of .16 c.f.s. of water from a spring located in Sec. 13 on Round Mountain Ranch, for the irrigation of 30 acres. This spring is presently accumulated in a tile drain with other waters.

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[1] Water Right Nos. 43-00182 and 43-00414 were consolidated into Claim No. 43-10824, which is a claim for 2.1 c.f.s. in the SRBA.

[2] See Footnote 1.

[3] Water Rights Nos. 43-02061 and 43-02110 are springs that are claimed to be private waters of Round Mountain Ranch, as they do not flow into a navigable stream or discrete water course, and do not leave the premises unless commingled with other water. If, however, they are not private waters and they are a part of Round Mountain Creek, they would make up a part of the waters of Round Mountain Creek identified under Water Right Nos. 43-00182, 43-00414 and 43-10116.

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Water Right No. 43-02110[4]--This is a licensed water right for the diversion of .8 c.f.s. of water from a spring for the irrigation of 51 acres within Round Mountain Ranch.

Recognizing that a portion of the above water rights are from the flows of two intermittent streams, Round Mountain Creek and Clear Creek, and fluctuating springs, Merle Jones filed a Snake River Basin Adjudication claim showing the place of use of all such water rights to be 266 acres within Round Mountain Ranch. He has claimed that all of the waters are commingled and applied to various places of use on the ranch. To fully understand this, it must be understood that all water from Clear Creek is diverted from Clear Creek at a point south and west of Round Mountain Ranch, and is conveyed to Round Mountain Ranch in an open ditch. Clear Creek waters are initially used to irrigate lands in the western part of Round Mountain Ranch. In the irrigation of these lands, irrigation return flows or waste waters are created in the nature of surface water that is collected and diverted in ditches used to irrigate lands also irrigated with Round Mountain Creek and spring water. In addition, there is a tile drain installed in a portion of the lands irrigated with Clear Creek water that captures other irrigation waste water and diverts the same through various conveyances and ditches for the irrigation of the other irrigable lands within Round Mountain Ranch. Round

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[4] See Footnote 3.

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Mountain Creek water is intermittent, but when received is used to irrigate all of the 266 acres, when water is available. Normally, the only flows in Round Mountain Creek and Rice Creek are either irrigation return flows from diversions south and above Round Mountain Ranch or during a period of high melt in the mountains which make up the watershed for Round Mountain Creek and Rice Creek. The extent to which the 266 acres are irrigated is determined upon the amount of water from these several sources. Testimony was undisputed that 266 acres had been irrigated with these waters, commingled, since 1952, and a constitutional appropriation and/or change in the place of use has occurred since that date.

EXCEPTIONS

FINDING OF FACT NO. 5: In the last sentence of this Finding of Fact, the Hearing Officer states:

> "The application for transfer also proposes changes in the period of use and nature of use of the rights."

Objection is made to this statement, as the application, to the extent it discusses the change in the place of use, does not seek the change in the period of use or the nature of use. The water is used for irrigation purposes during the irrigation season.

FINDING OF FACT NO. 6: Is an incomplete listing of the water rights and adjudication claims. For instance, Water Right No. 43-00286 describes the NW¼NE¼ and the NE¼NW¼, Sec. 13 in Round

Mountain Ranch. These two forty-acre parcels include the 23 acres and 17 acres sought to be transferred. This right also describes the NE¼SW¼ of Sec. 13 as a place of use. The lands described that are not authorized to be irrigated in Finding of Fact No. 6 are irrelevant to this case. Adjudication Claim No. A43-00286B was filed in an effort to establish the historical place of use since 1952, depending upon the water supply. As these flood waters are commingled with other waters, they include a place of use that is not the same as the original place of use described in the decree, but excludes over 600 acres that were included.

Under Water Right No. 43-00182 and 43-00414, the Hearing Officer fails to point out that these decreed rights allow the irrigation of 40 acres in the NW¼NE¼ and 40 acres in the NW¼NE¼ of Sec. 13 from which a total of 40 acres is sought to be transferred to the new place of use in the NE¼SW¼ of Sec. 13. Again, as no partial forfeiture is recognized in Idaho, the new place of use sought in the application was already a place of use under these water rights. Obviously, Claim A43-10824 should have included the additional acres, and IDWR was in error in aiding Sessions in preparing his claims and omitting these acres.

FINDING OF FACT NO. 7: Exception is taken to the statement that "the water from Kelso Springs seeps into Round Mountain Creek." In fact, Kelso Springs arise in the channel of Round Mountain Creek, some 1½ miles from Round Mountain Ranch. Kelso

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Springs are not a part of Round Mountain Creek of which applicant diverts water under his water rights.

FINDING OF FACT NO. 14: This is an incorrect Finding of Fact. Merle Jones maintained a ditch which captured the flows of Round Mountain spring and diverted it to lands of Round Mountain Ranch. Jeff Sessions constructed a pipeline to replace the open ditch. He later extended the pipeline to the spring to capture the water and conserve water. The water from the pipeline can be diverted to the reservoir or to open ditches on Round Mountain Ranch. When flowing onto the lands of Round Mountain Ranch, it has never reached any stream or creek.

FINDING OF FACT NO. 19: This Finding of Fact is incomplete. An essential fact that was undisputed is that the water from the drain tile was diverted and appropriated by Merle Jones in 1961, and this diversion and application of beneficial use constituted a constitutional appropriation of the water, if it is not private water, whether or not the water could be characterized as surface or ground water.

In King v. Chamberlain, 20 Idaho 504, 118 P. 1099 (1911), the Idaho Supreme Court made it clear that water developed from a slough by the construction of dams and dikes, thereby capturing fall and spring rains and melting snow, all of which was retained on the lands of the claimants, are not subject to appropriation and diversion for irrigation purposes. The Court then stated:

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> "In the first place, a landowner may use the surface of his land for any lawful purpose without let or hindrance from anyone. There is nothing unlawful in collecting and impounding surface and waste water; if he sees fit to turn his farm into a lake, he may lawfully do so, so long as he does not injure someone else in the process. Here the question of cutting off the flow of a natural stream or in any manner obstructing a water course or stream of water is in no manner involved."

The Court further went on to note that the landowner may consume or dispose of all the water if he so chooses without procuring any permit from the state engineer.

The Hearing Officer also failed to recognize the rules set forth in Reno v. Richards, 32 Idaho 1, 178 P. 81 (1918). In this case, the Idaho Supreme Court announced the rule that a person who, by removing obstructions from a stream in constructing artificial works, prevents the loss of water flowing therein through seepage and evaporation, and materially augments the amount of water available from the stream for a beneficial use, has the right to make use of the amount of water so conserved by his efforts in excess of the natural flow of the stream. A similar decision was approved by the Idaho Supreme Court in Basinger v. Taylor, 36 Idaho 591, 211 P. 1085 (1922). Finally, in Sebern v. Moore, 268 P. 176 (1927), the Idaho Supreme Court noted that when drainage works are constructed to collect waste and seepage waters and then used for the irrigation of lands, the water has been duly appropri-

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ated by the person in whom the possession of the water is found, and is not subject to appropriation by others.

FINDING OF FACT NO. 25: The last sentence is misleading and incomplete. Although the reservoir may capture discharge from Round Mountain spring and discharges from the tile drain, it is not necessary that those flows be directed to the reservoir. It is however true that the reservoir may capture irrigation return flow from use of Clear Creek water, Round Mountain Creek and Rice Creek water if diverted to it, subsurface waste water and water from either of the two springs.

FINDING OF FACT NO. 30: This Finding of Fact is incomplete and is misleading. In fact, the testimony was that the 40 acres sought to be transferred were irrigated when water was available, which normally occurs during high water. This does not infer that the lands couldn't have been irrigated at all times, if the owners of the land had elected to not irrigate other lands to which the water rights were appurtenant. Nor does it establish that only high water was used on these lands.

FINDING OF FACT NO. 34: This Finding of Fact is misleading as it fails to acknowledge that after the 1994 irrigation season some water remained in the reservoir, thereby taking less water to fill it during the fall of 1995.

FINDING OF FACT NO. 37: This is a misstatement, as it infers that water from Round Mountain spring, alone, would flow past the north property line of Round Mountain Ranch. Merle Jones testified that if Round Mountain spring was directed to the

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Round Mountain Creek water course, it would commingle with other water, including the drain tile water, and the waters as commingled would flow past the north property line of Round Mountain Ranch. It is also clear that a flow past the north property line of Round Mountain Ranch would occur only during the winter months when all water was commingled with the stream, as all water was applied to the lands for irrigation during the irrigation season. This would be a period of time when other water such as water from the tile drain also would be flowing and commingling with the Round Mountain spring water and snow melt.

FINDING OF FACT NO. 39: This is a misleading finding, as it indicates that water is diverted from Round Mountain Creek. In fact, it is Kelso spring water that flows in the Round Mountain Creek channel. It is an improper finding to restate the testimony of Ray Jones, as he did not qualify as an expert to measure water, and admitted on cross-examination or was shown to have absolutely no knowledge as to the measuring of water or the amount of water included in a cubic foot per second flow.

FINDING OF FACT NO. 40: This Finding of Fact is incomplete. The evidence is clear as well, and the Department could take judicial notice, that 1994 was the end of a severe drought affecting ground water supplies throughout the region. This Finding of Fact is also misleading, as no water has ever flowed in Round Mountain Creek during the irrigation season at the

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Jones property, but only the Kelso springs water flows in the channel of Round Mountain Creek.

FINDING OF FACT NO. 41: This is a misleading finding, as no witnesses could tell whether or not the water flowing in the Round Mountain Creek channel was from the Kelso springs, irrigation return flows, or other sources. No witness could testify that any of the water came from Round Mountain Ranch or above that ranch.

FINDING OF FACT NO. 49: This Finding of Fact is incomplete, as irrigation waste water from water diverted from Round Mountain spring, Round Mountain Creek, and Clear Creek are also commingled in the reservoir.

FINDING OF FACT NO. 52: This Finding of Fact is irrelevant and immaterial, as there is no evidence that there will be a diversion and beneficial use of additional water to lands of the applicant. If water is diverted and used on lands not previously irrigated, the lands that had previously been irrigated will not be irrigated, which is a natural occurrence when there is a shortage of water. There is no additional water.

CONCLUSION OF LAW NO. 3: This is an incorrect quote from I.C. §42-212. This section of the code does not refer to a "stream" but to a "spring." The quote also has omitted the words "except to the person or corporation."

CONCLUSION OF LAW NO. 5: Except for the first sentence of this Conclusion of Law, it appears to be a misstatement of the law.

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In Nordick v. Sorensen, 338 P.2d 766 (Idaho 1959), the Idaho Supreme Court thoroughly reviewed the definition of "private waters" within the purview of I.C. §42-212, and found that when springs are located wholly upon, are appurtenant to and a part of, the land, the use of the waters thereof belong exclusively to the owners of the land. The Court then stated:

> "It is only when the waters of natural springs flow off privately owned lands into a natural channel that such waters when flowing in a natural channel become public waters subject to appropriation, diversion and application to a beneficial use. I.C. §§ 42-101, 42-103. Jones v. McIntire, 60 Idaho 338, 91 P.2d 373,..."

The court then quoted from Maher v. Gentry, 67 Idaho 559, 186 P.2d 870, 872, where the evidence showed that "The water from the springs on appellant's land and from the spring on respondent's land sinks into the soil and none of the waters therefrom flows off the premises upon which the same rises."; which constituted those waters "private waters" within the purview of I.C. §42-212. These announcements of the Idaho Supreme Court make it clear that "private waters" on the lands of a landowners need not be appropriated by the landowner. The Hearing Officer had no authority to change the law in this respect.

CONCLUSION OF LAW NO. 6: The Hearing Officer again misstates the status of the law and the facts of this case. The Hearing Officer attempts to equate the applicant's transfer to an application to irrigate additional acres "not previously

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irrigated." No such application is on file nor has any such argument been made. There are no additional natural flows from the sources which provide water to Round Mountain Ranch. All natural flows have historically at all times been applied to the lands for irrigation. This has occurred so extensively that there is no natural water course for Round Mountain Creek on the irrigated portion of the ranch. Obviously, a Conclusion of Law that 40 acres not previously irrigated should not be allowed to be irrigated might, in some circumstances, seem to support a denial of a transfer. However, this is not the case for Round Mountain Ranch. It has a limited supply of water for the lands that are irrigated. To the extent any lands are given a full supply of water, other lands will in normal years be denied a full supply. The change in the place of use does not increase the acres that can be irrigated with the water supply, but merely identifies where the water may be used when water is available. Whether the applicant elects to irrigate the lands to which a portion of the water is transferred instead of some of the lands which still have a water supply, is within the prerogative of the landowner and not IDWR.

CONCLUSION OF LAW NO. 7: This is an inaccurate statement, as the flows from the springs do not flow from the lands of the applicant except when the waters are collected and caused to be commingled with water of Round Mountain Creek.

CONCLUSION OF LAW NO. 11: This Conclusion of Law ignores the facts as clearly established and undisputed and attempts to

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establish a new legal precedent not previously recognized in the State of Idaho. It is an undisputed fact that 23 acres in the NW¼NE¼ of Sec. 13 has, when water is available, been irrigated. It is immaterial as to whether or not the water is used to irrigate natural plants and grasses used for pasture, or a potato crop. (See brief filed with Hearing Officer.) There has been a beneficial use of the water. The water is obtained under the two Clear Creek water rights, the two water rights to Round Mountain Creek, the flood water right from Round Mountain Creek and the springs on Round Mountain Ranch. There is simply no evidence to show that the flood water rights from Clear Creek were the only waters ever used on this 23 acres. The Hearing Officer has also ignored the fact that partial forfeiture has been found to not exist in Idaho, notwithstanding the desires of the Hearing Officer. In essence, the Hearing Officer is saying that if there had been no application for transfer, the applicant would still be limited to irrigating within the 40 acres from which the applicant is seeking to transfer the water, 5 acres except when the flood water flows under Water Right No. 43-00286B are available. This ignores the properties of water rights and the place of use. If the landowner elects to irrigate the 40 acres and elects to provide it with a larger water supply than it has been able to provide the 40 acres in the past because of water shortages, it would be necessary for the landowner to dry up other lands that are now receiving the water supply. It is not

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appropriate for the Hearing Officer to attempt to dictate where the landowner may want to use his water. It is also inappropriate for the Hearing Officer to somehow indicate that the 17 acres irrigated in the NE¼NW¼ of Sec. 13 can only be irrigated with the flood water right. As this is a place of use of the commingled water, the landowner could elect to irrigate the 17 acres with a full supply of water and deprive a portion of the other lands of a full water supply. If the reasoning of the Hearing Officer is allowed to stand, it would be tantamount to saying that if you have grown only grain for thirty years, you cannot now convert the crop to alfalfa or potatoes, as they will use a greater amount of water, even though you may be required to plant less acres. The reasoning of the Hearing Officer is so unique that there are no cases that even attempt to discuss such a proposition.

CONCLUSION OF LAW NO. 17: The Hearing Officer accurately recognized the proceedings that have occurred in the courts in regard to the "amnesty statutes." However, it appears that the Hearing Officer has either misconstrued these statutes or has failed to understand their import. I.C. §42-1425 recognized that prior to the commencement of the Snake River Basin Adjudication many persons entitled to the use of water or owning lands to which water has been made appurtenant either by decree of the court or under the provisions of the constitution and statutes of this state, changed the place of use, point of diversion, nature and purpose of use, or period of use

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of their water rights without compliance with the transfer provisions of §§42-108 and 42-222, Idaho Code. In adopting this section, the legislature found that many of these changes occurred with the knowledge of other waterusers and that the water has been distributed to the right as changed. The legislature then found and declared that the continuation of a historic water use pattern resulting from these changes is in the local public interest provided no other existing water right was injured at the time of the change. Accordingly, the statute provides that if there has been a change in the place of use prior to November 19, 1987, the new place of use may be claimed in a general adjudication. It is therefore appropriate for the Hearing Officer to recognize that such change in the place of use had occurred and was justified as no other water rights existing on the date of the change (1952) were injured. If the Hearing Officer does not have this authority, then the change from the place of use provided in the decreed right should be considered, as there has been no partial forfeiture. This would leave the decision as to the place of use or other changes to be resolved in the SRBA.

The legislature also adopted I.C. §42-1427 as part of the amnesty statutes. In adopting this legislation, the legislature recognized that there are existing water rights that are not uniformally described. Recognizing that many water rights do not describe the place of use, this enactment provides that any undefined element of a decreed water right

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may be established based upon the extent of beneficial use of the water right as of the date of the commencement of the SRBA. Although it is not admitted that the place of use is not clearly described in the water rights appurtenant to Round Mountain Ranch, there is some inference by the Hearing Officer that he did not believe that all acres described were in fact irrigated. One must admit that this is consistent with the claims that were filed, showing the place of use to be substantially less than the place of use described in the decrees. On the other hand, the Hearing Officer should not and has no jurisdictional authority to reduce the place of use as established at the commencement of the adjudication. It was clearly improper for the Hearing Officer to pick and choose which portions of the SRBA claim he decided to review and to ignore the balance of that claim and the clear and undisputed facts to support the SRBA claim as filed.

EXCEPTION TO ORDER

For all of the above reasons, it is respectfully submitted that the Order recommended by the Hearing Officer is contrary to the facts and law of this case. There is simply no basis under Idaho law to limit the place of use of commingled water to those lands that a landowner has elected to irrigate when a full supply of water is not available from all rights, and to limit the irrigation of other lands historically irrigated with the commingled water to water received under a flood water right, on the basis that such lands have, at the

election of the landowner, not been irrigated with the frequency of other lands because of the absence of a full supply of water. It is particularly inappropriate and unlawful for the Hearing Officer to partially approve a change in the place of use of a water right that in fact presently has the place of use sought in the transfer as a place of use under the original right. Such reasoning could only be justified on the basis that there is and has been a partial forfeiture to use this flood water right on the lands described in the decree, and a transfer is necessary to now irrigate those lands. It is respectfully submitted that such a disregard of the law of this case in regard to partial forfeiture cannot and should not be sustained.

Exception is also taken to the provision of the Order which provides that all water rights of the applicant shall provide no more than 4 acre feet annually per acre for the lands described. It is unclear as to which lands the Hearing Officer is referring to. If it was referring to the place of use claimed in the SRBA claims, there is no basis to limit the right to 4 acre feet, unless this refers to a consumptive use. It is also improper for the Hearing Officer to attempt to limit the place of use of all Clear Creek and Round Mountain Creek waters to 231 acres, when it is clear that these waters can and have been used to irrigate 266 acres. If the water under Water Right No. 43-00045 (Clear Creek) cannot be used where the flood waters of Clear Creek under 43-00286B are used, what is the

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legal precedent for such a decision. There is no question that the lands irrigated with flood waters would be irrigated throughout the irrigation season every year if there was a sufficient supply of water. As there is not, the landowner must elect to determine which acres he desires to give a full supply. The reasoning of the Hearing Officer could be approved only where the flood water right is diverted from a different location and cannot and has never been used on those lands to which other water rights are also appurtenant. This is simply not the case. There is simply no evidence to support a finding that flood water from Clear Creek was used on the 35 acres only and on no other lands, and that none of the other water, when flood waters were available or otherwise, was ever used on the 35 acres. This is simply inconsistent with the facts. There is simply no evidence to establish that flood waters were always used in a particular place. The evidence established that it was when flood waters were available, without regard as to where they were used, that the entire 266 acres could be irrigated. The Hearing Officer has failed to understand the clear distinction between availability of water which determines the acres to be irrigated, and a specific location for specific water to be used. The latter did not occur in this case.

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CONCLUSION

For all of the above reasons, the Recommended Order of the Hearing Officer should be rejected where excepted to, and appropriate Findings and Conclusions made consistent with the clear and undisputed facts and law of this case.

RESPECTFULLY SUBMITTED this 20th day of January, 1997.

LING, NIELSEN AND ROBINSON

By: _____
Roger D. Ling
Attorney for Jeff Sessions

CERTIFICATE OF MAILING

I hereby certify that on the 21st day of January, 1997, I served a copy of the foregoing **EXCEPTIONS TO AMENDED RECOMMENDED ORDER AND MEMORANDUM IN SUPPORT OF EXCEPTIONS** upon:

Patrick D. Brown, Esq.
HEPWORTH, LEZAMIZ & HOHNHORST, CHTD.
Attorneys at Law
P.O. Box 389
Twin Falls, Idaho 83303-0389

by depositing a copy thereof in the United States mail, postage prepaid, in an envelope addressed to said attorney at the foregoing address.

_____
Roger D. Ling

LING, NIELSEN & ROBINSON
ATTORNEYS AT LAW
RUPERT, IDAHO 83350

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ROGER D. LING
ROBERT M. NIELSEN
BRENT T. ROBINSON
BRENT C. TINGEY

AREA CODE 208
TELEPHONE 436-4717
FAX 436-6804

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JAN 22 1997
Department of Water Resources

January 20, 1997

Director
Idaho Department of Water Resources
1301 North Orchard Street
Boise, ID 83706

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

Dear Mr. Dreher:

I have enclosed for filing in the above-captioned matter and for your consideration our **Exceptions to Amended Recommended Order and Memorandum in Support of Exceptions.**

Very truly yours,

Roger D. Ling

RDL:dmw
Enclosure

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APR 16 1997

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

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.

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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,

L. Glen Saxton

L. GLEN SAXTON
Chief, Water Allocation Bureau

Enclosure

C: IDWR - Region

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LAW OFFICES

Hepworth, Lezamiz & Hohnhorst

- Established 1952 -

TWIN FALLS OFFICE

John C. Hepworth
John T. Lezamiz
John C. Hohnhorst
Jeffrey J. Hepworth
Penelope Parker**
Eileen A. McDevitt*
Patrick D. Brown

Wm. L. Nungester
of Counsel

BOISE OFFICE

J. Charles Hepworth*
John J. Janis

*Member CA Bar
**Member UT Bar

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NOV 12 1996
Department of Water Resources
Southern Region

November 11, 1996

Idaho Department of Water Resources
Allen Merritt, Regional Manager
222 Shoshone St. E.
Twin Falls, ID 83301

Re: Round Mountain Ranch Transfer Application
Our File No. 95-1-125

Dear Mr. Merritt:

Enclosed for filing with the Department is an original Response to Petition for Reconsideration. By copy of this letter, I have sent a copy to the hearing officer, Gary Spackman.

Thank you for your assistance in this matter.

Very truly yours,

HEPWORTH, LEZAMIZ & HOHNHORST,
CHARTERED

By: LeAnn McMillan
LeAnn McMillan, Legal Assistant

:llm

cc: Roger Ling
Gary Spackman
Harold Jones

/1111IDWR.llm

HL&H
Chartered

TWIN FALLS OFFICE
208-734-7510
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Twin Falls, ID 83303-0389
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537 West Bannock
P.O. Box 2582
Boise, ID 83701-2582
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Southern 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.	**RESPONSE TO PETITION FOR RECONSIDERATION**

COME NOW the Protestants, Harold and Ray Jones, and respond to the Petition for Reconsideration of Recommended Order as follows:

The Applicant Jeff Sessions has asked for reconsideration of both Findings of Fact and Conclusions of Law. While the Applicant contends that those requests are made based on "undisputed fact," nowhere does the Applicant cite to the record in this case. Just as unfortunately, the extensive Findings of Fact and Conclusions of Law in the Recommended Order, with all due respect to the hearing officer, are also not based on the record created in this case. However, at this stage in the proceedings, the protestants have elected not to petition for reconsideration, and will instead simply file exceptions before the Director. Consequently, at this stage, it is important only to note that the Petition for Reconsider, as well as the Recommendation err in several regards. Without limiting the protestants' right to file exceptions, it is fair to inform the hearing officer that they believe recommendations concerning water right 43-00286B are entirely erroneous.

The record clearly indicates that this right had been abandoned and forfeited since at least 1937. The right was resurrected by Allen Merritt, not by use. The hearing officer neglected to address the abandonment issue although the water master's records indicate the nonexistence of the right, not the nondelivery of the right, since the early

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APR 14 1997

1980's. The water master records explicitly recognize that other parts of that "Settlers Right" exist, such as that used by the Jones and by Naf Store, but that 43-00286B does not. The Commissioner's Reports from the 1930's indicate nonuse of the right. Former owner Merle Jones admitted he never even knew the right existed, and instead had diverted all Clear Creek water under water right no. 43-00045. Jeff Sessions admitted that he never knew of the right until told about it recently by Allen Merritt. Sessions claimed any use of Clear Creek water was only under water right no. 43-00045 or waste water from his Utah neighbors.

Similarly, the contentions that Round Mountain Ranch has never been adjudicated are erroneous; by court decrees, the applicant has been enjoined from interfering with the protestants' rights.

However, as the protestants have stated above, they have elected to file exceptions before the Director rather than to petition for reconsideration.

Therefore, anything said in this document should not be construed as an admission as to the accuracy, relevance or propriety of any factual finding or legal conclusion in the Recommended Order. It merely acknowledges that the protestants have elected to proceed in a different manner.

Respectfully submitted this 11 day of November, 1996.

HEPWORTH, LEZAMIZ & HOHNHORST,
CHARTERED

By: _____
Patrick D. Brown
Attorneys for Protestants

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MAY 16 1997

CERTIFICATE OF SERVICE

The undersigned, a resident attorney of the State of Idaho, with offices at 133 Shoshone Street North, Post Office Box 389, Twin Falls, ID, 83303, and one of the attorneys for the protestants in this matter, certifies that he caused to be served a copy of the above and foregoing RESPONSE TO PETITION FOR RECONSIDERATION on the 11 day of November, 1996, as follows:

Roger D. Ling
Ling, Nielsen & Robinson
615 H. Street
P. O. Box 396
Rupert, ID 83350

Patrick D. Brown

(PDB\51125RES.DWR)llm

#5 . . .

THE IDAHO DECR● S AND DATES OF PR●PITY ARE AS FOLLOWS -

	DATE	INCHES	TOTAL	TOTAL SEC FT.
HOLMGREN LAND & LIVESTOCK CO,	1 JUNE 1881	120 150 150 110 25	555	11.10
CLEAR CREEK RANCH	. . . . .	70	625	12.50
GUNNELL RANCH.	2. JAN 1882	100	725	14.50
MERLE JONES	1 JUNE 1882	85	810	16.20
GUNNELL RANCH.	31 JAN 1884	100	910	18.20
HOLMGREN	15 JUNE 1886	195	1105	22.10
L+G	15 JUNE 1886	100	1205	24.10
HOLMGREN	1 JUNE 1887	110 135 220	1670	33.40
GUNNEL RANCH	1 JUNE 1897	140	1810	36.20
HOLMGREN	1 MAY 1908	130		
	21 MAY 1910	60		
	17 JAN 1911	26.66	2026.66	40.53
CLEAR CREEK RANCH	14 JUNE 1911	70		
	23 NOV 1911	160		48.33
NAF STORE	23 NOV 1911	160	2416.66	
CLEAR CREEK RANCH	14 JULY 1912	90	2506.66	50.13
HOLMGREN	14 JULY 1912	75	2581.66	51.63
GUNNELL RANCH	10 APR 1914	80	2661.66	53.23
L & G	1 APR. 1921	140	2801.66	56.33

ROGER D. LING
ROBERT M. NIELSEN
BRENT T. ROBINSON
BRENT C. TINGEY

LING, NIELSEN & ROBINSON
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RUPERT, IDAHO 83350

TELEPHONE 436-4717
FAX 436-6804

RECEIVED
OCT 29 1996
Department of Water Resources

October 28, 1996

Mr. Gary Spackman
Department of Water Resources
State of Idaho
1301 N. Orchard Street
Statehouse Mail
Boise, Idaho 83720

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

Dear Gary:

With regard to the above matter, enclosed herewith is my *Petition for Reconsideration.*

Very truly yours,

Roger D. Ling

jkb

enclosure

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OCT 2 9 1996
Department of Water Resources

**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 MOUNTAIN RANCH.	**PETITION FOR RECONSIDERATION**

COMES NOW the Applicant, Jeff Sessions, doing business as Round Mountain Ranch, and petitions the Hearing Officer for reconsideration of its Recommended Order of October 15, 1996 in the following respects and for the following reasons, to-wit:

FINDINGS OF FACT

Although the Hearing Officer has been meticulous in making certain findings of fact, he has overlooked certain essential facts that cause the entire Recommended Order to be confusing and to some extent inconsistent with the law. In analyzing the application of the Applicant, it is necessary to consider certain undisputed facts that are not clear from the Recommended Order. The Findings of Fact should make it clear that the right to use water from Clear Creek on the Round Mountain Ranch is represented by Water Right Nos. 43-00045 and 43-00286B. In addition, Clear and Round Mountain Creeks' waste water is recaptured in the drain tile installed in 1962 on the ranch. If the water recaptured in the drain tile is not private water, it has been duly appropriated by the Applicant and his predecessors and used on Round Mountain Ranch under the constitutional method of

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appropriation. As there has been no adjudication of the water rights of Round Mountain Ranch, the Hearing Officer should recognize this constitutional appropriation of drain water from the use of water from Clear and Round Mountain Creeks. The use of the water from the drain tile also supports the water spreading that has been accomplished on Round Mountain Ranch and recognized in all of the claims, showing that all of the waters have been commingled and applied to the irrigation of 266 acres. The Hearing Officer has recognized that a part of the water in the drain tile is waste water from the irrigation with Clear Creek water (Finding No. 20). It should include waste water from irrigating with Round Mountain Creek. Unfortunately, in Finding of Fact No. 21, the Hearing Officer merely notes that the measured flow from the drain tile of .17 cfs is greater than the flow authorized under License No. 43-02061, a springs. This is not a significant fact and is misleading. No claim was made for the recapture of the drain water on the belief that the Applicant was entitled to recapture water in the tile drain for use on Round Mountain Ranch. This would be in excess of the .16 cfs authorized by License No. 43-02061. It also must be noted that if the water is not captured by the drain tile or a license was not issued for the spring in the vicinity of the drain tile, the water would still be appurtenant to Round Mountain Ranch and Round Mountain Ranch would be entitled to use the water under the Round Mountain Creek rights of 43-00182 and 43-00414, combined into Right No. 43-10824, and Right No. 43-10116. It was

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incumbent upon the Hearing Officer to make these findings of fact, which are undisputed. It should also be pointed out in the Findings of Fact that there are no other claims to Round Mountain Creek, and all of the water in Round Mountain Creek, including any springs that may become a part of Round Mountain Creek, have always been appurtenant to Round Mountain Ranch. The water of the Protestants is only based upon the flow from the Kelso Springs, and not Round Mountain Springs or Round Mountain Creek. The Findings of Fact should make it clear that all of Round Mountain Creek and its tributaries have been fully appropriated by Round Mountain Ranch, as identified in Water Right Nos. 43-10824, 43-10116, 43-02061 and 43-02110. If, as the Hearing Officer has found, the springs are tributaries to and part of Round Mountain Creek, any limitation on the place of use of the springs and Round Mountain Springs are not controlled by Water Right Nos. 43-02061 and 43-02110, but also may be applied pursuant to Water Right Nos. 43-10824 and 43-10116. To find as a matter of fact otherwise, the Hearing Officer must note that the springs do not reach the channel of Round Mountain Creek, and therefore are not public waters of the state, even though a license was issued for their appropriation to the landowner upon which the springs arise and upon which the springs are used.

Other significant facts relating to the water rights appurtenant to the lands of Round Mountain Ranch should have been stated in the Findings of Fact. For instance, Water Right No.

43-00286 describes the Northeast Quarter of the Southwest Quarter (NE¼SW¼) of Section 13 as a place of use, which is the place by which Applicant sought to change all of his water rights to show as a place of use in his Application of Transfer No. 4640. As a result of the facts established at the hearing, it was not necessary to seek a transfer of Water Right No. 43-00286 to the 40 acres in the NE¼SW¼ of Section 13, as that water right has always been appurtenant to those acres. It should have also been noted in the Findings of Fact that the Northwest Quarter of the Northeast Quarter (NW¼NE¼) and the Northeast Quarter of the Northwest Quarter (NE¼NW¼) of Section 13 were identified as a place of use in Water Right Nos. 43-00182 and 43-00414 (ultimately Water Right No. A43-10824), and 43-00286B. Under the rulings of the SRBA Court, the Hearing Officer had no right to ignore the prior decree which showed the place of use, nor did the Hearing Officer have the authority to assume that any part of those decrees had been partially abandoned. The fact that a portion of the land had not been irrigated as the result of drought would not be a basis upon which one could ignore that the water rights are appurtenant to those lands. It must again be emphasized that the Findings of Fact should clearly show that all of the flows from Clear Creek and Round Mountain Creek appurtenant to Round Mountain Ranch have, when available, been used on lands of Round Mountain Ranch. It should also be pointed out that in most years, there is insufficient water to irrigate all of the lands to which these water rights are

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appurtenant. Therefore, if one should elect to irrigate one 40 acres for the entire irrigation season, to the extent that 40 acres had not been previously irrigated, another 40 acres would be deprived of its water supply. It is insignificant on the issue of water rights as to which 40 acres is deprived of a supply as the result of a change of use, as the lands deprived of a water supply by the irrigation of a different 40 acres are all within Round Mountain Ranch.

From the above undisputed facts, additional findings should have been made in regard to water spreading that may or may not have occurred on this ranch. To the extent there was a change in the place of use, or water spreading under any of the water rights appurtenant to the lands of Round Mountain Ranch, they are all justified and authorized by statute (amnesty statutes) in view of the fact that the diversions have not and could not have been increased at any time, as all diversions have historically taken all of the water to which Round Mountain Ranch may have been entitled, which was all of the Round Mountain Creek and its tributaries, including springs, and that portion of Clear Creek appurtenant to lands within Round Mountain Ranch. Whether the lands to which these waters may have been applied were irrigated for one (1) day or one hundred eighty (180) days is immaterial. The fact that must be recognized is that to the extent water was available, it was applied to lands totaling two hundred sixty-six (266) acres, even though the water may have been appurtenant to

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more than 266 acres. It was the lack of water, not intent, that limited the water to 266 acres. The Hearing Officer should have recognized the recent holdings of the SRBA Court in which it has determined that a partial forfeiture of a water right cannot be recognized in Idaho. In view of this change in the law, each of the claims of Round Mountain Ranch need to be amended to recognize completed transfers and the entire acres to which each water right is appurtenant.

Because of the changes that have occurred in Idaho law as the result of decisions in the SRBA court, the Hearing Officer should apply the law as it now exists, and not as it has previously considered the law to be. For instance, the Hearing Officer recognizes that the combined rights resulting in Water Right No. A43-10824 were appurtenant to three hundred twenty (320) acres. Under the recent decisions of the SRBA court, this water right should still be appurtenant to 320 acres, without regard to the claims that were filed, as the claims have not been finally resolved. In any event, it is clear that the Hearing Officer had no authority to reduce the place of use below the two hundred sixty-six (266) acres claimed, as this is less than the number of acres established in the water right as the place of use. The fact that there has been an accomplished change in the place of use does not diminish the water right. Again, the two springs recognized under Water Right Nos. 43-02061 and 43-02110, if a tributary to Round Mountain Creek as asserted by the Hearing Officer, are

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appurtenant to a minimum of 320 acres under A43-10824 and certainly 43-10116 as a constitutional appropriation of that water.

The Hearing Officer is misleading in his Finding of Fact No. 7. Although it may be an accurate statement of the fact, it is much too broad to be meaningful. The Protestant's own lands irrigated by water from Kelso Springs which flow in the channel of Round Mountain Creek near the Kelso Ranch. This is an accurate statement of fact. The Hearing Officer should not leave this finding as stated for interpretation by someone other than the Hearing Officer. There has never been a claim by the Protestants that they were entitled to any flows of Round Mountain Creek above Kelso Springs which arise near the Kelso Ranch in the Round Mountain Creek channel. In Finding of Fact No. 19, the Hearing Officer should also expand upon that finding, recognizing that although there was no permit and license for the diversion and application of water from the drain tile, such diversion can and must be recognized as a constitutional appropriation of water if in fact these waters are not drain waters to which the owner of Round Mountain Ranch is entitled to recover prior to their leaving the boundaries of the ranch without a permit or license. The Hearing Officer also made a proper finding of fact in Finding of Fact No. 26, but has made an erroneous conclusion from that finding. The irrigation of the lands simultaneous over a short period entitles the owner of a water right to apply the water to any portion of the land that has been irrigated and the water right is appurtenant.

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Therefore, it is immaterial as to which of the acres are to be taken out of production and the water transferred to other acres in view of the limited supply of water and the fact that all of the water available is at all times used on all of the acres. Finding of Fact No. 29 also appears to be consistent with the evidence, but again the Hearing Officer has reached improper conclusions from that finding. It is immaterial as to what crops the landowner has attempted to grow, whether it be sagebrush, crested wheat grass, or alfalfa. This does not diminish the water right and the fact that the water right is appurtenant to all of these forty (40) acres. In Finding of Fact No. 30, the Hearing Officer reached an improper finding from the evidence. The testimony was that the lands growing wheat grass and other range growth were irrigated during high runoff when sufficient water was available, and this water came from both Clear Creek and Round Mountain Creek during times of high spring runoff. The evidence is clear there was not sufficient water to irrigate these lands throughout the irrigation season. The fact that they were irrigated only occasionally in the spring does not diminish the fact that the water right was appurtenant to the lands.

Finding of Fact No. 35 is also inconsistent with the evidence. Merle Jones testified that the water from Round Mountain Spring and the water from the tile drain was commingled. It was this commingled water that would flow past the north property line of Round Mountain Ranch during the winter months when the water was

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not being used for irrigation. Finding of Fact No. 37 also is a misstatement of the evidence, as it implies that the Kelso Ranch of the Joneses is irrigated by water from Round Mountain Creek as well as springs known as the Kelso Springs. This is not true. The water right of the Kelso Ranch is limited to the Kelso Springs, which in fact flows in the Round Mountain Creek channel near the Jones property. Although the later sentences in this Finding seem to clarify the first sentence, it is suggested that the first sentence be restated. Applicant further objects to Finding of Fact No. 37, to the extent that it seems to imply that it is adopting the testimony of Ray Jones as to the flows of Kelso Springs in the Round Mountain Creek channel. Mr. Jones was not qualified nor did he give any foundation to show that he could be qualified to estimate the flow of water. No measurement was taken by any recognized measurement device, and such facts should be noted. As to Finding of Fact No. 38, there appears to be no dispute that the supply of water in the general region diminished significantly in 1994. It was appropriate for the Hearing Officer to note that there was a sever drought in the area during the years 1994 and 1995. As to Finding of Fact No. 39, although the first sentence is an accurate statement of the facts derived from the testimony, an additional fact should have been recognized that none of these witnesses were able to identify the source of the water flowing in Round Mountain Creek. Whether this was irrigation return flows, surface water, or some other source is unknown. The only conclu-

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sions that could be made is that the water they saw was water from Kelso Springs. We object to Finding of Fact No. 46, as this is mere speculation and is not a Finding of Fact. Whether or not the tile drain affects the flow in Round Mountain Springs is easily determined by comparing the flows of the spring with the flow of the drain. This test was not accomplished, which would have established that there is no correlation in the flows. Speculation was all that the evidence established. Finally, Finding of Fact No. 51 is irrelevant to any of the issues in this case. No additional water is sought to be applied to any lands not previously irrigated. Round Mountain Ranch has no additional water available to it. After July 15 of most years, there is insufficient water to irrigate even 40 acres by flood irrigation, the historic method of irrigating Round Mountain Ranch prior to the installation of a sprinkler system for some of the land. It is merely seeking to use the water that is appurtenant to the lands of the ranch. It is factually impossible for the proposed change in the place of use to affect the availability of water to others, as none of the water has ever been available to others under any circumstance except in flood conditions.

CONCLUSIONS OF LAW

Based upon the findings made by the Hearing Officer and those findings omitted that should have been included, numerous conclusions of law are either incomplete or erroneous. Therefore,

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the following conclusions of law should either be amended or deleted, to-wit:

1. Conclusion of Law No. 4 is merely a restatement of the argument of Applicant. If this conclusion remains, it should be noted as a matter of law that the water has, in any event, been appropriated under the constitutional method of appropriation by Applicant.

2. Under Conclusion of Law No. 5, the Hearing Officer ignores the title of Idaho Code §42-212 which is "**Diversion of private waters.**" If these waters are "private waters," Idaho Code §42-201 cannot be applicable to them, as this section refers only to the waters of the "state." The last sentence, in any event, of Conclusion of Law No. 5 is a misstatement of the law, as the appropriation of surface water by permit and license has been mandatory only since 1971.

3. In Conclusion of Law No. 6, the Hearing Officer again used a misstatement of the facts to support its Conclusion of Law. The application of water to additional acres not previously irrigated would cause an increase in consumptive use only in the event lands that had been previously irrigated continued to be irrigated. Because of the limited supply of water involved in this case, all of which is appurtenant to Round Mountain Ranch, it is physically impossible to irrigate additional acres without depriving other acres of the water supply that it had previously enjoyed. The only exception would be to the extent the method of

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irrigation has been improved, therefore providing more of the lands previously short of water with a better water supply. This is not a change in use that is controlled by statute and that can be used to establish an injury to another water right. Otherwise, any conservation of water by enhanced irrigation systems would be contrary to the policy of the state. It should also be pointed out that this Conclusion of Law recites a fact that is not in the record, and that is that somehow Application for Permit No. 43-07321 seeks an additional natural flow. No additional natural flow is available or is sought by Applicant. The storage of a natural flow right does not create an "additional natural flow."

4. Conclusion of Law No. 7 is inconsistent with the facts. The flow of Round Mountain Spring does not flow off of the lands of Round Mountain Ranch and is therefore located wholly upon the lands of Round Mountain Ranch. It is therefore private water as defined by §42-212, Idaho Code. The evidence shows that Round Mountain Spring will flow off of the ranch only if it is commingled with other waters, as is the fact with any supply of water, regardless of how *de minimis*.

5. Conclusion of Law No. 10 is an attempt to create a law that has not been previously recognized in the State of Idaho or any other jurisdiction to the knowledge of Applicant. The fact that lands had not previously been consistently irrigated does not deprive the owner of those lands of that water right used to irrigate the lands, regardless of the consistency. If the

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consistency of irrigation can be improved by improved irrigation methods, this does not constitute an enlargement of a water right. To hold otherwise would indicate that one could not improve the irrigation system in such a manner that lands that were not consistently irrigated could be consistently irrigated with the same water supply. It is incongruous to believe that this Conclusion of Law is an accurate statement of law in the State of Idaho or any other jurisdiction.

6. Finally, the Hearing Officer in Conclusion of Law No. 18 fails to recognize factual conditions which limit the affect of this Conclusion. The extent of beneficial use evaluated for the NW¼NE¼ and the NE¼NW¼ of Section 13 was under a gravity irrigation system with a water supply that was intermittent and insufficient to provide all lands a full supply for the entire irrigation season. However, to the extent the owner of lands to which water is appurtenant elects to provide certain of this lands with a full water supply and to deprive other portions of a full water supply does not require a consistency that will for all times require a portion of the lands to which the water right is appurtenant to receive less than a full supply. So long as the diversion does not increase, and the extent of the irrigation of the lands is dependent upon water available for that purpose, it is of no concern to IDWR or any other water right holder as to which of the lands the landowner seeks to provide a full supply. It is the

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number of acres that cannot be expanded, not the water supply to any of the original lands to which the water right is appurtenant.

O R D E R

The Recommended Order is inconsistent and must be amended to remove these inconsistencies. The first sentence of the Recommended Order provides that storage during the non-irrigation season is approved, and all other portions of the Application for Permit No. 43-07321 are rejected. This is inconsistent with Conclusion of Law Nos. 11 and 12, and the recommendation later in the Order that storage can accrue during the summer for water management purposes.

The Order is also confusing and inconsistent with the Findings of Fact and Conclusions of Law in other respects. An attempt to limit the irrigation of 35 acres in the NE¼SW¼ of Section 13 with water under Water Right No. 43-00286, is not a grant of a transfer, but a recognition of the entire 40 acres as the place of use now described under that water right. The Order also attempts to reduce the place of use from 266 acres to 231 acres, apparently on the basis that 35 acres have not been consistently irrigated because of inadequate water supplies. Again, there is no legal basis for reaching this Conclusion. There is also no legal basis to limit these rights to 4 a/f annually per acre, as the historical use clearly establishes that under a gravity irrigation system, much more than 4 a/f annually per acre is required. The fact that much of the irrigation has been

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converted to a sprinkler system cannot cause a partial forfeiture of the water right that exists for these lands. The attempt to limit all of the water rights to an annual diversion rate and an annual volume is not one of the issues that was before the Hearing Officer. No evidence was heard to establish the duty of water on these lands and it is a denial of due process for the Hearing Officer to attempt to establish limitations on water rights without a full hearing. The Hearing Officer should acknowledge that its Proposed and Recommended Order ignores the factual and legal issues of this proceeding. For instance, the Recommended Order provides for a completion of the transfer within one year when in fact no transfer is required for the portion of the transfer granted as the water under Water Right No. 43-00286B has always been appurtenant to the new place of use and no transfer is necessary.

On page 13, the Recommended Order provides that the 35 acres located in the NE¼SW¼ of Section 13 can only be irrigated with a portion of Water Right No. 43-00286. This provision of the Recommended Order ignores the waste water collected in the tile from water diverted under Water Right No. 43-00286. The law does not allow the Director to deny an appropriator the use of his waste water for irrigation. The Recommended Order places conditions which were not issues litigated in this proceeding and there is no factual basis upon which conditions are based. On page 14 of the Recommended Order, it provides that "this right" (sic), when combined with all other rights, shall provide no more than four a/f

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annually per acre. There was no evidence submitted to establish the duty of water for this farm. It is clear however that, to the extent flood water rights are used on the farm, four a/f could at some times be exceeded, primarily based upon the type of soils. It is inappropriate at this stage of the proceedings to attempt to limit the rights to four a/f per acre.

The Recommended Order then provides that the rightholder shall provide a means of measurement from all authorized points of diversion. This is acceptable as it is now being accomplished in regard to the water rights from Clear Creek. However, it is impossible to measure the flow of water from surface runoff in Round Mountain Creek and Rice Creek, as the water merely spreads across the lands of Round Mountain Ranch. When these flood waters reach the ranch, the testimony clearly showed that it is at times as much of a problem to get rid of the water as it is to use it. As to the measurement of water from Round Mountain Spring and the drain tile, little can be served, as all of this water is appropriated on Round Mountain Ranch, without regard to the measurement of the flow. Measurement would be beneficial only to the extent the flows exceed 3.06 cfs. (The combined flows of Water Right Nos. 43-10824, 43-02061 and 43-02110. This does not account for the irrigation return flow that is recaptured by the drain.) It is respectfully submitted that the provision on page 13 of the Recommended Order is more appropriate, which provides that after notification by the Department, the rightholder shall install

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suitable measuring devices. On page 14 of the Recommended Order, it is also provided that the water rights of Round Mountain Ranch will be regulated by the Watermaster of State Water District No. 43B. The Order should provide that the water rights of Kelso Ranch should also be regulated by the Watermaster. Applicant is entitled to equal protection of the law in this matter. The Hearing Officer has also failed to set forth the legal basis by which he seeks to limit the place of use of some of these water rights to two hundred thirty-one (231) acres and the diversion rate of 5.32 cfs except for conveyance losses. There is simply no legal basis to make these limitations without a full hearing. The Hearing Officer has failed to provide the factual or legal basis by which he attempts to limit the use of water under Right No. 43-00045 to 160 acres. Such an Order ignores the change in the place of use and water-spread acres that are allowed in the State of Idaho and the fact that the water under this right has historically been commingled with other water rights and waste water recaptured for irrigation of Round Mountain Ranch. It is equally necessary for the Hearing Officer to set forth the basis by which he attempts to limit the place of use for each of the other water rights, whether the limitation be 160 acres within the 231 acres or the 231 acres. None of these proposals in the Recommended Order have any legal basis.

It is also very perplexing that the Hearing Officer would recommend that five acres be irrigated with a pivot as proposed by

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the transfer. The Recommended Order by the Hearing Officer in effect destroys the irrigation system of the Applicant. This is not in the local public interest nor is it in the interest of conserving water. If the Recommended Order of the Hearing Officer is not amended, substantial injustice will be served upon the Applicant and will require the Applicant to attempt to have these matters resolved by the Director of IDWR which entails extensive time and effort to establish the facts established at the hearing. It is respectfully submitted that the Hearing Officer, after carefully reviewing the evidence, grant this Petition for Reconsideration.

Respectfully submitted this 28th day of October, 1996.

LING, NIELSEN & ROBINSON

By: _____
Roger D. Ling
Attorney for Jeff Sessions
d/b/a Round Mountain Ranch

LING, NIELSEN & ROBINSON
ATTORNEYS AT LAW
RUPERT, IDAHO 83350

CERTIFICATE OF MAILING

I hereby certify that on the 28th day of October, 1996, I served copies of the foregoing ***Petition for Reconsideration*** upon:

Patrick D. Brown
HEPWORTH, NUNGESTER AND LEZAMIZ
Attorneys at Law
P. O. Box 389
Twin Falls, ID 83303

by depositing said copy in the United States mail, postage prepaid, in an envelope addressed to said attorney at the foregoing address.

Roger D. Ling

LING, NIELSEN & ROBINSON
ATTORNEYS AT LAW
RUPERT, IDAHO 83350

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

PHILIP E. BATT
GOVERNOR

KARL J. DREHER
DIRECTOR

October 17, 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 "**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.

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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,

L. Glen Saxton

L. GLEN SAXTON
Chief, Water Allocation Bureau

Enclosure

cc: IDWR - Region

MICROFILMED

RECEIVED
SEP 2 6 1996
Department of Water Resources

LAW OFFICES

Hepworth, Lezamiz & Hohnhorst

- Established 1952 -

TWIN FALLS OFFICE
John C. Hepworth
John T. Lezamiz
John C. Hohnhorst
Jeffrey J. Hepworth
Penelope Parker**
Eileen A. McDevitt*
Patrick D. Brown

Wm. L. Nungester
of Counsel

BOISE OFFICE
J. Charles Hepworth*
John J. Janis

*Member CA Bar
**Member UT Bar

September 24, 1996

Gary Spackman
IDWR, State of Idaho
1301 N. Orchard
Statehouse Mail
Boise, ID 83720

Re: Jones/Sessions/Round Mountain Transfer Applications
Our File No. 95-1-125

Dear Mr. Spackman:

Please let me know if a decision has issued in the above matter, and if not, when my clients can expect to receive one.

I look forward to hearing from you.

Very truly yours,

HEPWORTH, LEZAMIZ & HOHNHORST, CHARTERED

By: Patrick D. Brown

PDB/llm

Enclosure

cc: Harold Jones

/0923GS.llm

HL&H
Chartered

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208-734-7510
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P.O. Box 389
Twin Falls, ID 83303-0389
FAX-208-734-4115

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537 West Bannock
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PHILIP E. BATT
GOVERNOR

KARL J. DREHER
DIRECTOR

SEPTEMBER 27, 1996

Patrick D. Brown
Hepworth, Lezamiz & Hohnhorst
Blick Bldg.
133 Shoshone St N
PO Box 389
Twin Falls, ID 83303-0389

RE: Round Mountain Ranch

Dear Patrick,

I apologize for being tardy issuing the Round Mountain Ranch decision. My 60 days expired the middle of September. I anticipate issuing a decision the first full week of October.

Thank you for your patience.

Sincerely,

Gary Spackman

Gary Spackman

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APR 1 8 2005

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

PHILIP E. BATT
GOVERNOR

KARL J. DREHER
DIRECTOR

SEPTEMBER 27, 1996

Roger Ling, Esq.
Ling, Nielsen & Robinson
615 H Street
PO Box 396
Rupert, ID 83350

RE: Round Mountain Ranch

Dear Roger,

I apologize for being tardy issuing the Round Mountain Ranch decision. My 60 days expired the middle of September. I anticipate issuing a decision the first full week of October.

Thank you for your patience.

Sincerely,

Gary Spackman

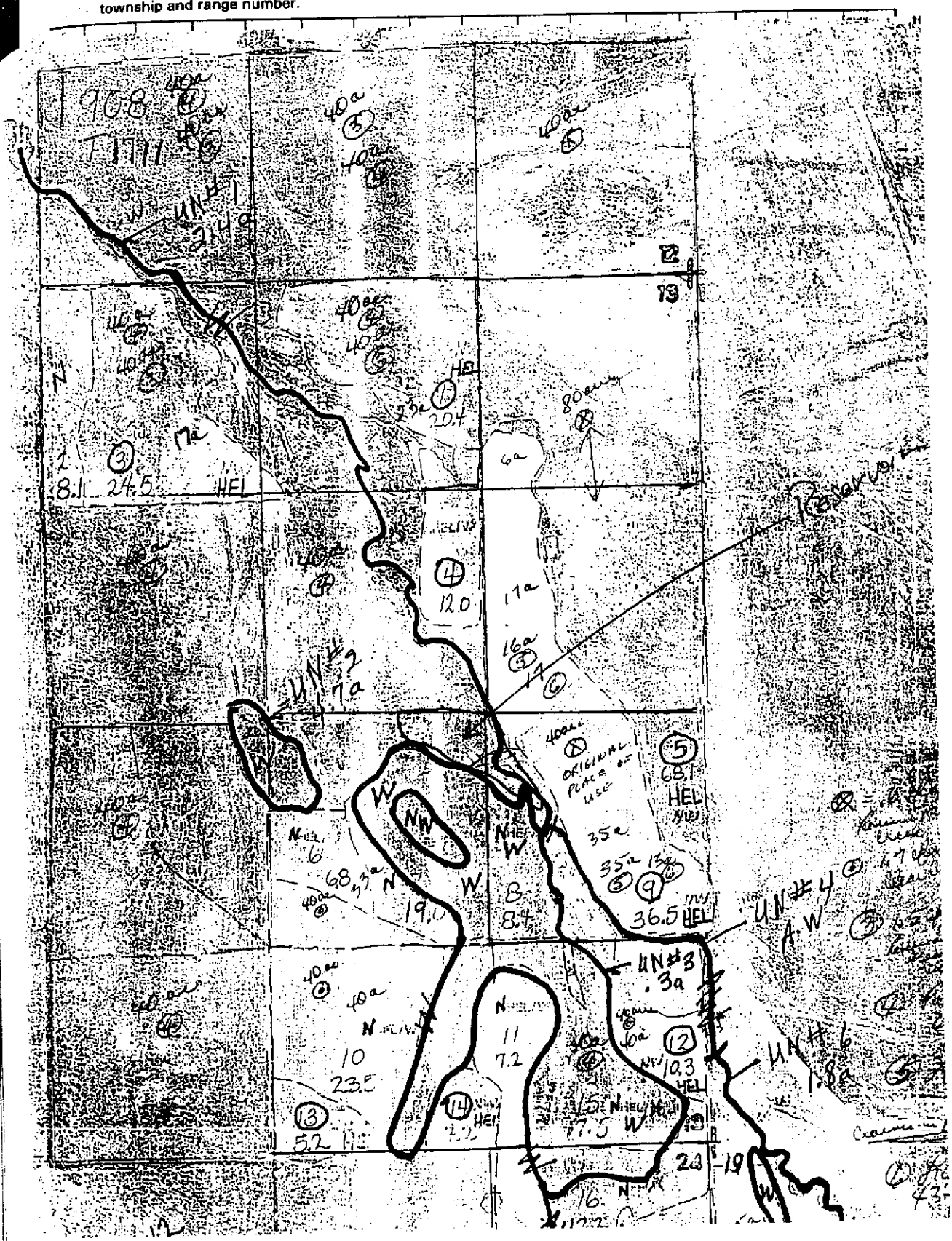
Gary Spackman

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only stored in private drain & seep water which originates
such and does [redacted] flow off of ranch.

Map Cell - Chapman

Map of proposed project: show clearly the proposed point of diversion, place of use, section number, township and range number.



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DEC 1 1983

OWNER CODE	NAME & ADDRESS	PRIORITY DATE	WATER USE	USE PERIOD FROM	USE PERIOD TO	DIVERSION RATE	DIVERSION VOLUME
C	ROUND MOUNTAIN RANCH	05/24/1995	IRRIGATION STORAGE	11/16	03/14		26.00 AFA
	HC 72 BOX 2346		IRRIGATION FROM STORAGE	03/15	11/15		26.00 AFA
	MALTA ID 83342		DIVERSION TO STORAGE	11/16	03/14	1.000 CFS	
	(208) 824-5727						
					TOTAL DIVERSION:	1.000 CFS	

Water Source: ROUND MOUNTAIN CREEK — Tributary to: CLEAR CREEK — Stage: PERMIT
UNNAMED DRAIN — ROUND MOUNTAIN CREEK
WASTE WATER — ROUND MOUNTAIN CREEK

Point(s) of Diversion: T16S R27E S13 NESE NWSE CASSIA County

Place of use Legal Description for: IRRIGATION STORAGE

	NE				NW				SW				SE				
	NENE	NWNE	SWNE	SENE	NENW	NWNW	SWNW	SENW	NESW	NWSW	SWSW	SESW	NESE	NWSE	SWSE	SESE	
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	Lt Ac	Lt Ac	Lt Ac	Lt Ac	
16S 27E 13													I	I			

Place of use Legal Description for: IRRIGATION FROM STORAGE

16S 27E 13	06			17					40					33	40	40	176.0
16S 27E 24	40																40.0
16S 28E 19						15											15.0
														TOTAL ACRES			231.0

Pou County: CASSIA

Other Water Rights Listing Overlapping Place(s) of use:
43-00045 43-00286 43-00414 43-02061 43-02110 T43-00045 T43-00182 T43-00286A T43-00286B T43-00414
T43-10116

Conditions of Approval:

005 - Use of water under this right is subject to control by the
- watermaster of State Water District No. 43B.

18B - 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.

Remarks: This right authorizes an annual volume of water to fill the storage facility and the amount required to replace losses through evaporation during the above described irrigation storage season of use.
After specific notification by the department, the right holder shall install suitable measuring devices to determine the amount of water diverted and shall annually report the information to the department.
See Final Order for conditions and limitations for use of

Remarks: water under this approval.

Dates: App. Received: 05/24/1995 Priority Date: 05/24/1995
Proof Due Date: 12/01/1997 Proof Made Date:
Exam Made Date: Exam Sent to S.O.:
Licensed Date:

Misc: Water District Number: 43B Field Exam Fee:

Audit: 09/20/96 CZIMMERM

MICRO

APPLICATION FOR PERMIT
STATE OFFICE REVIEW
by Cindy Zimmerman

No.: 43-7321 **Name:** Round Mountain Ranch **Date:** 9/20/96 **Ad OK?** ✓
Correct Fee? ✓ **Receipt #:** 5018126 **Priority:** 5/24/95 **✓ Gvmt Lts:** ✓

AREA OF CONCERN? - No/Yes ESRP Mor Raft R. C GWMA Trust/Non-trust
PROTESTED: - 020(Protest Agr) or W19(See Final/Prelim Order)
SYSTEM COMPLETED:
Yes/proof filed - NA
1 year/no proof - **P16**
+1 year - 26A-**P17**
GROUNDWATER: <✓ *FLO-CH*>
+ 0.2 cfs - 01M
=/- 0.2 cfs - No MD
=/+ 5 a. - 01M, 065(if GW use SW 1st)
Drilling Permit:
Existing well - NA (pre 7/1/87)
Included w/permit - Permit No. ___-___-___-____-____, **P99**
No WD permit? - 046-46B-**P23** (post 7/1/87)
irr. in WD - **P05** (new well)
SURFACE WATER <✓ *FLO-CH*>(Surface water that *doesn't sink* is regulated):
Water District(~~dom~~) - 005 (*req*) WD #43B <SEE MAP & LISTING>
+ 0.2 cfs - 01J(meas dev)-**P08**
=/- 0.2 cfs - 01H(lock dev)-**P01** or No MD
~~In-WD~~ + 0.2 cfs - 01M or No MD (in-stream)
- 0.2 cfs - No MD
=/+ 5 a. irr. - 01M
RIVER BASINS (**Surface water*):
Snake R (01) - 11A-**P04**, NA
(02/03-irr) - 007-**P07** (w/remark WB9-↑ Weiser), NA
Boise R (63) - 05A (if ~~WD~~), 11E (not 42-111 use), NA
Payette R (65) - 064(regulated uses), 047-**P04**(Payette Lake), NA
USE:
Domestic *(surface)* - *WB5(Boise R ↑ Star Bridge); 27A(Payette R); NA
Fish Propagation - 07A-042(*rg*)-010/06A/09E(WQ)-**P10**;044(N 1000 Spr)
Irr <*POU*> =/- 5 a - 057 (0.03 cfs/A)
+ 5 a - 03A (0.02 cfs/A)
Mining - 054 (*req*) & 06A/010/09E-**P10**
Power - 08A-17K-025-027-028-01F(**P19**)-09E(**P10**);
+25 cfs-**P18**; 17G(FERC) or 17M(~~FERC~~); 18B-**P09**
Storage*(✓ 3 compo.)* - ~~18A~~(multi MD in WD), 18B-**P09**(+10' dam), *W07
LOCATION:
42-248 area - In 20/30/40/50/60/70/80 (~~87~~) basin? **P84**
Boise Front LoGeo - 058 (-85° GW temp only)
In-stream dev. - **P52** (stream channel alteration)
Irr Dist/Canal Co. - 023 (Twin Falls area)
Swan Falls Flag - 99 <SEE CODE CHART>
Trust - ~~051-052-053-054~~(Consumptive Uses), NA
Non-Trust <1> - 048-049 (Consumptive Uses), NA
OWNERSHIP: Non-land owner - 004 (PD/PU) _____
OTHER CONDITIONS: - _____
STANDARD REMARKS: - * W07 W19 modified _____
BENEFICIAL USE DUE: - ~~12~~-1-1997
COMMENTS: - _____

LING, NIELSEN & ROBINSON
ATTORNEYS AT LAW
615 "H" STREET
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JUL 12 1996
Department of Water Resources

July 11, 1996

Idaho Department of Water Resources
222 Shoshone Street East
Twin Falls, Idaho 83301

RE: Round Mountain Ranch
Application for Permit No. 43-07321

Dear Water Resources Clerk:

Enclosed and herewith submitted for filing in the above-referenced matter is **Applicant's Reply Brief.**

If you have any questions, or if you need anything further to complete this filing, please do not hesitate to contact the undersigned.

Very truly yours,

Roger D. Ling

clb
Enclosure
pc w/encl: Patrick D. Brown, Esq.
Gary Spackman, Hearing Officer
Jeff Sessions

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Department of Water Resources

**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 MOUNTAIN RANCH.

APPLICANT'S REPLY BRIEF

INTRODUCTION

Protestants have filed a Post-Hearing Brief in this proceeding in which they attack the applicant's brief previously filed by alleging that it misrepresents or mischaracterizes the evidence, misstates the law and obfuscates the issues. In making these accusations, the protestants rely upon innuendo, statements taken out of context, and legal standards that are neither supported by statutory enactments or case law. The superficial treatment by protestants of the legal issues involved in this case makes it difficult to respond to protestants' brief in an orderly manner. Applicant will therefore address protestants' brief and the issues they attempt to raise therein by addressing the facts clearly established from the evidence and the law as it applies to those facts.

STATEMENT OF FACTS

Applicant has filed an Application for Transfer of Water Right, seeking to change the place of use of five (5) water rights appurtenant to the lands of applicant from a forty-acre parcel of a total of 266 acres irrigated to another forty-acre parcel, with

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a total number of irrigable acres after the transfer to be 266 acres. The change in the place of use and the right to store the water under these water rights during the irrigation season is being made to establish a place of use closer to the source of the water supply and to convert the irrigation from gravity irrigation to a sprinkler system on the forty acres. All purposes of the proposed change in the place of use are consistent with the conservation of water.

The water rights included in the Application for Transfer are as follows:

(a) Water Right No. 43-10824 -- This water right is a consolidation of two water rights appurtenant to lands of applicant Round Mountain Ranch. The first right is Right No. 43-00414, providing for a right to use .6 cfs. of Round Mountain Creek with a priority of April 1, 1909. The second consolidated right is Right No. 43-00182 for use of 1.5 cfs. of water from Round Mountain Creek with a priority of February 17, 1912.

(b) Water Right No. 43-10116 -- This water right is for the use of 20 cfs. of water from Rice Creek and Round Mountain Creek with a priority of December 31, 1900. This right also includes a stockwater right of .04 cfs.

(c) Water Right No. 43-00286B -- This right is derived from a decreed right to 60 cfs. from Clear Creek decreed to Settlers Land and Water Co., with a priority date of November 23, 1911, and for use on 9,600 acres. Lands owned by the applicant

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Round Mountain Ranch which are described in the Settlers Land and Water Co. right include the following, to-wit: W½NE¼, E½NW¼, E½SW¼, W½SE¼, and the SE¼SE¼ in Section 13 and the NE¼NE¼ and W½NE¼ of Section 24, all in Township 16 South, Range 27 East of the Boise Meridian.

(d) Water Right No. 43-00045 -- 1.7 cfs. from Clear Creek with a priority date of June 1, 1882.

Both Clear Creek and Round Mountain Creek are intermittent streams. Clear Creek flows for substantially longer periods of time than Round Mountain Creek. Water Rights Nos. 43-10116 and 43-00286B are what is commonly referred to as flood water rights, as neither Round Mountain Creek nor Clear Creek flow in sufficient volumes to fill such rights except for a very short period of time during the snow melt or a large rain occurrence. Because of the nature of these streams, flood water rights are used when available.

Water rights represented by licenses are also appurtenant to the lands of Round Mountain Ranch, including Water Right No. 43-02110 for .8 cfs. with a priority date of May 23, 1912, located near the common west section corner between Sections 18 and 19, and Water Right No. 43-02061 for .16 cfs. referred to as a springs with a priority of January 19, 1910, which is diverted from a drain pipe in Section 13. These two springs or seepage are claimed by Round Mountain Ranch to be private waters, as they do not flow off of Round Mountain Ranch unless diverted and commingled with other

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waters. Because they are private waters, there is no provision under the law which requires that an application to transfer the place of use be made to change the place of use. Section 42-222, Idaho Code, does not require the filing of an application to change the place of use of private waters. It also should be noted that in the report of the engineer in regard to Water Right No. 43-02061, it was noted that the water was captured by a reservoir and dam into which the water from the seepage ran continuously.

Applicant Round Mountain Ranch has also filed an Application for permit to store in an expanded reservoir up to fifteen (15) acre/feet of water for stockwater and irrigation purposes. The evidence clearly established that the water from the drain tile by which seepage water was collected was sufficient to fill the reservoir after the irrigation season, without the use of any waters of the State of Idaho. During the irrigation season, the storage reservoir would be utilized as a part of the irrigation system to better utilize and conserve the water available to Round Mountain Ranch from these several sources referred to.

No other person has appropriated water from Round Mountain Creek below the Round Mountain Ranch nor has any other person appropriated or claimed an appropriation of any of the water from the springs or seepage water arising on Round Mountain Ranch and contained thereon. All of the waters available, whether private or state waters, have been commingled and used to irrigate the 266 acres identified in the SRBA claims of Round Mountain

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Ranch, when such water was available. There is no evidence to indicate that the spring arising on the Round Mountain Ranch is in anyway connected with the seepage water collected in the drain tile. The evidence does establish that the seepage water is waste water from the irrigation of the Round Mountain Ranch or percolating water rising and contained on Round Mountain Ranch as a result of the geographical makeup of the underlying lands which prohibit the water from flowing and mixing with the underlying groundwater.

Protestants Harold and Ray Jones filed a Notice of Protest, objecting to the Application to store water, alleging, among other things, that the water supply in the area is insufficient and has been fully appropriated, the Application is not an appropriation of private waters, the proposed appropriation will reduce the quantity and quality of water under existing rights, the Application will conflict with the local public interest and the proposed appropriation is contrary to the conservation of water resources. A similar protest was filed to the Application for Change in the Place of Use. There was no claim that any of the water rights sought to be transferred had been abandoned or forfeited, but a claim that the change would constitute enlargement. The pre-conference statement of protestants restated their objections and again raised no issue as to the alleged abandonment or forfeiture of any of the rights sought to be transferred. Notwithstanding the very narrow scope of the Protest, protestants now raise issues unrelated to their Protest.

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ISSUES RAISED BY PROTESTANTS IN THEIR POST-HEARING BRIEF

1. Protestants allege that abandonment and forfeiture has been established by uncontroverted evidence. Such allegation is neither supported by facts nor legal authority. Abandonment is a question of intention and clear and convincing evidence is required to establish the abandonment of a water right. *Jenkins v. State, Department of Water Resources*, 103 Idaho 384, 647 P.2d 1256 (1982). It is also undisputed law and well settled that no forfeiture or abandonment occurs where there is or has been a resumed used prior to the filing of a petition for transfer. *In Re Boyer*, 73 Idaho 152, 248 P.2d 540 (1952). It is also clear that there can be no abandonment or forfeiture where the person with the water right has been prevented from exercising such right by circumstances over which he has no control. *Hodges v. Trail Creek Irrigation Co.*, 78 Idaho 10, 297 P.2d 524 (1956). Finally, the forfeiture of a water right is not favored and all intendments are to be indulged in against a forfeiture. *Hodges v. Trail Creek Irrigation Co.*, *supra*. In spite of these clear legal principles, protestants would urge that the rights of Round Mountain Ranch under Water Right No. 43-00286B have been forfeited. There is no dispute that this is a flood water right. There is also no dispute that flood waters have been delivered by the Clear Creek Watermaster to Round Mountain Ranch for use when said flows were available. This normally occurs when the Clear Creek is unregulated because of the large flows. Such conditions arose in 1995 and

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1996. The fact that Merle Jones, the former owner of Round Mountain Ranch, was not intimately familiar with the Settlers Land and Water Co. decreed rights, a portion of which was appurtenant to 480 acres of the Round Mountain Ranch, does not detract from the fact that such flood waters were delivered to the Round Mountain Ranch when available from Clear Creek. Almo Water Co. v. Darrington, 95 Idaho 16, 501 P.2d 700 (1972). The use of such flood water rights is contrary to any intent of abandonment of such right to the use of said flood water rights. Even if such use of flood waters from Clear Creek were not a part of the Settlers' rights, there was clearly a constitutional appropriation of said rights through the historical diversion of such flood water rights for use on Round Mountain Ranch. The issue of abandonment and forfeiture is a red herring asserted by protestants to overcome the clear showing of no injury to their water rights.

2. Protestants then assert in their brief that the waste water of Round Mountain Ranch is somehow commingled with the source of supply of Jones' water rights. There is simply no evidence to support a finding that the seepage water captured by the drain tile on Round Mountain Ranch is or has ever been a source of supply of any of the water under the water rights of Jones'. As previously mentioned, neither of the protestants have a water right to Round Mountain Creek, Round Mountain Springs, nor waste or seepage water from Round Mountain Ranch. Perhaps the absurdity of the protestants' factual conclusion can be demonstrated by reviewing the

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legal principles involved in the appropriation or use of waste or seepage water, or private water. Section 42-101, Idaho Code, recognizes the control in the state of all waters of the state, when flowing in their natural channels, including the waters of all natural springs and lakes within the boundaries of the state. Section 42-202, Idaho Code, provides, for the purpose of regulating the use of the public waters and of establishing by a direct means the priority right to such use, that any person intending to acquire the right to the beneficial use of the waters of any natural streams, springs or seepage waters, lakes or ground water, or other public waters in the state, shall make application for a permit before commencing the construction of any diversion or distributing works. This section does not indicate that all springs or seepage waters are public waters, but it does not indicate that spring waters or seepage waters are identical in nature. They certainly are not "ground water", or there would be no need to identify this as a separate source of public waters. Section 42-107, Idaho Code, makes it clear that waste, seepage and spring water of the state shall all be treated in the same manner as the waters of running streams. This section further recognizes that ditches that are constructed for the purpose of utilizing seepage, waste or spring waters of the state, is not an appropriation of ground water. It also should be pointed out that Section 42-107, I.C., does not attempt to control seepage, waste or spring water that is not within the definition of waters of the state.

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Section 42-212, Idaho Code, recognizes that the Department of Water Resources is prohibited from issuing or granting permission to divert or appropriate the waters of any lake not exceeding five (5) acres in surface area at highwater 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. This section of the Idaho Code makes it clear that the Department of Water Resources may grant a permit to divert or appropriate private waters to the person owning the water. It does not provide that a permit must be issued, nor that a change in the nature of use must be sought from the state of Idaho. In *Public Utilities Commission v. Natatorium Co.*, 36 Idaho 287, 211 P. 533 (1922), the courts recognized that percolating or seepage water, merely arising out the earth, without an outlet through any definite channel, and no part of any natural spring or stream, or any subterranean stream or flow, was not subject to appropriation, except by the owner of the fee. The court went on to note that percolating waters were within the provisions of Section 42-212, I.C., and if located or situated wholly or entirely upon the lands of a person, may not be controlled by the state. In *Sebern v. Moore*, 44 Idaho 410, 258 P. 176 (1927), the court recognized that certain seepage waters on public lands whose source is natural springs may be subject of appropriation under what was then Section 42-202, I.C., and the seepage water from a canal having its source

in a watershed other than that in which seepage occurs is subject to appropriation under what is now Section 42-107, I.C. At the same time, the court stated:

> "It is conceded that there is no vested right in waste or seepage waters as against the paramount owner thereof -- that is, the owner of the water taken from the stream or the owner of the land, or reservoir etc., from which is afterwards seeps or wastes."

The Court further stated:

> "Where there has been no appropriation of waste or seepage water prior to the construction of the drain in which such water collects, said water is in the possession of the owner of the drain, and is therefore not subject to appropriation under C.S. § 5562." (now known as § 42-107, I.C.).

From the above cases, there appears to be little distinction between what is often referred to as "percolating water" and "seepage water." Both waters merely arise out of the earth, and are within the definition of a spring as adopted by the court in Branson v. Miracle, 107 Idaho 221, 687 P.2d 1348 (1984). The Idaho Supreme Court adopted the definition of a spring contained in Beisell v. Wood, 102 Or. 66, 185 P.2d 570 (1947), which provided that:

> "[a] 'spring' is a place where the water issues naturally from the surface of the earth."

In Beisell v. Wood, supra, the Oregon Supreme Court stated:

> "The water of the spring involved in the present case does not pass from the tract of land upon which it arises, or become the

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> source of any water course. It merely seeps or flows directly into a small marsh upon the same tract, having no perceptible outlet. Such spring is not subject to appropriation by any person other than the owner of such land. It is private water, a part of the land upon which is arises, and belongs to the owner of that land."

It is also clear that the installation of drain tile or a drain ditch, to drain seepage or percolating water does not cause such water to become public ground water. In Sebern v. Moore, supra, the installation of a drain was recognized as merely a means by which waste, seepage, or percolating water can be collected. It is therefore proper to use the test as to whether or not the seepage or percolating water rises wholly on the property of Round Mountain Ranch and does not flow from Round Mountain Ranch in its own natural water course to determine whether or not the water is private water of Round Mountain Ranch. The accumulation of waste, seepage, or percolating water in a drain, whether in an open drain or drain tile, does not change the nature of the water. That such water, if private water before accumulated, continues to be private water is consistent with the theory of "developed water." In Reno v. Richards, 32 Idaho 1, 178 P. 81 (1918), the Supreme Court recognized that when one, through his activities, materially augments the amount of water available from a source, has the right to make use of the amount of water so conserved by his efforts in excess of what was otherwise available. This is also consistent with the decision of the Idaho Supreme Court in Washington County

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Irr. Dist. v. Talboy, 55 Idaho 382, 43 P.2d 943 (1935. In discussing public and private waters collected in a reservoir, the court stated in regard to the storage of private waters that:

> "If the water impounded belongs to the latter class, then it is the unqualified private property of the owners of the reservoir, and they may do with it as they see fit."

In *Nordick v. Sorensen*, 81 Idaho 117, 338 P.2d 766 (1959), the Idaho Supreme Court found that the lack of evidence beyond mere conjecture that the waters of certain springs formed a natural stream flowing in the natural channel of Gooseberry Creek would be insufficient to sustain a finding that said springs were public waters. The court also rejected the argument that seepage from the springs in an unestablished measure that reached Gooseberry Creek would make the spring public water. The undisputed testimony of Sessions and Merle Jones established that neither the seepage, waste, surface runoff, or percolating water accumulated in the drain tile nor that the spring diverted into a ditch flow in a natural channel or would leave the Round Mountain Ranch if unmolested and not interfered with.

Protestants also urge that a District Court decision attached to their brief somehow controls the issue of private versus public water. Contrary to the position of protestants, the District Court decision found that the water rising in the drain ditch on the landowner's property was public water in that it flowed off the property and in a natural channel prior to being

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appropriated by the plaintiff's predecessors. The District Court also noted that there had been an appropriation and there is no evidence that the appropriation was made in trespass or without permission. The District Court then concluded that the landowner who owns the water could not reclaim the water that had been appropriated as shown by the protestants' license. There is no such appropriation involved in the application before the hearing officer.

It would also appear that the hearing officer's impression that "private water" must still be appropriated by the landowner is contrary to the law. In King v. Chamberlin, 20 Idaho 504, 118 P. 1099, 1101 (1911), in discussing the distinction between public, unappropriated waters of the state as distinguished from private water, stated:

> "If a man collect and impound surface and flood waters from his own land before they reach any natural stream or channel and holds the same on his land and premises, the fact that he may not use it for irrigation or any other commercial purpose does not render it any less his property or authorize any one else to invade his property or appropriate and divert the same."

The court then went on to quote with approval from Metcalf v. Nelson, 8 S.D. 87, 65 N.W. 911, 59 Am.St.Rep. 746, where the court was dealing with percolating waters which had combined and struggled to the surface on plaintiff's land. The South Dakota court then stated:

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> "We think the plaintiff had more than the ordinary usufruct in the water of this spring, so long, at least, as it was held in the spring. He might consume or dispose of it all if he chose. He might convey it away in pipes, or carry it off in tanks. If medicinal, he might bottle it, and sell it for the healing of the nations. It would be inconsistent with the maintenance of such right in plaintiff to allow that the defendant or any other stranger had also the right in hostility to the plaintiff, to take and carry away water from the same spring."

The Idaho Supreme Court then quoted from a New Mexico decision, Banderwork v. Hewes, 15 N.M. 439, 110 P. 567, and stated:

> "The court there held that the water, while surface and seepage water, was the sole property of the land owner to deal with as he chose without procuring any permit from the state engineer, and that he might consume it all or grant its use to another, and that the lower owner had no cause of action on that account."

From this decision which has not been reversed or limited, it clearly appears that the private water of a landowner may be used by the landowner in such manner as he may deem appropriate, without a permit from the State of Idaho, even though he may, if he so desires, also seek a permit for the use of the water from the State of Idaho. It would therefore follow that if no permit is required, certainly a change in the nature of use would not require an application for approval of such change from the department, nor could another complain of injury to his water right as a result of such change. Although his use of the private water could injure another

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wateruser, it would not be an injury to a water right of another, unless the right was in the private water, obtained by permission.

Whether or not any of the water sought to be stored or transferred to other lands is private or public water may not be a controlling issue in this proceeding. Regardless of the nature of the water, there has been clearly shown that there will be no injury to the water rights of the protestants by either the storage of water on or around Round Mountain Ranch for improvement in the utilization of water rights appurtenant to Round Mountain Ranch, or for a change in the place of use.

In Poole v. Olaveson, 82 Idaho 496, 356 P.2d 61 (1960), the Idaho Supreme Court again reaffirmed that:

> "[T]he policy of the law of this State is to secure the maximum use and benefit, and least wasteful use of its water resources." (Cases cited)

This policy was particularly demonstrated in the case of In Re: Boyer, supra, in which the Supreme Court reviewed a proceeding in the matter of the application for a change of point of diversion and place of use of certain decreed waters of Big Lost River. The District Court had found that the lands from which the transfer was sought were unproductive, gravelly, and porous, and that the waters applied thereto failed to produce crops in sufficient quantity to justify the use of said waters thereon; that the lands to which the water was sought to be transferred are fertile, highly productive, and capable of producing all kinds of agricultural crops with the

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application of said water. The protestants to the application allege that the transfer of the water would have an horrendous effect upon the water table which was a source of their water supply. The court then noted that the evidence did not show other rights were immediately injured by the proposed change, and the mere fact that injury might result is not a valid reason to reject the application. The court, after noting that the application was approved for the reason that more beneficial use of water on more fertile soil would occur, stated:

> "If respondent, by a different method of irrigation in Section 30 could so utilize his water that it would all be consumed in transpiration and consumptive use, Water, Supply and Utilization, page 340, Baker & Conkling, John Wiley & Sons, 1930, and thus no waste water return by seepage or percolation to the river, no other appropriator - from the evidence herein - could complain. Reynolds Irrigation District v. Sproat, 70 Idaho 217 at 222, 214 P.2d 880. Instead of this changing the method of use, respondent accomplishes the same result by changing the point of diversion..."

These findings are particularly significant to issues before the hearing officer in this case. Applicant seeks to change the place of use of forty (40) acres, to improve the irrigation of the forty (40) acres with a sprinkler irrigation system. Sherl Chapman testified on behalf of the applicant that the change in the place of use and method of irrigation would result in a more beneficial use of water on more fertile soil. Thus, this application meets the same criteria applied in In Re: Boyer, supra. Chapman further

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testified that no injury would occur to other rights, as any waste water from this irrigation would return to the same subsurface strata that irrigation waste water had historically seeped and percolated into.

The application of Round Mountain Ranch does not involve an increase in irrigated acreage, nor annual volume of water diverted. The testimony clearly established that all water from all sources has always been used on the lands of Round Mountain Ranch. No new water sources are either available or are being developed. This has been recognized by the protestants in that they have alleged that the only injury to their water rights is that the applications of Round Mountain Ranch may result in an increase in consumptive use. Dr. Charles Brockway in his testimony was particularly careful in noting that the only affect upon any of the water rights of the protestants would be a possible increase in the consumptive use of the water on Round Mountain Ranch, thereby reducing the waste water from Round Mountain Ranch that could contribute to the water supply of the protestants.

It is respectfully submitted that reducing waste consistent with state water policy will inevitably increase the consumptive use when the efficiency in the irrigation of the crops improves the quality of the crops. This is the exact circumstance that occurred in the case of In Re: Boyer, supra. For one to argue that an increase in consumptive use can somehow interfere with or injure the water rights of another would in essence be an argument

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that one may not reduce waste in the irrigation of his crops. It would also ignore the fact that the right to the consumptive use of water under a water right is not altered by the method of irrigation or crop grown. Otherwise, one would be prohibited from improving the efficiency of his irrigation system and would be limited to the crops that could be grown with an inefficient irrigation system. Such a policy is contrary to the established policy of the State of Idaho in regard to the use of public waters.

Protestants misstate numerous facts in an effort to find some argument that the transfer and permit applications somehow will cause injury to their water rights. It is necessary to clarify these misstatements for the record. Protestants first claim that the springs on Round Mountain Ranch, the drain, flood waters, and Clear Creek water are commingled and collected in the drains. This is a blatant misrepresentation of the facts. No springs on Round Mountain Ranch are located or arise in the channel of Round Mountain Creek. The spring arising in the corner of Sections 18 and 19 is neither in the channel nor does it flow in the channel, and is not used for the irrigation of lands that are drained by the drain tile. Flood waters within Round Mountain Creek are not diverted into the drain although any waste water from the use of these flood waters for irrigation may ultimately get to the drain. Again, Clear Creek water is not diverted into the drain, but waste water from irrigation with Clear Creek water may be recovered by the drain. Contrary to the allegations of protes-

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tants, the drain tile does not collect ground water nor is there any testimony to support such an allegation. Protestants' witness, Dr. Brockway, merely stated that water seeping from Clear Creek could flow toward Round Mountain Ranch as well as to the Kelso Springs on protestant's property. As clearly shown by the testimony of Chapman, the water percolating and rising to the top in the area where the drain tile is located on the Round Mountain Ranch is collected and held on Round Mountain Ranch by the underlying soils, and unless drained by the drain pile, would remain on Round Mountain Ranch. If this water was a supply to Kelso Springs, it would not be rising to the surface and accumulate on Round Mountain Ranch.

Finally, protestants allege that the storage of water outside of the irrigation season constitutes an enlargement of the use of water. There appears to be no objection to storage during the irrigation season. They fail to acknowledge or address the water that is actually stored outside of the irrigation season. The only water sought to be stored and stored is that water accumulated by the tile drain. The testimony was clear that if the tile drain was not allowed to flow, the water would remain on Round Mountain Ranch as part of the marshy area now being drained by the drain tile. The application to store this water does not enlarge the use, but merely stores the water in a reservoir rather than in the marshy area in which the water is drained. Protestants next argue that an enlargement occurs in the quantity consumed by

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extending the number of irrigation applications through the use of storage. This simply is not a valid issue in regard to the enlargement in the use of a water right, as it is consistent with the state policy of the need to obtain maximum, beneficial use of a water right. Next, protestants argue that there is enlargement by the irrigation of more acreage than has previously been watered. A review of the water rights of the applicants shows that the water rights cover many more acres than have historically been irrigated, because of the insufficient supply of water available for irrigation. On the other hand, there can be no partial forfeiture of these rights. (See SRBA Basin Wide Issue 12 Decision.) At the same time, clear and undisputed proof was submitted to establish the number of acres that have historically been irrigated with the water supply available. It is a gross misstatement to allege that more acreage will be irrigated by approval of the transfer.

Finally, protestants argue that an enlargement by capturing water in the drain tile and applying it to irrigation increases the consumptive use. This allegation is particularly troublesome in view of the fact that the evidence, without dispute, clearly establishes that water from the drain tile has historically been used for irrigation. It is also a misstatement of fact to allege that by storing water in a dam there will be an increase in the diversion of water during the non-irrigation season. This is simply untrue for the reason that the water has always been retained on Round Mountain Ranch, and the place of holding of the

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water on Round Mountain Ranch merely has been changed from the surrounding lands to the new reservoir. The construction of a storage dam does not divert water from the system nor does it reduce the amount of water in the system. Protestant also objects because applicant presented no evidence to show his consumptive use by irrigation of Round Mountain Ranch prior to the change in place of use of forty (40) acres and the construction of a reservoir. Even if such evidence were to be submitted, it would be irrelevant. Consumptive use is based upon the crops grown and the water supply. Protestants fail to recognize that irrigation of Round Mountain Ranch does not occur in a vacuum. The water supplies vary from year to year, thereby affecting the water applied per acre, the number of irrigation applications during the year, and the timing of those applications. Applicant acknowledges that through the improvement of his irrigation system, less water will be wasted and better crops will be grown, resulting in a higher consumptive use. On the other hand, applicant does not concede nor does applicant believe it to be relevant that an increase in the consumptive use, so long as the use is within the criteria allowed for the water rights being used, and there is no increase in the number of acres being irrigated, constitutes an injury to another's water rights under the laws of the State of Idaho. There is simply no legal principle under the laws of the State of Idaho that would justify a conclusion that an increase in the consumptive use, without an increase in the amount of acres or volume of water diverted, could

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under any circumstance constitute an injury to the water right of another. It is for this reason that protestants have submitted no such authority to support their argument.

CONCLUSION

For the above reasons, it is respectfully submitted that the applications of Round Mountain Ranch be granted in all respects, the evidence clearly establishing that there would be no injury to the protestants by the approval of such applications.

Respectfully submitted this 16th day of July, 1996.

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By _____
Roger D. Ling
Attorney for Applicants

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LING, NIELSEN & ROBINSON
ATTORNEYS AT LAW
RUPERT, IDAHO 83350

CERTIFICATE OF MAILING

I hereby certify that on the 11th day of July, 1996, I served a true and correct copy of the within and foregoing **Applicant's Reply Brief** upon:

Gary Spackman, Hearing Officer
Department of Water Resources
1301 North Orchard Street
Boise, Idaho 83720-9000

Patrick D. Brown, Esq.
Hepworth, Lezamiz & Hohnhorst
P.O. Box 389
Twin Falls, Idaho 83303-0389

by depositing the same in the United States mail with first-class postage prepaid, enclosed in envelopes addressed to said parties in interest at their respective addresses.

Roger D. Ling

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COPY

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE
STATE OF IDAHO

RECEIVED
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Department of Water Resources

IN THE MATTER OF APPLICATION FOR PERMIT NO. 43-07321 AND APPLICATION FOR TRANSFER NO. 4640 IN THE NAME OF ROUND MOUNTAIN RANCH.	))))))	PROTESTANTS' POST-HEARING BRIEF

By a letter dated March 11, 1996, the hearing officer requested that counsel address several issues. This brief will address those issues as they pertain to the facts and opinions presented at hearing. In that regard, the brief differs the applicant's. The applicant's post-hearing brief misrepresents or mischaracterizes the evidence in numerous regards. It misstates the law in several regards, including perhaps more importantly, by suggesting that the protestants have not met their burdens of proof. As the hearing officer knows, the burdens are not on the protestants, except regarding abandonment and forfeiture which has been established by uncontroverted evidence.

It is for the applicant to prove each criteria of I.C. § 42-222, as well as showing that any alleged recapture of Sessions' own waste water, which is admittedly commingled with the source of supply of the Jones' rights, can be identified, quantified, and separated from those supplies so no other rights will be injured. Sessions has failed to meet those burdens including, most obviously, by failing to even present evidence to show there would be no enlargement in consumptive use.

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Instead, Sessions obfuscates the issues through his counsel's mantra: "This is private water." The designation of water as "private" is irrelevant. As the attached District Court Decision explains, the only significance of water being "private" under I.C. §§ 42-212 and 213, is that IDWR may not grant permission for the appropriation of it by someone other than the owner of the property without the owner's consent. That District Court Decision, which Mr. Ling is aware of as he attempted his "private water" argument there, should also help answer the hearing officer's inquiries about the limited scope of the private water statute. That Decision and this brief explain (1) the significance of the groundwater flows from Upper Clear Creek to Round Mountain and then North to Kelso; (2) the significance of Sessions' admission that the sources of drain flows are commingled and cannot be separately identified or quantified; (3) the significance of rights 43-02061 and 43-02110, which establish the drains captured groundwater below two springs; and (4) that the destruction of the Channel through the Ranch cannot change the character of the adjudicated water.

In short, the Jones agree with the District Court Decision, with one qualification. The Decision states that there was no dispute about whether the original appropriator could recapture waste water and put it to beneficial use. Here, quite aside from the commingling, there is a question about whether any waste water that may exist, but that has not been proven to exist, could be put to beneficial use by the original appropriator where it increases consumptive use and is part of the supply for the Jones' adjudicated rights. This additional hurdle is required because this is a transfer proceeding where no enlargement may occur. Obviously, according to IDWR's longstanding practice

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of finding an enlargement to be any increase in historical consumptive use, the use of recaptured water for storage to irrigate further through the season, on new ground, increases consumptive use. Thus, when Sessions' proposed plan is taken as proposed, it constitutes an irrefutable enlargement, it injures other rights by diminishing the water supply, and directly and adversely impacts the Jones and their rights.

Below are some additional points concerning the hearing officer's questions:

I. PRIVATE WATER AND RELATED ISSUES.

In the March 11, 1996 letter, Mr. Spackman correctly describes the source of authority for and limitations on "private water." None of the water Sessions seeks to transfer use is "private water."

A. The Round Mountain Spring is not private, as it is not a lake, pond, pool, or spring arising wholly upon and not running off the Ranch.

The spring does not arise wholly upon and not leave Round Mountain Ranch. The unrefuted testimony is that Round Mountain Spring arises in the Round Mountain Creek Channel and that the channel flows, including the spring water and water from south of the Ranch, from the South of the Ranch onto the Ranch, through the Springs and off of the Ranch. Sessions admits that, but unimportantly states that the channel carries water off the property for only a few days a year, and when the Spring flood waters flow. One day is enough. Sessions admits that the location of the claim is right through the Round Mountain Creek Channel which runs through the Ranch. Now that the channel has been filled between the spring and the dam, he diverts the spring <u>from the channel</u> and runs it down to the east of the old channel. Because it may now sink before leaving the Ranch during

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some times of the year and after being diverted from the channel does not transform the spring into private water. Olsen v. Bedke, 97 Idaho 825 (1976) (a stream from a spring is not private where it would have flowed into channel and off the property but for the farmers capturing the water and diverting it on the land); Jones v. McIntire, 60 Idaho 338 (1939) (natural springs that flow into stream channels or off the property are public waters).

Furthermore, the factual allegation that the spring water remains wholly on the property is untenable. The Jones' video exhibit shows the spring and tile water flowing off the Ranch; Sessions admits it flows off by saying that it sinks within a few hundred yards after flowing off, except during spring run off when it may go further; Merle Jones, former owner, testified that it sometimes flowed off when not diverted for irrigation; Ray Jones testified that it flowed off; and several other witnesses stated that, where it left Round Mountain Ranch, they had seen the water and had watered stock with it for decades.

Finally, Sessions is admittedly a successor-in-interest to David Jones, John Lithgo, Idaho-Albion Land Co. and others who were parties to the Jobe Adams Decree and the Settlers Land and Water Co. Decree. The Jobe Adams Decree confirmed the rights to Clear Creek and its tributaries, including Round Mountain Creek (p. 6); specifically found that Round Mountain Creek to be a tributary thereto and contributor to the flows of Raft River (p. 5) and constitutes the water supply to Raft River (p. 6); and enjoined and required Sessions' successors (and Sessions therefore) to permit the water to flow down the stream for junior appropriators; except when diverted and used on the described lands according to the decree. That decree further provides that Sessions, as a successor, is "particularly restrained and enjoined from using, attempting to use, diverting or attempting to divert, any

of said waters of said Raft River or its tributaries as hereinbefore defined and set out in any manner except as hereinbefore provided . . . ," (p. 40). The Settler's Decree contains similar prohibitions.

Consequently, the "private water" designation Sessions seeks in the springs is foreclosed by the prior decree of those rights as tributary sources, in suits to which his successors were duly served parties. Johnson v. Strong Arm Reservoir District, 82 Idaho 478, 482-83 (1960). Sessions' attempt to designate spring water (or the drain tile water as is explained below) as "private" water is nothing but an after-the-fact attempt to evade the consequences of unlawfully constructing the dam, and impounding, diverting and using water without a right. The spring water is not, and never has been, wholly contained on the Ranch.

B. Water emanating from the drain tiles is not private water.

The two Branson v. Miracle decisions dispose of Sessions' assertions that water from the drain is private. Just as water emanating from the mine portal was groundwater, so is the water emanating from the buried drain. That water is not a lake, pool, pond, or natural spring. It was originally installed under licenses for right nos. 43-02061 and 43-02110 to drain Round Mountain Spring and a spring to the west of there. It collects public groundwater.

C. The Clear Creek water is not private water.

Sessions alleges one right to 85" of Clear Creek water and an additional 4.3 c.f.s. from Clear Creek under a portion of the "Settler's" rights. This water is admittedly public water. Sessions and his predecessor, Merle Jones, further admit that only the 85",

not the Settler's 4.3 c.f.s., have been used on the Ranch since Merle Jones acquired the property decades ago.

D. The 20 c.f.s. "flood right," for the same reasons set out above, is not private water.

In sum, the "private water" theory is, as both a matter of law and fact, inapplicable to these proceedings. Each of the four rights in the application for transfer have been judicially determined to be tributary waters. None may be redesignated here as "private."

II. COMMINGLED WATER.

Even if one of the rights could be called "private," the spring, drain, flood, and Clear Creek water is, by Sessions' own admission, commingled when collected in the drains, in inseparable proportions and quantities. That system also collects groundwater, which is public, and comes from the Southwest by Clear Creek, through the Ranch, and on to supply Kelso Springs and the Jones' well to the North. In another manner of description, it collects groundwater in a Critical Ground Water Area, meaning there is an insufficient supply. Therefore, it must all be considered public, because Sessions has not sustained his burden of proving that the water he seeks to collect, store, and use on new ground are identifiably separate and distinct from the flows constituting part of the supply of groundwater and surface flows on Clear Creek system, including the prior adjudicated rights of the Jones to water for the Kelso place. See, Union Central Life Ins. Co. v. Alberthsen, 50 Idaho 196, 199-200 (1930). Nor are the waters "developed waters," because in their natural form, they form part of the surface and underground supply which flows in the channels,

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above and below ground. In sum, Sessions' theories concerning private water, recaptured water, and drainage water are unpersuasive, as he has failed to separately identify or quantify those uses or to prove those uses would not constitute an enlargement, would not injure other rights, are in the local public interest, and would not directly and adversely impact the Jones and their rights. This case involves no private water.

III. THE DRAIN TILE WATER IS GROUNDWATER.

Mr. Spackman asks about the significance of the groundwater source being collected by the drain and also arising as Round Mountain Spring. It is significant because all of that water is part of the ground and surface water supply to the rights adjudicated on the Clear Creek system, including the Jones' rights at Kelso. *See* Union Central Life Ins. Co. It is commingled and not subject to characterization as "private." It is tributary to the Jones' rights and any diminishment thereof, diminishes their supply and flows.

IV. FORFEITURE, ABANDONMENT, AND EXTENT OF BENEFICIAL USE.

While the SRBA court has ruled that I.C. § 42-222 does not work to "partially forfeit" an unused portion of a right, that decision is unnecessary to the holding which this hearing officer should enter, denying the transfer and dam permit. Testimony of Sessions' predecessor, Merle Jones, and that of Harold and Ray Jones establishes that Round Mountain Ranch has no right to the 4.3 c.f.s. claimed with priority of November 23, 1911. Those persons testified, and the former water masters records show, that no part of the 4.3 c.f.s. has been used on Round Mountain Ranch for decades. The only diversion from Clear Creek for Round Mountain when Merle Jones owned it, and before when Merle's and Harold's father owned it, was under the 43-00045 right of 85". Sessions disputes none of that.

Instead, he admits to having no knowledge of use or even of a claim to the right of 4.3 c.f.s., whatsoever, before Allen Merritt of IDWR helped him with his application in the summer of 1995. At most, Sessions says that in 1995 he did get "waste water" flowing off the lands of Larry Kempton, but not through any ditch. That waste water, by Sessions' testimony, flowed down the Rice Creek Channel from Kempton's property. It was not, by Sessions' own testimony, water diverted from Clear Creek for use on Round Mountain Ranch. It was someone elses waste water that escaped due to a broken diversion structure.

In sum, while that right is presumed to have existed at the time of the Settler's Land Decree, the uncontroverted evidence is that it has not been used in any amount since at least the middle 1950's. If complete nonuse, coupled with the prior owner's admission of no right or use for decades, does not clearly establish an abandonment, then surely it must when corroborated by the testimony of Harold Jones, Ray Jones, Dave Sundberg, and the omission of the right from those recognized in 1988 by the former water master of over three decades.

The intent to abandon is unequivocally established by Merle's acknowledgment that he had no right, claimed no right, used no right, and that the ditches would not carry the right. Along similar lines, the doctrines of laches and estoppel prevent the assertion of such a right, especially where the only means for diverting and delivering such a right would be through the ditch which will uncontrovertedly hold no more than the Jones' water and 85" for Round Mountain.

V. ENLARGEMENT OF USE.

The enlargement questions in this transfer revolve around (1) enlargement of

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the total quantity diverted and stored, which inevitably will occur if water is stored outside the irrigation season, as proposed by Sessions; (2) enlargement in the quantity consumed by extending the number of irrigation applications through use of storage; (3) enlargement in the quantity consumed by the irrigation of more acreage than previously watered; and (4) enlargement by capturing the commingled groundwaters and applying them to irrigation, thereby increasing consumptive use.

Regarding each type of enlargement, there is no question that diverting water into a storage dam will increase the use both by the diversion of water during the nonirrigation season and by the use to irrigate "more efficiently," which, by definition, results in the consumption of a greater percentage of the water during each application, and adds consumption by extending watering to more and later applications. No evidence was submitted to refute Dr. Brockway's testimony that increased consumptive use will occur. No one disputes that an increased diversion volume results from out-of-season diversion. Moreover, the evidence is that only 6 or 7 acres were previously irrigated, not the 40 allegedly being transferred.

Consequently, the only viable argument for Sessions is that diversion volume is irrelevant; that despite Sessions' failure to present any evidence about past or future consumptive use, it will not be increased; and that instantaneous diversion rate is the only criteria of water quantification which bears on the enlargement issue. Because Sessions presented no evidence or opinions to establish either past or future consumptive use, it is unnecessary to decide whether a consumptive use increase should be based on authorized acres within a place of use, acres historically irrigated, or some other baseline.

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Sessions put on no evidence to establish consumptive use based on authorized acres. In fact, under the rights being transferred, there are no authorized acres in the two quarter/quarter sections from which Sessions proposes to "dry up" 40 acres. He further put on no evidence to establish consumptive use for the acres historically irrigated. He presented no evidence concerning the amount of water applied per acre, the number of applications, nor the timing of applications. Hence, the hearing officer has no basis upon which to determine the burden of proof has been met and there would not be an increase.

On the other hand, Dr. Brockway, the only witness concerning consumptive use, opined that consumptive use would increase if Sessions is allowed to accomplish the transfer. Thus, testimony of the only qualified witness was that the transfer and issuance of the dam permit will increase consumptive use regardless of whether authorized acres or historically used acres are the starting point. In short, Sessions has utterly and irrefutably failed to show that there would be no enlargement in use.

VI. SIGNIFICANCE OF ROUND MOUNTAIN CREEK CHANNEL.

The material consideration concerning the obliteration of Round Mountain Creek Channel is that the applicant seeks to assert theories about private water based on the assertion that Round Mountain Spring water is wholly contained on, and does not flow off, the Ranch. The aerial photographs establish the channel existed both above and below the springs. The applicant and his witnesses admit the springs arise in the channel. They assert that the springs have never flowed off the property except when combined with other waters. The argument is barred by Jobe Adams, and Settlers, and is incredulous given the

admission that the former channel was defined and created by water flowing in the channel onto the Ranch from the south, through the Ranch, off the property, and on to Kelso.

That is compelling evidence, especially when combined with testimony from Merle Jones. Merle Jones admitted that in the 1980's he protested an application to appropriate water from Round Mountain Creek below Kelso because such water was appropriated to Round Mountain Ranch. From that, the only reasonable conclusion to be drawn is that Round Mountain Springs, and Creek flows are interconnected with the water at Kelso and below, via the channel.

Additionally, as Dr. Brockway stated, flows in or beneath the creek channel supply the Kelso rights and Sessions' interference with those flows injure the Jones.

VII. OTHER WATER RIGHTS.

Water right nos. 43-02061 and 43-02110 are claims to the springs and drain on Round Mountain Ranch that are senior to those being sought to be transferred. They are significant in several ways.

First, 43-02110's description of the source as Round Mountain Springs and a drain "from the springs" is further admission that the drain is not merely recapturing irrigation waste but is collecting the groundwater from the spring area, i.e. public water adjudicated to be part of the Clear Creek system. This is exactly what is shown by the May 15, 1911 map in IDWR's file for right no. 43-02061 from the "Report of Engineer" which is part of the original permit application.

Second, given the applicants testimony concerning the limited quantity of spring and tile flows, the only proper conclusion to be drawn is that there is an insufficient

water supply in the area to satisfy the proposed transfer and storage without effecting other rights.

Third, while the hearing officer may be curious to know why those rights were not included in the transfer application, the fact of omission, not the reasons therefor, is what must be considered in deciding the applications. And there is no dispute in that regard, or that such omission must lead to the conclusion that insufficient water is available and that the tiles collect public groundwater.

VIII. ENLARGEMENT OF EXISTING RIGHTS.

By adding new uses and extending the period of use, it will increase the quantity diverted and consumed, and injure the Jones' rights by diminishing an already insufficient supply to those rights. The change in the nature of use to a storage during the nonirrigation season also diminishes the supply to the Jones, and will affect the timing of when that supply is realized at Kelso. How the enlargement criterion applies to that change in nature and period of use can be found in the purpose of the criterion.

The purpose is to prevent original rights from changing in a manner that causes diminution to the water system or, even without diminution, cause changes in the timing or course of flows within the system. The enlargement criterion operate and apply even if "injury to other rights" are not established. That is logically and practically appropriate because the nature or extent of injury to other rights may not be obvious or immediate, but IDWR must nevertheless assure that the ground and surface water supplies are not mined or diminished; that flow patterns are not otherwise changed; and that the delicate balance between one person's use and other's supplies is not disrupted, especially

where the effect of a change in use can not be definitively proved to cause injury to a particular right, but will cause a certain hydrologic change in the system.

The Department's own study of this critical groundwater area by Shane Bendixensen concludes that such a balance between discharge and recharge to that system in the area that includes the Round Mountain Ranch will, "increase declines in the north by intercepting recharge," (p. 14), declines which have been averaging about two feet per year since 1950, (p. 14), and which Sessions' own expert, Mr. Chapman, attributes as a cause of decline to the Kelso Springs and well.

The protestants respectfully submit that the enlargement criterion is designed to protect people such as themselves, and the system as a whole, from the effects of circuitous logic such as Mr. Chapman's, and from enlargements because they disrupt the balance of the already undersupplied system. In sum, the criterion applies to prevent those who hold rights from bootstrapping the existence of the rights into new uses that undeniably disrupt the system.

VI. CONCLUSION.

Because Sessions has not met his burden of proving any of the elements of § 42-222(1), nor has he shown a significant, unappropriated supply of water for storage, the dam permit and transfer application must be denied. The protestants respectfully request the hearing officer to rule accordingly.

Dated this 6th day of June, 1996.

HEPWORTH, LEZAMIZ & HOHNHORST,
CHARTERED

By: _____
Patrick D. Brown
Attorneys for Protestants

CERTIFICATE OF SERVICE

The undersigned, a resident attorney of the State of Idaho, with offices at 133 Shoshone Street North, Post Office Box 389, Twin Falls, ID, 83303, and one of the attorneys for the protestants in this matter, certifies that he caused to be served a copy of the above and foregoing PROTESTANTS' POST-HEARING BRIEF on the 6th day of ~~May~~ June, 1996, as follows:

By hand delivery to:	Idaho Department of Water Resources 222 Shoshone Street East Twin Falls, ID 83301
By mailing to:	Roger Ling, Esq. Boyd Baggett, Esq. Ling, Nielsen & Robinson 615 H. Street P. O. Box 396 Rupert, ID 83350
By overnight delivery to:	Gary Spackman Hearing Officer Department of Water Resources 1301 North Orchard Street Boise, ID 83720-9000

_____
Patrick D. Brown

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Report of Eng...

1. State name of applicant and number of permit: James Mathews - Permit No91

2. State source of water supply: Round Mountain Springs

3. Location of point of diversion: SE4 SE4 Sec.13, Tp. 16 S., R. 27 E.B.M.
(Fully completed)

4. State whether or not the works of diversion are fully completed and in accordance with terms of permit: Fully completed

5. Describe works as they exist, giving dimensions of same as follows:
(a) Width of conduit at bottom: 1½'
(b) Width at water line: 2'
(c) Depth of water: 4'
(d) Grade per mile: 6'

6. State whether or not water has been turned into works of diversion and if so, to what extent: Full extent.

7. Give exact location of lands to be irrigated. ~~Describe each forty acre tract~~
SE¼NE¼ NE¼SE¼ Sec 13, T.16S. R.27E.B.M.
8 acres under cultivation NE¼SE¼ Sec 13, T16S R27E B.M.

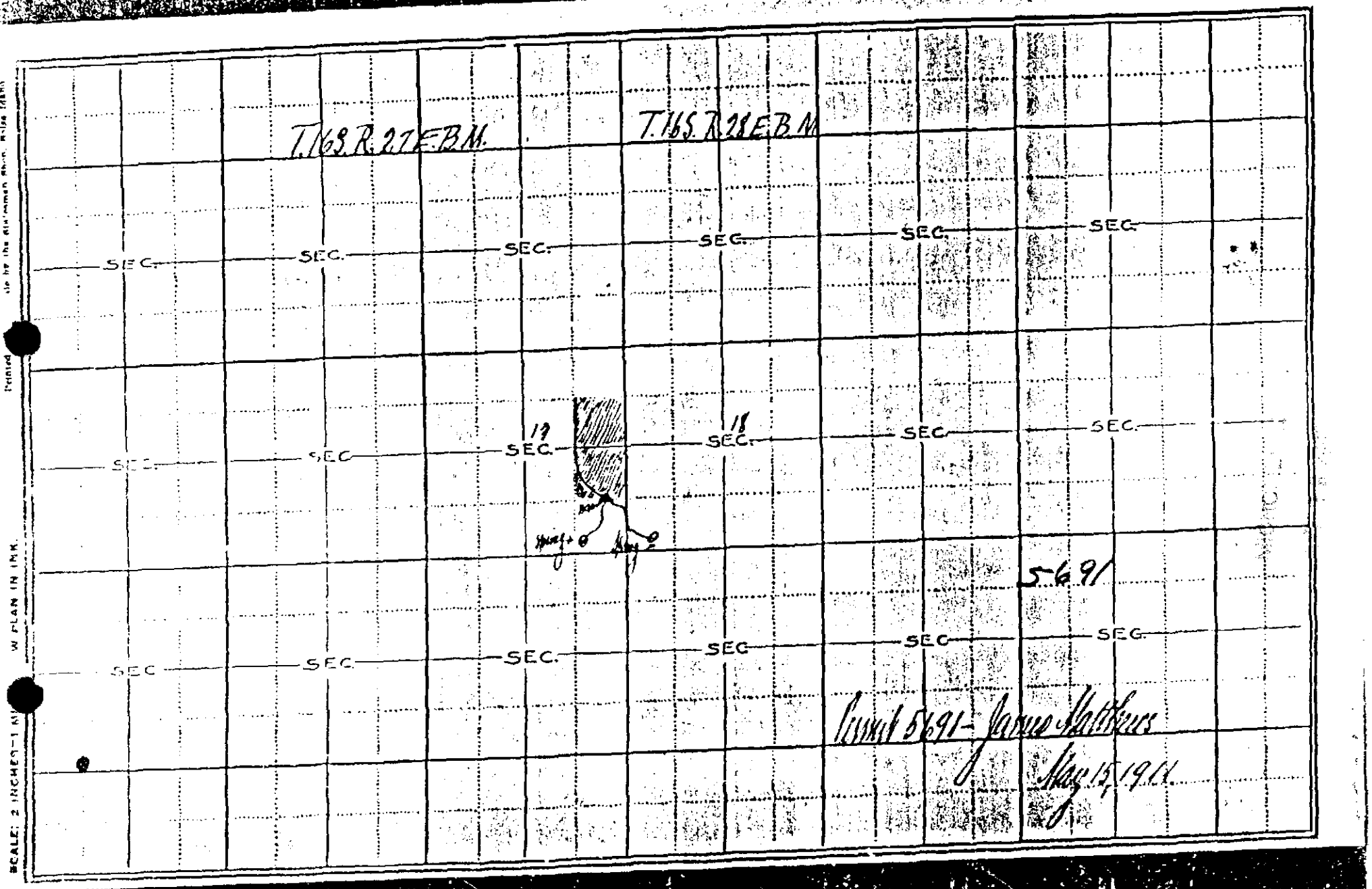
8. Submit map on enclosed plat, source of supply, point of diversion, route of ditch or ditches and cross hatch lands to be irrigated.

Remarks: Dam 3½' high
100' long on bottom
125' in top

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OFFICE OF STATE ENGINEER

Bernard Mathews
Water Com. and Applt.

STATE OF IDAHO, } ss.
County of ..... that the state-


T.16S. R.27E.B.M.
T.16S. R.28E.B.M.
SEC.
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5-691
Permit 5691 - James Matthews
May 15, 1911

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

RICHARD A. BEARD and LARRY L. PAWSON, Plaintiffs, vs. DAVID FUNK and DARRELL FUNK, Defendants.	Case No. CV-90-01250 AMENDED MEMORANDUM DECISION

Plaintiffs' application for permanent injunction following entry of preliminary injunction enjoining defendants from pumping water from springs which are the source of the plaintiffs' water rights, granted.

Richard A. Beard and Larry L. Pawson were represented by Gary D. Slette; Rosholt, Robertson & Tucker.

David Funk and Darrell Funk were represented by Roger D. Ling; Ling, Nielson & Robinson.

FACTS

The plaintiffs, Richard Beard and Larry Pawson, have a 1910 licensed water right to the flow of 3.4 cubic feet per second (cfs) of water flowing from the springs and seeps on land owned by the defendants, Darrell and David Funk. Beard has another licensed water right from the same source for .46 cfs of water with a 1968 priority date. The spring water flows into ditches on the

defendants' property and is ultimately delivered by pipeline and open ditch to the plaintiffs' property.

The source of the springs is deep percolation from regional irrigation on the Twin Falls track, seepage from flows of Rock Creek and seepage flows of the Twin Falls Main Canal, all of which increase the level of the regional aquifer. During the summer the level of the aquifer rises causing an increased flow of the springs.

At some point before the defendants purchased their property in 1987, a drain tile was installed in the field near the springs. The tiles intercept one spring which is the source of the plaintiffs' water. The defendants' predecessor had installed a pump in the ditch in which the springs are located or flow from. The defendants replaced the pump with one having a greater pumping capacity.

During the 1989 irrigation season, the plaintiffs agreed to allow the defendants to pump from the ditch in exchange for replacement water from the Twin Falls Canal Company. During the 1990 irrigation season, however, the defendants asserted that the water in the ditch was irrigation runoff from their property which they had the right to reclaim. The defendants cut off the plaintiffs' water and refused to provide replacement water.

As a result, the plaintiffs filed this action for preliminary and permanent injunctions to prohibit the defendants from operating the pump. The preliminary injunction was granted, and this is the decision on the hearing for permanent injunction.

DISCUSSION

The plaintiffs have bona fide water rights to 3.4 and .46 cfs of water from the natural springs arising on the defendants' property, as described in the licenses, with priority dates of 1910 and 1968, respectively. Since those water rights are licensed, they are prima facie valid. I.C. § 42-220. The court presumes that the licenses were validly issued until the challenger of the license shows that some statutory condition was not met or that the license is otherwise invalid. Reddy v. Johnston, 77 Idaho 402, 407, 293 P.2d 945, 948 (1956). The defendants, as challengers, have not made such a showing.

Licensed water rights continue to be valid as long as the licensee uses the water under the conditions set forth in the license. Basinger v. Taylor, 36 Idaho 591, 211 P. 1085 (1922). The defendants contend, however, that even if the licenses were validly issued, the defendants can cut off the plaintiffs' use of the water because the water is "private." It is private, the defendants argue, because it arose as a natural spring on the

defendants' property and has never flowed off the defendants' property in a defined, natural watercourse. See I.C. § 42-212 and § 42-213.

First, although conflicting evidence was presented, sufficient evidence was presented for this court to find that, when the spring water was appropriated in 1910, it flowed off the property in a natural channel.

Additionally, the court is issuing this amended decision to clarify its holding that, even if the water did not flow off the property, the defendants may not interfere with the plaintiffs' licensed rights.

To the defendants, "private" water appears to connote that one owns the water itself if one owns the real property where the isolated spring rises and, therefore, the land owner can reclaim the water without regard to the fact that a valid, licensed, prior appropriation has been made by another. Although this 'water as part of soil' theory has a nebulous basis in Idaho, Public Util. Comm'n v. Natatorium Co., 36 Idaho 287, 211 P. 533 (1922), the theory does not apply to the present case.

In Natatorium, the water in question was hot, percolating water from a deep well and the court appears to have assumed that its source was wholely circumscribed by the real estate boundaries.

While the distinction may be scientifically arcane, the present case deals with flowing springs fed by a regional aquifer, not idle, isolated groundwater. See Hinton v. Little, 50 Idaho 371, 296 P. 582 (1931); cf. Matter of General Determination of Rights to Use of Surface and Ground Waters of Payette River Drainage Basin, 107 Idaho 221, 687 P.2d 1348 (1984), appeal after remand, Branson v. Miracle, 111 Idaho 933, 729 P.2d 408 (App. 1986).

Further, as later courts have noted, the Natatorium court addressed the issue of whether the use of the water was "public" in the sense that its use was subject to regulation by the Public Utilities Commission, not in the sense of whether it was subject to appropriation. Hinton, at 379, 296 P. at 584.

To this court, "private" water does not mean that the landowner owns the water itself and can reclaim it after allowing another to appropriate it, but merely that one cannot trespass on private property to appropriate public water. Short v. Praisewater, 35 Idaho 691, 700 and 701, 208 P. 844, 847 (1922). This interpretation is expressed in the case law at the time of the plaintiffs' appropriation and later; Bassett v. Swenson, 51 Idaho 256, 5 P.2d 722 (1931), Marshal v. Niagara Springs Orchard Co., 22 Idaho 144, 125 P. 208 (1912), LeQuime v. Chambers 15 Idaho 405, 98 P. 415 (1908), see Parke v. Bell, 97 Idaho 67, 539 P.2d 995

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(1975), Lemmon v. Hardy 95 Idaho 778, 519 P.2d 1168 (1974). It is consistent with the statutory requirement enacted in 1911 that written permission be obtained from a landowner before a permit to appropriate an isolated spring can be issued, I.C. § 42-212; and, most importantly, it is consistent with the doctrine of prior appropriation and the Idaho Constitution, Short, at 700, 208 P. at 847, Cantlin v. Carter, 88 Idaho 179, 397 P.2d 761 (1964).

There is no evidence in this case to suggest that the plaintiffs' appropriation in 1910 was made by trespass or without permission. Written permission was not required until 1911. I.C. § 42-212.

It would be unjust to hold that the defendants could cut off the plaintiffs' uninterupted use of eighty years. It would be contrary to the evidence in that the use was uncontested by defendants' predecessors and recently even acknowledged by the defendants by trading for the other water. Therefore, this court holds that the plaintiffs' licensed appropriations are valid against the defendants as landowners.

The defendants also assert that, because the water is in a manmade conveyance system, the ditches, and not a natural water course, it is private and belongs to the defendants. However, the fact that the water flowed on the defendants' predecessors'

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property in a ditch rather than in a natural channel makes no difference in this case. "A stream does not lose the attributes of a water course merely because a part of its channel may have been artificially created." Poole v. Olaveson, 82 Idaho 496, 503, 356 P.2d 61, 65 (1960), citing 1 Kinney on Irrigation and Water Rights, p. 489 (citations omitted).

As already said, even if the water was "private", the defendants have not shown that it was appropriated without permission. The fact that the defendants' predecessors permitted ditches to collect and convey water to the plaintiffs only strengthens the conclusion that the appropriation was with permission.

With the conclusion that the plaintiffs have valid, licensed rights, the question becomes to what extent do those rights limit the defendants' attempts to reclaim waste water on their own land.

The defendants claim that since the source of the water arising on their land is, in part, from irrigation of their property, the water is "private" and may be reclaimed as waste water. No one disputes that waste water may be recaptured by the original appropriator if put to beneficial use. However, when waste water becomes commingled with other appropriated water, the reclaimer has the burden of identifying the water he wishes to

reclaim as waste. United States v. Haga, 276 Fed. 41 (D. Idaho 1921).

The principal sources of the appropriated seeps and springs are percolation and seepage from Rock Creek, the Twin Falls Main Canal, and regional irrigation. Conflicting testimony was presented over whether that water collected in a perched or regional aquifer to feed the springs. But, because springs were common in the area around the defendants' property and the flow of the springs increases over the irrigation season, and because the defendants' irrigation produces very little waste water, the weight of the evidence supports the theory of a regional aquifer. Regional water, not just the defendants' irrigation, accounts for the increased flows.

While the defendants have the right to recapture waste water, they have not established the origin or the amount that may be their irrigation runoff or seepage which flows into the ditch. Without such identification, the defendants' claim to waste water fails.

Dr. Brockway testified that, while the defendants' tile may be recapturing waste, the tile draws water from the springs and and tributaries and thus commingles the plaintiffs' appropriated water with the any waste water. By collecting and pumping that

commingled water, the defendants cause actual harm to the plaintiffs because the plaintiffs receive less than their licensed amount of water. A permanent injunction is the appropriate remedy to prevent this harm to the plaintiffs. Bower v. Moorman, 27 Idaho 162, 147 P. 496 (1915).

CONCLUSION

The court grants the plaintiffs' request for an injunction to permanently enjoin the defendants from pumping water from the springs originating on the defendants' property which are the source of the plaintiffs' licensed water rights. The defendants have failed to show that the plaintiffs hold invalid licenses or had appropriated water without permission or by trespass.

The defendants have admitted that their irrigation is but one source of the springs, but have failed to identify any water attributable to their irrigation. By testimony of the plaintiffs' expert, it has been shown that collecting water from the tiles and pumping from the ditch harms the plaintiffs. Therefore, the defendants are ordered to remove the pump and are enjoined from pumping water from the ditch located in the SW 1/4 of Section 23, T. 11 S., R. 18 E.B.M.

If, in the future, the ditch contains water in excess of the plaintiffs' licensed rights or the defendants appear and prove that

they have identifiable waste water, the permanent injunction would not prevent the defendants from claiming the excess water.

Counsel for the plaintiffs is respectfully requested to prepare an order reflecting this decision and the order granting the defendants' motion to amend findings of fact and conclusions of law and judgement and submit copies to the court and defendants' counsel for review and entry.

DATED this 28 day of October, 1991.

DANIEL C. HURLBUTT, JR.
District Court Judge

CERTIFICATE OF MAILING

The undersigned certifies that on the ____ day of October, 1991, she caused to be mailed or hand delivered a copy of the above AMENDED MEMORANDUM DECISION to:

Gary D. Slette
Rosholt, Robertson & Tucker
P. O. Box 1906
Twin Falls, ID 83303-1906

Roger D. Ling
Ling, Nielson & Robinson
P. O. Box 396
Rupert, ID 83350

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

PHILIP E. BATT
GOVERNOR

KARL J. DREHER
DIRECTOR

May 29, 1996

Patrick K. Brown
Attorney at Law
P.O. Box 389
Twin Falls, Idaho 83303

Re: Application for Permit No. 43-07321, Round Mountain Ranch - Adherence to Post Hearing Briefing Schedule

Dear Mr. Brown:

Enclosed is a copy of a letter I received from Roger Ling. He correctly points out that your response brief is two weeks overdue. Please submit your brief by June 7, 1996. While I depend on the expertise of counsel to lead me through difficult legal issues, I will not accept a brief after June 7.

I will also allow Mr. Ling two extra weeks beyond the original 14 days granted to file a rebuttal brief to compensate for the late filing of your brief.

Sincerely,

Gary Spackman

Gary Spackman

cc. Roger Ling

Enclosure

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ATTORNEYS AT LAW
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ROGER D. LING
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RECEIVED
APR 15 1996
Department of Water Resources

April 11, 1996

Mr. Gary Spackman
Department of Water Resources
State of Idaho
1301 N. Orchard Street
Statehouse Mail
Boise, Idaho 83720

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

Dear Gary:

With regard to the above matter, enclosed herewith is the ***Post Hearing Brief of Applicant.***

Very truly yours,

Roger D. Ling

jkt

enclosure

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RECEIVED
APR 15 1996
Department of Water Resources

**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 MOUNTAIN RANCH.	**POST HEARING BRIEF OF APPLICANT**

Jeff Sessions, doing business as Round Mountain Ranch, filed with the Department of Water Resources his Application to change the place of use of water for irrigation to forty (40) acres in the NE¼SW¼ of Section 13, Township 16 South, Range 27 East of the Boise Meridian, from twenty-three (23) acres in the NW¼NE¼, and seventeen (17) acres in the NE¼NW¼ of said Section 13, being a part of the lands being irrigated under water rights of applicant Nos. 43-00045, 43-00286B, 43-10116, and 43-10824 (a combination of Water Rights Nos. 43-00182 and 43-00414). The water from these rights has been used to irrigate two hundred sixty-six (266) acres of applicant's land when water is available. This portion of the Application is known as Transfer No. 4640. Applicant has further applied for a permit to store drain and seepage water and surface runoff during the non-irrigation season in a reservoir located on applicant's property, with an active capacity of fifteen acre/feet (15 a/f) and to store irrigation water during the irrigation season to enhance and more economically use his irrigation water. Hearing on these Applications was held commencing February 21, 1996.

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STATEMENT OF FACTS

Round Mountain Ranch, consisting of approximately one thousand seventy (1,070) acres, was purchased by Jeff Sessions, who does business as Round Mountain Ranch, in 1992 from Merle Jones. Numerous water rights are appurtenant to lands within Round Mountain Ranch, including Water Right No. 43-00045 for 1.7 cfs of water from Clear Creek for the irrigation of one hundred sixty (160) acres in Sections 13 and 24; Water Right No. 43-00286B for 4.3 cfs of water from Clear Creek for the irrigation of five hundred twenty (520) acres in Section 13 and all of Section 24; Water Right No. 43-02061 for .16 cfs of water from Round Mountain Spring for the irrigation of thirty (30) acres in Section 13; Water Right No. 43-02110 for .8 cfs of water from Round Mountain Spring for the irrigation of fifty-one (51) acres in Section 13; Water Right Nos. 43-00182 and 43-00414, consolidated as Water Right No. 43-10824, for 2.1 cfs of water from Round Mountain Creek for the irrigation of three hundred twenty (320) acres in Sections 12 and 13. Merle Jones, the predecessor in interest to Jeff Sessions, d/b/a Round Mountain Ranch, lived on the ranch from 1958 through 1992, and owned the ranch from 1962 through 1992. Merle Jones filed a claim in the Snake River Basin Adjudication for water rights on the ranch in which he showed that only two hundred sixty-six (266) acres of the ranch was being irrigated with the existing water supply from the various water rights above referred to. All of the water available from all sources has been diverted to

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irrigate lands on the ranch from 1962 through 1995, save and except those isolated incidents when the flow of surface flood waters from Round Mountain Creek exceeded the capacity of the ditches on the ranch, which normally occurred for no more than a few hours at any particular time. Of the 266 acres identified by Merle Jones to being irrigated at the time he filed the SRBA claims for said ranch, a portion of the irrigated lands were being irrigated with a sprinkler system, a portion was irrigated by gravity flow, and a portion was irrigated by subsurface waters caused by irrigation. Crops grown from irrigation ranged from natural grasses and shrubs to alfalfa and grain.

The water under all of the water rights appurtenant to Round Mountain Ranch is an intermittent supply that rarely provides sufficient water to provide a full supply for irrigation during the entire irrigation season. The water from Clear Creek provides water from a few days to several weeks in different years, depending on the amount of snow and rain on the watershed. Water from Round Mountain Creek rarely flows for more than two or three days and is normally caused by a warming spell which causes excessive melting of snow on the watershed. The water from Clear Creek is provided to Round Mountain Ranch through a ditch leading from Clear Creek to the ranch. The water from Round Mountain Creek and its tributary, Rice Creek, flows in a natural water course until it reaches the southern boundary of Round Mountain Ranch, where the natural water course ends and the waters are distributed

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through numerous feeder ditches out and over the irrigated lands on Round Mountain Ranch. Rarely are these flows in Round Mountain Creek sufficient to irrigate the entire 320 acres described in Water Right No. 43-10824, but when the water from such water right is sufficient and water is available under Water Right No. 43-10116, a flood water right, then excess waters may flow over the lands of Round Mountain Ranch and into a natural water course which commences in the northwest corner of the NE¼SE¼ of Section 13 in Round Mountain Ranch. This water course then continues in a southwesterly direction for a distance of approximately three-fourths (3/4) of a mile through the Round Mountain Ranch where it leaves the ranch in the SE¼SW¼ of Section 12, and continues approximately two miles to the ranch of protestants. The natural water course of Round Mountain Creek ends in Section 24 of Township 16 South, Range 27 East of the Boise Meridian, and in Section 18 of Township 16 South, Range 28 East of the Boise Meridian, all on the Round Mountain Ranch. There is no natural water course for any water for a distance of approximately three-fourths (3/4) of a mile in Round Mountain Ranch.

Round Mountain Spring under Water Right No. 43-02110 arises in the SW¼SW¼ of Section 18 of Township 16 South, Range 28 East of the Boise Meridian, and flows into no natural water course or channel, but flows into a ditch which is used to spread the water across lands of Round Mountain Ranch. In 1994, this spring flowed at a rate of approximately .15 cfs. In 1995, the flow of

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the spring increased slightly, but has never had a water flow sufficient to allow the water to flow off of the Round Mountain Ranch unless said water is combined with other waters. The irrigation of lands within Round Mountain Ranch does not improve the flow from this Round Mountain Spring. The second Round Mountain Spring referred to in Water Right No. 43-02061 cannot be clearly identified and there are no flows into a natural water course or channel from the seeps in the location of this spring as identified in the water right. There are lands that show substantial seepage in the NE¼SE¼ of Section 13, described as the point of diversion under this water right, which may have been described as a springs under this water right. Historically, and specifically since 1962, neither of the Round Mountain springs flow off of the Round Mountain Ranch. If they are not diverted into fields at the location of the springs, they have been allowed to flow in a ditch and rediverted by a small earthen dam located in the northwest corner of the NE¼SE¼ of Section 13 into a ditch leading to fields on the ranch at a point above the point where the natural water course of Round Mountain Creek again exists. Even if allowed to be commingled and to flow in the channel of Round Mountain Creek, the waters from the springs alone will not flow off of the ranch. Depending on the water supply as it exists from year to year from the several sources above described, the entire 266 acres is at times irrigated, including the 23 acres in the northwest of the northeast (NW¼NE¼) and the 17 acres in the northeast of the

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northwest (NE¼NW¼), all in Section 13. Most of these lands have remained in natural grasses and shrubs and have not been cultivated or planted to any grasses other than crested wheat grass.

Since 1962, portions of the Round Mountain Ranch have been converted to a sprinkler irrigation system for the irrigation of the irrigable land. This irrigation system, installed by Merle Jones, consists of pumps, mainlines and handlines. Approximately one hundred ten (110) acres were sprinkled by Merle Jones prior to selling the Round Mountain Ranch to Jeff Sessions. Jeff Sessions now seeks to irrigate an additional forty (40) acres with a 40-acre pivot in the NE¼SW¼ of Section 13, Township 16 South, Range 27 East of the Boise Meridian, transferring the place of use from the NW¼NE¼ and the NE¼NW¼ in Section 13, Township 16 South, Range 27 East of the Boise Meridian. The method of irrigation at the new place of use will be by sprinkler, whereas the prior place of use had been irrigated by gravity irrigation.

As a result of the irrigation of those lands of Round Mountain Ranch from Clear Creek under Water Right Nos. 43-00045 and 43-00286B, when available, and from Round Mountain Creek under Water Right No. 43-10824, seepage and irrigation waste water occurs in the SE¼SE¼, the W½NE¼SE¼, and the E½NW¼SE¼, all in Section 13, Township 16 South, Range 17 East of the Boise Meridian. In 1962, perforated drain tiles were installed in the southerly portion of these seep areas to collect the irrigation waste water and seepage for irrigation of lands within Round Mountain Ranch. These drain

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tiles have continued to be used on Round Mountain Ranch since 1962, continuously and uninterrupted. Although the flow in the drain tiles have been allowed to continue throughout the year, the flows substantially increase upon irrigation of adjacent lands, and substantially decrease upon the end of irrigation. The drain tiles also will increase in flow as the result of surface runoff such as rain and melting snow over the lands under which the drain tiles exist.

The applicant seeks a permit to store irrigation waste water, surface runoff from his lands, developed drain water, the flow of the springs located on his property, and flood waters from Round Mountain Creek in an earthen dam located in the NW¼NE¼SE¼ of Section 13, Township 16 South, Range 27 East of the Boise Meridian, for the purposes of irrigation. The storage facility would store up to twenty-eight acre/feet (28 a/f) of water over a surface area of approximately 7.7 acres. Of the water stored in the reservoir, four to five acre/feet (4-5 a/f) would be dead storage. Water can be released from the reservoir through an outlet structure or spillway by gravity or through a pump and a pressurized water system. By storing water prior to and during the irrigation season, the efficiency of the irrigation system will be substantially increased, allowing irrigation for shorter periods of time over a greater area, as compared to a smaller sprinkler irrigation system over a smaller period which must run for longer periods of time to cover the same acres. The irrigation with a larger system

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also reduces the water loss through transpiration, thereby irrigating the same lands with less water, resulting in an enhanced economic use of the water. All of these practices are consistent with the conservation of water.

In 1994, the flow of water from the drain tile on Round Mountain Ranch was measured at sixty-eight gallons per minute (68 gpm), or .17 cfs. This drain water flow was used to fill the reservoir between October 20, 1994 and January 10, 1995, or a total of twenty-seven and 8/10 acre/feet (27.8 a/f) of water over a period of eighty-two (82) days. It could not be determined as to the amount, if any, of this water stored which was lost to seepage. After the storage facility was filled in January, 1995, the water from the drain and the Round Mountain springs was allowed to run into the natural water course of Round Mountain Creek below the reservoir site, but said combined flow was not sufficient to leave the Round Mountain Ranch property. Between October 20, 1995 and December 10, 1995, the reservoir was again filled with the flow from the drain tile and any surface runoff that may have flowed into ditches on Round Mountain Ranch which were diverted to the reservoir. Although these flows were not measured, if the flows were similar to the 1994 flows, it would have taken twenty acre/ feet (20 a/f) to fill the reservoir by December 10, 1995. After the reservoir filled on December 10, 1995, the combined flows of the springs, drain tile, surface runoff and flows from Round Mountain Creek flowing onto the Round Mountain Ranch properties

were all ultimately diverted to the Round Mountain Creek water course below the site of the reservoir. Again, said waters did not reach the lands of protestants, even though the flows were substantially increased. On February 12, 1996, there was estimated to be seventy-five (75) to one hundred (100) inches flowing into the Round Mountain Creek water course below the reservoir from water sources on Round Mountain Ranch including Round Mountain Creek, none of which was reaching the property of the protestants, but was gradually lost to seepage into the ground.

Protestant Harold Jones is the owner of what is known as the Kelso Ranch located in Section 3 of Township 16 South, Range 27 East of the Boise Meridian, and Section 34 in Township 15 South, Range 27 East of the Boise Meridian. One of the sources of water for the Kelso Ranch is a well located in the SE¼SE¼NE¼ of Section 3, and Kelso Springs in the vicinity immediately south of said well. The flow of the Kelso Springs located in the natural water course of Round Mountain Creek immediately south of the Jones well has diminished substantially in the last few years. A serious drought has existed from 1986 through 1994 in this area, and the reduction of the flows of Kelso Springs is attributed to the drought. There is no competent evidence to establish that the change in the place of use of forty (40) acres of irrigated land by Sessions or the construction of a reservoir by Sessions has or could in any way interfere with the flow of Kelso Springs or the water available in the Jones well. No diversions or water exist

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between Round Mountain Ranch and the Kelso Ranch from Round Mountain Creek. In 1994, Sessions had a capacity of sprinkler irrigating one hundred fifty-two (152) acres, but had sufficient water to irrigate only sixty (60) acres. In 1992, a well of Harold Jones was tested by Robin Wells which shows that the well had a capacity of nine hundred gallons per minute (900 gpm), but was licensed with only a diversion rate of seven hundred eighty gallons per minute (780 gpm/1.74 cfs). During a pump test, the flow from the pump was seven hundred thirty-eight gallons per minute (738 gpm) with a lift of one hundred one (101) feet. The Jones well was shown to have a cascading water problem which indicates that water is flowing in an area above the water table of the well into the well, which would reduce the amount of water located above the water table of the well. Kelso Springs is believed to receive a recharge from the Clear Creek watershed, and as Clear Creek water supplies are reduced, the recharge benefits to the well are also reduced. Because of the severe drought prior to 1995, Clear Creek water supplies were substantially reduced, contributing to the reduction of the flows of Kelso Springs and perhaps the water table in the Jones well, although no water table was established prior to 1992.

The conversion to irrigation by sprinkler results in the conservation of water, which is in the local public interest. The further improvement in the irrigation with a sprinkler by the use of a reservoir when limited supplies of water are available is also

a conservation measure which is in the local public interest of a water-short area. Although it is possible that through improved irrigation, such as a conversion to sprinklers, the consumptive use of water may be increased, based upon the assumption that more plant life will receive a water supply or existing plant life will receive a greater water supply, resulting in greater consumption, such increase in consumptive use is an enlargement of the consumptive use to which one would be entitled under the water rights held for and by Round Mountain Ranch.

It is clear that the seepage water on Round Mountain Ranch is a result of a perched water table which prevents the water from flowing in an underground path off of Round Mountain Ranch, and instead said water is forced to the surface. The installation of drain tiles to improve the drainage of lands, to remove irrigation waste water, and to reuse irrigation waste water is a conservation of water and is in the local public interest. This is especially so in a water-short area as exists in the areas of the Round Mountain Ranch and Kelso Ranch. If the drain tiles had not been installed on Round Mountain Ranch, the water would have remained on the lands of Round Mountain Ranch, substantially reducing the plant growth on such supersaturated lands, resulting in a reduced economic benefit from said water. To improve the productivity of land by reducing the seepage water in the lands is a recognized conservation practice and such practice is within the local public interest. Irrigation waste water and seepage water

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recovered by a perforated drain pipe is private water of Round Mountain Ranch that has not left Round Mountain Ranch and has never been appropriated by any other party. Surface waters from melting snow and rain on Round Mountain Ranch that are captured by Round Mountain Ranch constitute private waters of Round Mountain Ranch and may be used by Round Mountain Ranch for any purpose. The Round Mountain springs located on Round Mountain Ranch are private waters that would not flow off of Round Mountain Ranch unless intentionally co-mingled with other waters and diverted to Round Mountain Creek water course. Whether or not such waters are private waters is however irrelevant, as the storage of such springs is in the interest of conservation of water, improves the irrigation efficiency of Round Mountain Ranch, improves the economic benefit of the water, and injures no other water rights or deprives no other person of water under said rights.

LEGAL POINTS AND AUTHORITIES

The protestants Harold Jones and Ray Jones have alleged certain grounds to support their Protest to the Application for Transfer of Round Mountain Ranch. The protest does not appear to set forth any grounds for a protest to the Application to store water, but the protest will be addressed as though it was a protest to the Application for a permit to store water as well as the Application to change the place of use. The protest of Harold Jones and Ray Jones raises five (5) issues which can be summarized as:

1. The proposed use of Sessions would reduce the quantity and quality of water under rights of Harold Jones.

2. The water supply is insufficient.

3. The proposed uses conflict with local public interest.

4. The proposed use is contrary to conservation of water resources.

5. The change in use would constitute an enlargement in use.

A close review of each of these grounds shows that there is no basis for the protests. There is simply no evidence to support the allegation that the change in use or the storage of irrigation water as a means of improving the irrigation system will reduce the quantity and quality of water under the rights of Jones. The only evidence presented in support of this allegation is that through the efficient irrigation by the use of a sprinkler and a storage facility, the consumptive use of water may be increased. This is not a reduction in the quantity of water under existing water rights as contemplated by Section 42-203A, Idaho Code, or an injury to water rights as contemplated by Section 42-222, Idaho Code. The storage of water during the irrigation season does not increase or change the nature of use, but merely creates an irrigation method to conserve water. Whether the water was stored or not, history has shown that all of the water appropriated for irrigation on the Round Mountain Ranch has been used throughout the

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irrigation season for irrigation on the ranch, and no part of the water under those water rights have been allowed to flow back into the water course of Round Mountain Creek for any junior appropriators. In fact, there are no junior appropriators of Round Mountain Creek or Round Mountain springs. Protestants Harold Jones and Ray Jones have also failed to establish that they have any water right for the storage of any water in the non-irrigation season, nor do they have any rights to water for recharge of any aquifer. It would appear that the protestants are urging that by conserving water through the use of a small reservoir and conversion to a sprinkler system, less waste water will be available that may somehow recharge Kelso Springs, one of the sources under one of the water rights of protestants. Even if surface waste and seepage water on Round Mountain Ranch had been appropriated by protestants, their water right has not been injured. In *Sebern v. Moore*, 44 Idaho 410, 258 P. 176 (1927), the Idaho Supreme Court concluded that surface waste and seepage water may be appropriated, subject to the right of the owner to cease wasting it, or in good faith to change the place or manner of wasting it, or to recapture it, so long as he applies it to a beneficial use. The court further found that:

> Where there has been no appropriation of waste or seepage water prior to the construction of the drain in which such water collects, said water is in the possession of the owner of the drain, and is therefore not subject to appropriation under C.S. §5562.

In *Colthorp v. Mountain Home Irrigation District*, 66 Idaho 173, 157 P.2d 1005 (1945), the Idaho Supreme Court addressed a claim that the owner of a ranch located above the claimant's ranch should be enjoined from changing the place of use from the upper ranch to another ranch as 75% of the water used on the upper ranch would seep or flow through the soil into Canyon Creek and became a part of the water supply of the claimant under his decree. The court restated its holding in *Sebern v. Moore*, *supra* that surface waste and seepage water may be appropriated, subject to the right of the owner to cease wasting it, or in good faith to change the place or manner of wasting it, or to recapture it, so long as he applies it to a beneficial use. The court then noted: "As to change of place of use or transfer of water . . . the only injury which another user may set up is injury to his water right and/or the use thereof." The court then found that the owner of the upper ranch could not be required to continue to irrigate the ranch, could not be required to continue to waste 75% of the water decreed to it for the benefit of the claimant, and that the owner of the upper ranch could not be enjoined from ceasing to waste such decreed water in making beneficial use of it on other lands.

The second ground for protest by Harold Jones and Ray Jones is that the water supply is insufficient for the purpose of use, as all water has been appropriated. Sessions has established that the surface waste and seepage water collected by the drain line on Round Mountain Ranch is sufficient to fill the reservoir on

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Round Mountain Ranch in a period of fifty (50) to ninety (90) days, depending upon the extent of irrigation the prior year. It is also clear that Round Mountain Ranch had the right to recapture this water and to apply it to a beneficial use. Protestants did not appropriate the irrigation waste water and seepage water being collected in the drain of Round Mountain Ranch prior to the recapture of this water by Round Mountain Ranch, nor could they have appropriated said water. Protestants also have no right to demand that the water table on Round Mountain Ranch remain at any particular level. This issue was addressed by the Idaho Supreme Court in *Nampa & Meridian Irr. Dist. v. Petrie*, 38 Idaho 529, 223 P. 529 (1924). In this case, Petrie alleged that he had suffered damages to his waste water right caused by the construction of a drainage system by the irrigation district. In addressing this issue, the court stated:

> We conclude, however, that he had no right to insist the water table be kept at the existing level in order to permit him to use the underground waters. There is no proof that he secured water from a natural subterranean stream. The evidence tends to show that he secured it from water collected beneath the surface of the ground due to seepage and percolation. To hold that any landowner has a legal right to have such a water table remain at a given height would absolutely defeat drainage in any case, and is not required by either the letter or spirit of our constitutional and statutory provisions in regard to water rights.

The protestants' next ground for protest is that the proposed uses of applicant conflict with the local public interest

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and directly impact the protestants, as well as others, in the immediate area by affecting the quality and the quantity of the protestants' and others' water and the depleting of raw supplies. There is simply no evidence to establish that the storage of water conflicts with the local public interest as defined in Section 42-203A(5), Idaho Code, nor may one argue that the conservation of water resources is in conflict with local public interest. To make such an argument would be in conflict with the requirement that any application for a permit may be denied if it is contrary to conservation of water resources within the State of Idaho under §42-203A(5)(f), Idaho Code. The same reasoning must apply in construing §42-222, Idaho Code, which requires that any change in the place of use must be approved, provided no other water rights are injured thereby, the change is consistent with the conservation of water resources within the State of Idaho, and is in the local public interest. It is also clear that there is simply no evidence to establish that the water recaptured by the drain or the water sought to be stored or transferred to a new place of use affects the quantity of protestants' water or depletes the water supplies in the area.

The fourth ground for the protest of protestants is that the proposed use is contrary to the conservation of water resources within the State of Idaho and would result in depletion of both aquifer and spring flows. Again, the facts clearly establish the contrary. The change in the place of use will enable Round

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Mountain Ranch to convert to a pivot irrigation system from a gravity system, which conserves water resources available to Round Mountain Ranch. It is also undisputed that the use of a storage facility to hold recaptured water for application to a beneficial use or to store irrigation water supplies to enhance the efficiency of an irrigation system are consistent with the conservation of water resources. Finally, there is simply no evidence to show that either the change in the place of use or the storage of recaptured water or other waters to which Round Mountain Ranch may be entitled would in any way deplete aquifer or spring flows used by protestants. Round Mountain Ranch will be using no greater amounts of water than has been used since 1962.

Finally, protestants allege that the change in use would constitute an enlargement in use. Again, there is simply no evidence to support this allegation. In *Joyce v. Murphy Land & Irrigation Co.*, 35 Idaho 549, 208 P. 241 (1922), the Idaho Supreme Court, in discussing the nature of a water right stated: "Respondent corporation has a vested right in the waters decreed, as well as a right to apply the same to a beneficial use upon any lands available under its system." Round Mountain Ranch has decreed rights for the irrigation of 266 acres, at a minimum. The requested change in place of use will not increase the irrigable acres. Protestants have no basis to object if the efficiency of the irrigation system on the transferred acres is enhanced by Round Mountain Ranch. That is consistent with the policy of the State of

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Idaho that more efficient uses of water is to be encouraged and that the recognition of a right in a third person to enforce the continuation of waste will not result in more efficient uses of water. *Hidden Springs Trout Ranch v. Hagerman Water Users, Inc.*, 101 Idaho 677, 619 P.2d 1130 (1980).

It should also be pointed out that a change from the irrigation of wild pasture by gravity diversion to the sprinkling of other lands planted to alfalfa with a pivot sprinkler is not an enlargement in use. The Idaho Supreme Court has clearly held that water is put to a beneficial use when it is diverted to irrigate wild pasture, even when sagebrush is part of the vegetation. *McAtee v. Faulkner Land & Livestock, Inc.*, 113 Idaho 393, 744 P.2d 121 (Idaho App. 1987). Again, such change in the place of use may be a more efficient and economical use of the water, but does not constitute an enlargement.

Private Water - Although Round Mountain Ranch has made an application to store private water, it has not conceded that by making such application it has waived its claim that the water is private and not public waters subject to appropriation. The hearing officer has actually noted that §§42-212 and 42-213, Idaho Code, identify what is private waters that are not subject to appropriation except to the person or corporation owning the land or with his or its written permission. Section 42-212, I.C., identifies private waters to be the waters in 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. These statutes were first adopted in the State of Idaho in 1911. Prior to the adoption of the statutes, the Idaho Supreme Court had the opportunity in *King v. Chamberlin*, 20 Idaho 504, 118 P. 1099 (1911) to define private waters while noting that only the public waters of the State of Idaho were subject to appropriation without the consent of a landowner. The court found that Avondale Lake, by a series of dikes and dams, had been converted from a shallow slough of approximately 15 acres that became dry intermittently, to a lake three-quarters of a mile long by from 200 to 400 yards wide. Said lake is not and had never been fed or supplied with water by any stream and contained no springs, but was supplied with water from the spring and fall rains and from the snows that melt in the spring and flow and seep over and through the lands of the owner of the lake. In finding the lake to be private water and not subject to appropriation without consent of the landowner, stated:

> The entire legislation of this state, as well as the repeated decisions of this court, has been along the line of encouraging economy in the use of water in collecting and impounding the same. If a man collect and impound surface and flood waters from his own land before they reach any natural stream or channel and holds the same on his land and premises, the fact that he may not use it for irrigation or any other commercial purpose does not render it any less his property or authorize anyone else to invade his property or appropriate and divert the same.

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118 P. at p. 1101. It is therefore undisputed that water from the spring and fall rains and the melting snows impounded by the dam of Round Mountain Ranch constitutes private water to use as Round Mountain Ranch may deem appropriate. It is of some significance that the court in *King v. Chamberlin*, *supra*, also included seepage water as the sole property of the landowner until and if such seepage water should ultimately reach a natural channel. This same premise was reaffirmed by the Idaho Supreme Court in *Public Utilities Commission v. Natatorium Co.*, 36 Idaho 287, 211 P. 533 (1922). In finding that water diverted by a series of hot wells constituted private water, the court stated:

> This being percolating or seepage water, merely, arising out of the earth, without an outlet through any definite channel, no part of any natural spring or stream, or any subterranean stream or flow, was not subject to appropriation, except by the owner of the fee. It was the property of the owner of the land upon which it stood, and under the well-recognized doctrine that percolating water existing in the earth belongs to the soil as part of the realty, it may be used and controlled to the same extent by the owner of the land as itself. *Bruening v. Door*, 23 Colo. 195, 47 Pac. 290, 292, 35 L.R.A. 640.

In *Reno v. Richards*, 32 Idaho 1, 178 P. 81 (1918), the Idaho Supreme Court adopted the rule that where the flow of a stream is augmented by removing obstructions from the channel and the excavation of channels, thereby reducing the loss by seepage and percolation, the person so conserving water is entitled to the use of the waters which they have thus conserved. Under this rule,

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whether or not the water collected by the drain tile on Round Mountain Ranch is public water or private water, the conservation of the water by the recapture of the same in the drain tile entitles Round Mountain Ranch to the use of the water. As previously mentioned in this Brief, the court has also recognized the right to appropriate seepage water, subject to the right of the owner to cease wasting it, or in good faith to change the place or manner of wasting it, or to recapture it, so long as he applies it to a beneficial use. *Sebern v. Moore*, *supra*; *Hidden Springs Trout Ranch v. Hagerman Water Users, Inc.*, 101 Idaho 677, 619 P.2d 1130 (1980).

The definition of private waters contained in §§42-212 and 42-213, Idaho Code, appears to be self-explanatory. In *Maher v. Gentry*, 67 Idaho 559, 186 P.2d 870 (1947), the Idaho Supreme Court confirmed the statutory definition of private waters and confirmed that waters from a spring that rises and sinks on the lands of a person are private waters and are not subject to appropriation without the written permission of the owner of the land. *Nordick v. Sorensen*, 81 Idaho 117, 338 P.2d 766 (1959), confirmed the rule established in *Jones v. McIntire*, 60 Idaho 338, 91 P.2d 373 (1939), that:

> . . . It is well settled that the waters of natural springs, which form a natural stream or streams flowing off the premises on which they arise, are public waters subject to acquirement by appropriation, diversion and application to a beneficial use.

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In adopting said rule, the court rejected inferences and speculation that the water from the springs could find its way to a creek or would supplement the water in a creek by subsurface flows to defeat a claim that the spring was private water. In rejecting this testimony, the court stated:

> We have concluded . . . that there is no evidence beyond merely conjecture that the waters of those springs formed a natural stream flowing into the natural channel of Gooseberry Creek.

The court also rejected any allegation that the definition of water as private would be defeated by the finding that the water could reach a natural channel by underground seepage. 338 P.2d at p.775.

Although the Idaho Supreme Court in *Branson v. Miracle*, 107 Idaho 221, 687 P.2d 1348 (1984) found that an open flow of water emanating from a mine portal which would not exist absent development of the mine is appropriable public water, there is no attempt by the court to overturn the numerous cases involving private water or the recapture of surface waste and seepage water. First, the court made it clear that the water flowing as the result of the development of the mine did not constitute water from a "spring." The court then identified a "spring" as a place where ". . . the water issues naturally from the surface of the earth." The court also distinguished the facts of that case where ground water was brought to the surface artificially as compared to those situations where the persons are "responsible for augmenting the amount of ground water available or preventing the loss of ground

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water available." A further distinction can be made by reviewing §42-237(a), Idaho Code. Under this section, the Director of the Department of Water Resources is granted certain powers in the effectuation of the policy of this state to conserve its ground water resources, all of which relate to the construction, operation and maintenance of "wells." Under §42-230(b), Idaho Code, a "well" is defined as "an artificial excavation or opening in the ground more than eighteen (18) feet in vertical depth below land surface by which ground water of any temperature is sought or obtained." By adoption of this definition, it was clear that the legislature did not intend to control, as ground water, the use or appropriation of seepage, percolating or spring water. It is also significant to note that under §42-226, Idaho Code, it is the stated policy of the State of Idaho that "while the doctrine of `first in time is first in right' is recognized, a reasonable exercise of this right shall not block full economic development of underground water resources."

Finally, the question has been raised as to whether or not a landowner may be required to appropriate private water on his lands. Although §42-212, Idaho Code, infers that the Department of Water Resources may issue or grant a permit to divert or appropriate private waters to the person owning the land, there is no provision which requires such an appropriation, as the water, by definition, is owned by the individual and not the State of Idaho. Section 42-202, Idaho Code, provides in part:

> For the purpose of regulating the use of the public waters and of establishing by diret means the priority right to such use, any person, association or corporation hereafter intending to acquire the right to the beneficial use of the waters of any natural streams, springs or seepage waters, lakes or ground water or other public waters in the State of Idaho, shall, . . . make an application to the Department of Water Resources for a permit to make such appropriation. . . . (Emphasis added.)

There is no like statute setting forth the requirements for the appropriation of "private water" except with the consent of the owner of the land. It is also clear that neither the legislature or the courts have at any time rescinded the long-standing policy that a landowner shall have the right to recapture surface waste or seepage water, without regard as to whether or not said water had been appropriated by another, as such appropriation is subject to the recapture and use by the owner.

Origin of Ground Water on Round Mountain Ranch - The origin of the recaptured drain water or springs on Round Mountain springs may or may not have any significance in this controversy. It is clear that the tile drain installed on Round Mountain Ranch does not constitute a well and that the source of water in the drain is irrigation waste water and surface runoff from melting snow and rain. To this extent, such water is private water that has been recaptured and to which Round Mountain Ranch is entitled to its use so long as it is applied to a beneficial use. It is also clear that there has been no attempt by any other person to

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appropriate this water. No evidence was presented by the protestants that the recapture of water in the tile drain in any way interferes with the protestants' water rights or the water under those rights. Even if such evidence were available, it would be immaterial, as the existence and operation of the tile drain since 1962 would constitute a proper appropriation to the extent the water is public water and subject to appropriation. It is also clear that the shortage of water, if any, in the protestants' Kelso Springs or well cannot be attributed to a drain tile that has been installed since 1962. For these reasons, the effort by the protestants to establish that recharge of the Kelso Springs or protestants' well may be provided by ground water flowing from Round Mountain Ranch is merely a red herring which has no significance to the issues in this case. On the other hand, it is necessary to dispute such a theory when it is clear that the seepage and irrigation waste water recaptured by Round Mountain Ranch would not flow off of Round Mountain Ranch if it was not recaptured by the ranch in the tile drain.

Forfeiture or Extent of Beneficial Use - The attorney for the proponents has made a compelling argument that there is no basis for a partial forfeiture of a water right under the laws of the State of Idaho in response to Basin-Wide Issue No. 10 in the SRBA. In any event, partial forfeiture is not an issue in this proceeding. The testimony of Merle Jones and Jeff Sessions clearly established that all of the water available to Round Mountain Ranch

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from whatever source has at all times been used throughout the entire irrigation season on Round Mountain Ranch lands except to the extent flood waters may pass over the ranch and reach the natural water course of Round Mountain Creek in the lower half of the ranch. Forfeitures are not favored in the law, and clear and convincing proof is necessary to support a claim of forfeiture. *Gilbert v. Smith*, 97 Idaho 735, 552 P.2d 220 (1976). Nonuse of water under a water right cannot constitute forfeiture where there has been a wrongful interference with the water right. Nonuse may not constitute a forfeiture for the failure to use the water which occurred as the result of circumstances over which the water right holder has no control. *Almo Water v. Darrington*, 95 Idaho 16, 501 P.2d 700 (1972). A holder of a water right is entitled to presume that a watermaster is delivering water to him in compliance with priorities expressed in the governing decree. *Almo Water v. Darrington*, 501 P.2d at p.705. Also see §42-607, Idaho Code. If water under a water right appurtenant to the lands of Round Mountain Ranch has not been delivered or used on Round Mountain Ranch, the non-use has occurred as a result of there being no water available, caused by the drought. There can be no forfeiture when all of the water made available has been used. Finally, so long as the use of a water right is resumed prior to any third parties claiming the water, no forfeiture can be found to exist. *Jenkins v. State Dept. of Water Resources*, 103 Idaho 384, 647 P.2d 1256 (1982).

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Enlargement of Use - There is no issue as to enlargement of use in this proceeding. The Application for Transfer by Round Mountain Ranch does not seek to expand the number of acres being irrigated nor increase the total water diverted during the year. All of the water available has historically been used on Round Mountain Ranch, and the annual volume of use, therefore, cannot be increased. It is also clear that an increase in consumptive use through improved conservation and irrigation practices is not an enlargement. The economical use of water appropriated in the State of Idaho is a matter of state policy. Section 42-101, Idaho Code. In *Muir v. Allison*, 33 Idaho 146, 191 P. 206 (1920), certain principles were enunciated in regard to the elements of a water right. One such principle is that

> . . . In the case of the maturing of grain crops it is only necessary to say that the users of water may change the character of crops grown at will from those that require much water to those that require little, and vice versa, and the extent of a user's permanent right may not be limited by the character of crops raised unless the soil is adapted only to one, or to limited kinds of crops.

Round Mountain Creek Channel - The evidence, and only evidence in the record, in regard to Round Mountain Creek channel is that it ends on or near the southern boundary of the Round Mountain Ranch and another channel commences approximately one-half mile north and within the Round Mountain Ranch. There is no evidence to indicate that there has ever been a channel between these two points. This absence of a channel is certainly plausible

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in view of the fact that the only water flowing in the channel above and south of the Round Mountain Ranch consists of flash floods for short periods of time. However, it is doubtful that this issue has any bearing or relevancy to the decision required of the hearing officer. Whether the two Round Mountain springs represented by water rights ultimately flow into a channel of Round Mountain creek is immaterial. The issue is whether or not said water from either spring is located wholly upon and within the lands of Round Mountain Ranch. If so, they belong exclusively to the owners of the land, Round Mountain Ranch. *Jones v. McIntire*, *supra*, 91 P.2d at 379. The evidence clearly establishes that the water from these springs, even when flowing in the natural channel of Round Mountain Creek, do not flow off of Round Mountain Ranch. The evidence is also clear that these springs do not flow in their own natural channel. There is no natural channel in the location of the springs, and the evidence indicates that, at least to one of the Round Mountain springs clearly identified, the water is either carried in a ditch to lands within Round Mountain Ranch for irrigation and stockwater use or is diverted into a pipeline to the pump used to irrigate lands of Round Mountain Ranch. Under the facts of this case, it is really insignificant as to whether or not said springs are private waters of Round Mountain Ranch or are public waters of the State of Idaho that have been duly appropriated by Round Mountain Ranch. The only practical result is that the water should be available for storage to improve the economic use

of the water and to conserve water, both of which are goals to be obtained under the policies of the State of Idaho. It is clear that the storage of this water will not reduce the quantity of water under any other existing water right nor will any other water rights be injured thereby.

Other Water Rights - It is not clear why the water rights for Round Mountain springs under Water Rights Nos. 43-02061 and 43-02110 were not included in the application. Of course, if these springs are private waters, established by the evidence, there is no limitation as to the use to which the owner of these springs may apply the water and therefore no application for transfer or for storage is necessary. The application does clearly recognize that these two water rights are used for the same purpose. It is also clear that the water from these springs does not leave the property of Round Mountain Ranch, and therefore can be held either in a reservoir or allowed to be spread upon other lands of Round Mountain Ranch or held for stockwater purposes or any other use. The evidence establishes that these springs have historically been commingled with recaptured surface waste and seepage water arising from the use of water from Clear Creek, and the intermittent freshet flows coming from Round Mountain Creek and Rice Creek, for the purposes of irrigating the lands of Round Mountain Ranch. As the water from the two Round Mountain springs is private water, as is the recaptured water from the drains, no application for a change in place of use or for storage is necessary.

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Enlargement of Existing Water Rights - This issue has been previously discussed in this Brief. It is, however, worthwhile to restate the position of the applicant. The evidence establishes that during the non-irrigation season, the reservoir on the Round Mountain Ranch can be filled from the surface water and recaptured waste water in the tile drain and that the applicant Round Mountain Ranch has the right under Idaho law to use this water in any manner it sees fit so long as it is a beneficial use. No permit is required for this use. In view of the fact that the reservoir can be filled in the non-irrigation season with this water, there is no need to use the water from Round Mountain Creek or from the two Round Mountain springs to fill the reservoir. It is therefore impossible to show that there has been any enlargement, assuming these rights apply to public waters, as all waters, both private and public, will be diverted for stockwater use or sent down the Round Mountain Creek channel in the non-irrigation season, and any benefits of such water will not be changed. It is also clear that no other water right holder may assert any rights to the irrigation waste water and seepage water recovered by Round Mountain Ranch, as such water has never been appropriated and, even if it has been appropriated, was subject to the owner of the water ceasing to waste it. As to the storage of water during the irrigation season, there is no extended period of use nor a change in the nature of use. Storage of water during the irrigation season as a part of an irrigation system is not an expansion of the

use of that water, but merely an altered method of irrigation to insure the greatest economic use of the resource. Again, no other water right holder can be injured, as none of the water is diverted away from the ultimate use and the entire supply eventually is applied to the lands of Round Mountain Ranch for irrigation, as has historically occurred. It should finally be noted, from the testimony of Mr. Chapman, that if the irrigation waste water and seepage water on Round Mountain Ranch was not collected in the tile drain, it would still remain in the meadows of Round Mountain Ranch where said water would not be placed to its greatest economic use or benefit, as the saturation of the meadows with this water reduces the plant growth in the meadows. Therefore, the collection of this water from the tile drain and placed in a reservoir is merely a relocation on Round Mountain Ranch of the storage facility for this water. Whether the water was stored in the new reservoir or remains in the meadow, it will be stored on the ranch. Storage of this water in the reservoir is not an enlargement of the use, any more than the storage of the springs would be an enlargement of their use, as the springs also remain on the lands of Round Mountain Ranch, whether or not diverted to the storage reservoir.

CONCLUSION

For all of the above reasons, it is respectfully submitted that the Application of Round Mountain Ranch to transfer the place of use of 40 acres of irrigated land within Round Mountain Ranch be granted and that the Application for a Permit to

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store such waters as may be public waters be granted, as it has been clearly established by the evidence that these transfers will improve the economic benefit and use of the waters of Round Mountain Ranch, will conserve the waters of Round Mountain Ranch, and that said economic use and conservation will not injure the water rights of any other person nor deprive any person of any water to which they may be entitled.

Respectfully submitted this 11th day of April, 1996.

LING, NIELSEN & ROBINSON

By: _____
Roger D. Ling
Attorney for Jeff Sessions
d/b/a Round Mountain Ranch

CERTIFICATE OF MAILING

I hereby certify that on the 11th day of April, 1996, I served copies of the foregoing ***Post Hearing Brief of Applicant*** upon:

Patrick D. Brown
HEPWORTH, NUNGESTER AND LEZAMIZ
Attorneys at Law
P. O. Box 389
Twin Falls, ID 83303

by depositing said copy in the United States mail, postage prepaid, in an envelope addressed to said attorney at the foregoing address.

_____
Roger D. Ling

LING, NIELSEN & ROBINSON
ATTORNEYS AT LAW
RUPERT, IDAHO 83350

RECEIVED
FEB 13 1996
Department of Water Resources
Southern 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 NOTICE OF TAKING DEPOSITION DUCES TECUM OF SHERL CHAPMAN

TO: The above-named applicant and to their attorneys of record:

You, and each of you, will please take notice that at **1:30 o'clock p.m., on Wednesday, the 14th day of February, 1996,** at the offices of Hepworth, Lezamiz & Hohnhorst, 133 Shoshone St. N., Twin Falls, Idaho, the protestants in the above-entitled action will take the deposition of **SHERL CHAPMAN,** in the above-entitled action, upon oral examination pursuant to Rule 30 of the Idaho Rules of Civil Procedure, before a Notary Public, or before some other officer authorized by law to administer oaths.

The deponent is further requested to bring with him the following items and documents:

1. All documents in his possession, custody or control that relate to the properties of Jeff Sessions and Harold Jones located in Malta, Idaho including, but not limited to, all records of work done, data collected, information obtained, or preliminary or final conclusions or opinions about the properties and uses which have been or will be made of the properties, including water uses.

MICROFILMED

The oral examination will continue from day to day until completed. You are invited to attend and cross-examine.

Dated this 9th day of February, 1996.

HEPWORTH, LEZAMIZ & HOHNHORST,
CHARTERED

By: Susan McMurry for
Patrick D. Brown
Attorneys for Protestants

MICROFILMED

CERTIFICATE OF SERVICE

The undersigned, a resident attorney of the State of Idaho, with offices at 133 Shoshone Street North, Post Office Box 389, Twin Falls, ID, 83303, and one of the attorneys for the protestants in this matter, certifies that he caused to be served a copy of the above and foregoing AMENDED NOTICE OF TAKING DEPOSITION DUCES TECUM OF SHERL CHAPMAN on the 9th day of February, 1996, as follows:

Roger Ling, Esq. Ling, Nielsen & Robinson 615 H. Street P. O. Box 396 Rupert, ID 83350	___ Hand Delivered ___ U.S. Mail ___ Overnight Mail _X_ Telecopy (Fax)
Linda Ledbetter Magic Valley Reporters P. O. Box 611 Twin Falls, ID 83303-0611	___ Hand Delivered _X_ U.S. Mail ___ Overnight Mail ___ Telecopy (Fax)

Suzanne Kenworthy for
Patrick D. Brown

(PDB\51125NOD.SC2)llm

MICROFILMED
APR 1 8 1996

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

PHILIP E. BATT
GOVERNOR

KARL J. DREHER
DIRECTOR

RECEIVED
OCT 18 1995
Department of Water Resources
Southern Region

October 16, 1995

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

Dear Interested Parties:

I have enclosed a copy of the **PRE-HEARING ORDER** issued for the above referenced water right.

If you have any questions regarding the enclosed order, please feel free to contact me at (208)327-7900.

Sincerely,

Julie L. Yarbrough

JULIE L. YARBROUGH
Senior Secretary

Enclosure

cc: IDWR - Region

MICROFILMED
OCT 1 6 1995

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)

PRE-HEARING ORDER

On October 12, 1995, the department conducted a pre-hearing conference in connection with the above captioned matter. At the conference, the applicant and protestant (parties) asked the department to issue this pre-hearing order.

ORDER

IT IS HEREBY ORDERED that pursuant to IDAPA 37.01.01513 (Rule of Procedure 513) and IDAPA 37.01.01521 (Rule of Procedure 521) as follows:

1. On or before **November 10, 1995**, the parties shall exchange copies of documents, proposed exhibits, witness lists together with a brief statement of the substance of testimony from each witness and shall provide a copy to the department.

2. On or before **December 1, 1995**, the parties shall take depositions of expert witnesses and shall provide a copy of the depositions to the opposing party and to the department.

3. On or before **December 15, 1995**, the parties shall:

a. Exchange reports which have been prepared by expert witnesses and provide a copy to the department.

b. Submit a request for subpoenas to the department together with the subpoenas prepared for signature.

IT IS FURTHER HEREBY ORDERED, that the department authorizes discovery by the parties for the purpose of deposing expert witnesses.

Dated this 16th day of October, 1995.

L. GLEN SAXTON
Hearing Officer

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 16th day of October, 1995, I mailed a true and correct copy, postage prepaid, of the foregoing **PRE-HEARING ORDER** to the following:

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

Roger Ling
LING NIELSON & ROBINSON
615 H St.
P.O. Box 396
Rupert, ID 83350

Harold & Ray Jones
HC 72
Malta, ID 83342

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

Julie L. Yarbrough

JULIE L. YARBROUGH
Senior Secretary

MICROFILMED

FROM: Allen Merritt DATE: October 13, 1995

TO: File: Application for Permit 43-07321 and Transfer #4640

SUBJECT: Pre-hearing Conference

Yesterday I conducted the pre-hearing conference for these protested matters. All parties were present. The applicant was represented by Roger Ling. The protestants were represented by Pat Brown. Others were in attendance as the signup sheet notes.

At the conference we narrowed the issues to two: 1) injury to existing rights 2) local public interest 3) expansion of existing rights.

Mr. Ling gave a brief explanation of the application and transfer. He indicated the application was for storage for private drain water (also a day or so flood water on creek) and that the transfer was for change in place of use to cover a pivot. He indicated that the rights were decreed around 600 acres and only 266 acres claimed in SRBA since that is all that can reasonably be irrigated due to sources very limited. He indicated that forfeiture of water right should not be an issue since lack of water prevents forfeiture.

Mr. Brown gave a brief explanation of the protestant's concern. He indicated that the addition of the pivot expands the historical acres irrigated and reduces the return flow to the creek. Development of the storage also impedes spring flow that historically has been used by protestant. He indicates protestants right have been injured in that well discharge has reduced and spring water dried up.

I asked if there was room for settlement in this matter and Mr. Brown indicated not.

We then discussed setting the hearing. Both attorneys agreed and recommended that the department should issue a pre-hearing order pursuant to rules 513 or 530. They ask that the order require:

-The deadline of Nov. 10 be set or exchange of known documents, exhibits and witness lists with a brief statement of substance of testimony of each witness. **

-The department grant discovery and that "expert witnesses" be deposed by Dec. 1.

-That any reports by "expert witnesses" be exchanged my Dec. 15.

-That the requests for subpoenas be mailed to Dept. by Dec. 15.

We discussed available time for attorneys for the hearing and due to conflicts with SRBA proceedings and other matters it was very limited but they did identify a window from Jan. 2 to Jan 10 in which both attorneys could be available for the hearing. We discussed place and it was generally agreed that the Burley or Rupert area was ok. They suggested that the hearing could be finished in two days.

** I discussed with both attorneys the hearing officer's desire to limit duplicative testimony as described in Rule 560. Mr. Brown indicated his initial witness list could be trimmed.

The attached "Draft Pre-hearing Order" is based on the above.

MICROFILM
SEP 10 2007

RE: WR# 43-00045,et al- TR #4640 (Round Mountain Ranch)
WR# 43-07321

PLACE: Room 3, Cassia County Courthouse

DATE: 10:00 a.m., Thursday; October 12, 1995

CONFERENCE OFFICER: Allen D. Merritt

ASSISTED BY: None

ROSTER OF ATTENDANCE

NAME	ADDRESS	REPRESENTING
Harold Jones	Malta	myself
Alvin Neddo	Malta	on looker
Roger W. Ewing	P.O. Box 396, Rupert	Applicant
Vern Kempton	Malta	on looker
Jeff Sermon	Malta	
Larry Kempton	Malta	on looker
Pat Brown	Box 389 Twin Falls	Jones
Ray Jones	Naf, Idaho	
DAVE SUNDERLAND	BOX #1 MALTA ID	

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P. O. BOX 396
RUPERT, IDAHO 83350

ROGER D. LING
ROBERT M. NIELSEN
BRENT T. ROBINSON
BRENT C. TINGEY
BOYD L BAGGETT

AREA CODE 208
TELEPHONE 436-4717
FAX 436-6804

RECEIVED
OCT 12 1995
Department of Water Resources
Southern Region

October 9, 1995

Idaho Department of Water Resources
Southern Region Office
222 Shoshone Street East
Twin Falls, Idaho 83301

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

Dear Clerk:

Enclosed is our *Pre-Conference Statement* for filing in the above matter. Thank you for your kind assistance in this matter.

Very truly yours,

Roger D. Ling

RDL:jkt

enc

RECEIVED
OCT 12 1995
Department of Water Resources
Southern 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 MOUNTAIN RANCH.	**PRE-CONFERENCE STATEMENT**

COMES NOW Round Mountain Ranch, Applicant, by and through its counsel of record and pursuant to Rule of Procedure IDAPA 37.01.01510 (Rule of Procedure 510), does submit the following Pre-Conference Statement.

1. Issues to be resolved in the Matter of Application for Permit No. 43-07321:

A. Whether or not other water rights are injured thereby.

B. The change does not constitute an enlargement in use of the original right.

C. The change is consistent with the conservation of water.

D. The permit is in the local public interest as defined in Section 42-203A(5), Idaho Code.

E. Whether or not the permit is required for the storage of private water.

The issues to be resolved in the Application for Transfer No. 4640:

LING, NIELSEN & ROBINSON
ATTORNEYS AT LAW
RUPERT, IDAHO 83350

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A. Would any other water rights be injured thereby.

B. Does the change constitute an enlargement in use of the original right.

C. Is the change consistent with the conservation of water resources within the state.

D. Is the change in the local public interest as defined in Section 42-203A(5), Idaho Code.

2. Brief statement of facts and reasons supporting applicant's position. -- All of the water sought to be stored for irrigation or change to a different place of use is water that has been fully appropriated by applicant or is private water, created by the installation of drainage tiles of applicant. Therefore, no junior appropriator can claim injury and has no standing as to privately developed water of applicant on his own premises by the installation of drainage tile. The storage of water will conserve the amount of water used for irrigation each year, will enable applicant to more efficiently apply the water to his crops, and enhances the conservation of water for the benefit of all water users of the state.

3. List of proposed witnesses:

A. Jeff Sessions
B. Officials of Idaho Department of Water Resources
C. Sherl Chapman
D. Merle Jones
E. Robin Wells

LING, NIELSEN & ROBINSON
ATTORNEYS AT LAW
RUPERT, IDAHO 83350

4. Applicant does desire to pursue discovery after the Pre-Conference Hearing.

5. Applicant requests the hearing be held in Cassia County, Idaho.

6. Applicant estimates one (1) day to present its case.

7. Applicant believes that at least sixty (60) days will be required for discovery and a hearing can be held at any time after discovery is completed.

Respectfully submitted this 9th day of October, 1995.

LING, NIELSEN & ROBINSON

By: _____
Roger D. Ling
Attorneys for Applicant

LING, NIELSEN & ROBINSON
ATTORNEYS AT LAW
RUPERT, IDAHO 83350

CERTIFICATE OF MAILING

I hereby certify that on the 9th day of October, 1995, I served copies of the foregoing Pre-Conference Statement upon:

Patrick D. Brown
HEPWORTH, NUNGESTER AND LEZAMIZ
Attorneys at Law
P. O. Box 389
Twin Falls, ID 83303

by forwarding a copy thereof via facsimile transmission to (208) 734-4115 and then depositing said copy in the United States mail, postage prepaid, in an envelope addressed to said attorney at the foregoing address.

_____
Roger D. Ling

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE
STATE OF IDAHO

RECEIVED
OCT 06 1995
Department of Water Resources
Southern Region

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

PRE-CONFERENCE STATEMENT

COME NOW Protestants, by and through their counsel of record and, pursuant to IDAPA Rule of Procedure 510 and the August 31, 1995 Order For Pre-Conference Statements and submit the following pre-conference statement.

1. The issues to be resolved are those set forth in Idaho Code §42-222, i.e. (a) will the proposed transfer injure other water rights; (b) will the proposed transfer constitute an enlargement in the use of the original right; (c) is the proposed transfer in the local public interest; and (d) is the proposed transfer contrary to the conservation of water resources within the State of Idaho.

2. The protestants believe that the proposed use would reduce the quantity and quality of water under existing rights, including, but not limited to, the rights of the protestants numbered 43-00037, 43-00084, 43-00085, 43-00259, 43-00260, 43-00286A, and 43-02401; the water supply is insufficient for the purpose of use, as all water has been appropriated; the proposed uses conflict with local public interest in that they directly impact the protestants, as well as others, in the immediate area by affecting the quality and the quantity of the protestant's and others' water and will deplete the aquifer and spring

HL&H Chartered
Hepworth, Lezamiz & Hohnhorst

systems in the area; the proposed use is contrary to conservation of water resources within the State of Idaho and would result in depletion of both aquifer and spring flows including those used by the protestants; and the change in use would constitute an enlargement in use in terms of both diversion and consumption.

3. Witnesses the protestant's propose to use at hearing include those listed below:

(a) Larry Kempton

(b) Laverne Kempton

(c) Alvin Neddo

(d) Delbert Hutchison

(e) Brad Hutchison

(f) Cody Barfus

(g) Nish Hutchison

(h) Ardel Wickel

(i) Orville Wickel

(j) Ardell Wickel

(k) Arden Wickel

(l) Bill Wickel

(m) Nick Marten

(n) Glen Park

(o) Brent Neddo

(p) Delbert Neddo

(q) Park Neddo

(r) Joe Durfee

(s) Mark Durfee

(t) Arlo Jones

(u) Gary Ward

(v) Ross Jones

(w) Dean Barnes

(x) Bob Booth

(y) Collin Booth

(z) Beth Jones

(aa) Harold Jones

(bb) Ray Jones

(cc) Dave Sundberg

(dd) Robin Wells

(ee) Dr. Charles Brockway

(ff) Any IDWR employees who have personal knowledge.

Pursuant to Rule 525, the protestants hereby request the issuance of subpoenas in order to compel the attendance of some of the above witnesses listed. Additionally, the protestants request that subpoenas duces tecum be issued to produce documents at any hearing or depositions to be held at least ten (10) days prior to any evidentiary hearing.

4. Protestants wish to pursue discovery as authorized under Rule 521. The extent of discovery required can not be determined until protestants receive the

applicants prehearing disclosures.

5. The estimated length of time to present the protestants evidence and testimony is one day.

Dated this 6th day of October, 1995.

HEPWORTH, LEZAMIZ & HOHNHORST, CHARTERED

By: _____
Patrick D. Brown
Attorneys for Protestants

CERTIFICATE OF MAILING

The undersigned, a resident attorney of the State of Idaho, with offices at 133 Shoshone Street North, Post Office Box 389, Twin Falls, Idaho, 83303, and one of the attorneys for Protestants, in this matter, certifies that he caused to be mailed a copy of the above and foregoing PRE-CONFERENCE STATEMENT on the 6th day of October, 1995, to:

Roger Ling	Hand delivered	___
Ling, Nielsen & Robinson	U.S. Mail-Regular	X
615 H. St.	U.S. Mail-Certified	___
P. O. Box 396	Facsimile Transmission	___
Rupert, ID 83350		

_____

MESSAGE CONF TRANSMISSION

Post-it® Fax Note 7671 | Date | # of pages ▶ 4

To Glen Sexton | From Allen Merritt

Co./Dept. | Co.

Phone # | Phone #

Fax # | Fax #

OCT-06-'95 FRI 16:52

P-9999

My Pre-hearing conf 10/12/95

NO.	DATE	ST. TIME	TOTAL TIME	ABBR/SPD	3275400	DEPT CODE	#PGS
934	10-06	16:50	00'02'20				OK- 4 NG- 0

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE
STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR TRANSFER NO. 4640 & PERMIT 43-07321	NOTICE OF PRE-HEARING CONFERENCE
ROUND MOUNTAIN RANCH, Applicant	SOURCE: Round Mountain Creek, Clear Creek, Rice Creek, Drain & Springs
HAROLD AND RAY JONES, Protestants	COUNTY: Cassia

On May 24, 1995, Round Mountain Ranch, applicant, by owner Jeff Sessions, filed with the Department of Water Resources an application for transfer No. 4640 and application for permit to appropriate water No. 43-07321. On June 9, 1995, both applications were amended by the applicant. The Department has received protests against the approval of said applications from the above captioned protestants by their attorney Patrick D. Brown.

The Department has set the matter of protests for a pre-hearing conference for **Thursday, October 12th, 1995, at 10:00 am** in the Commission Room #3 in basement of the Cassia County Courthouse, 1459 Overland Ave., Burley, Idaho.

As part of this notice, please find attached an order requiring pre-conference statements to be filed regarding this matter.

The purpose of the conference is to formulate and simplify the issues, obtain admissions of fact and of documents which will avoid unnecessary proof, arrange for the exchange of proposed exhibits or prepared expert testimony prior to the hearing, limit the number of witnesses, consolidate the examination of witnesses, and advise the parties of the procedure which will be followed at any subsequent hearing.

The conference will be held in accordance with Chapter 2, Title 42, of the Idaho Code and the adopted Rules of Practice and Procedure of the Department of Water Resources. (Please find enclosed a copy of the rules for your reference.)

The conference will be conducted in a facility which meets the accessibility requirements of the Americans with Disabilities Act. If you require special accommodations in order to attend, participate in or understand the conference, please advise the department within (10) days prior to the conference.

Dated this 31st day
of August, 1995.

Allen D. Merritt, P.E.
Conference Officer

MICROFILMED

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 MOUNTAIN RANCH	ORDER FOR PRE-CONFERENCE STATEMENTS

In order to prepare and schedule the above captioned contested matter for hearing before the department of Water Resources,

IT IS HEREBY ORDERED, pursuant to Rule of Procedure IDAPA 37.01.01510 (Rule of Procedure 510) that each party file with the conference officer and serve upon the other parties of record a Prehearing Statement responding to the following items:

1. The issues to be resolved, and the statutes, rules, and legal precedent involved if known;

2. A brief statement of the facts and reasons supporting your position on each matter in dispute;

3. A list of proposed witnesses together with a request for any requested subpoenas to be issued as authorized in IDAPA Rule 37.01.01525 (Rule of Procedure 525);

4. Whether you wish to pursue discovery as authorized in IDAPA Rule 37.01.01521 (Rule of Procedure 521) and, if so, the estimated length of time required;

5. Requested location of hearing;

6. Estimated length of time to present your case at the hearing;

7. The date by which you will be ready to have a hearing in this matter;

8. If you do not have an attorney, your home and business addresses and telephone numbers; If you have recently retained an attorney, the name, address and telephone number of your attorney; and

9. Other related matters.

IT IS FURTHER ORDERED that you must mail your Pre-conference Statement to the conference officer and mail copies to all parties of record on or before **October 6, 1995**

Dated this 31st of August, 1995.

Allen D Merritt, PE
Conference Officer

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CERTIFICATE OF MAILING

I hereby certify that on the 31st day of August, 1995, a true and correct copy of the forgoing Notice of Pre-Hearing Conference and Order for Pre-Conference Statements were forwarded with all required charges prepared, by the methods indicated below, to the parties listed:

Mary A. Baldwin
Secretary

JEFF SESSIONS ROUND MOUNTAIN RANCH HC 72 BOX 2346 MALTA ID 83342	Hand delivered U.S. Mail-Regular U.S. Mail-Certified Fax	 ✓
ROGER LING ESQ PO BOX 396 RUPERT ID 83350	Hand delivered U.S. Mail-Regular U.S. Mail-Certified Fax	 ✓
HAROLD & RAY JONES HC 72 MALTA ID 83342	Hand delivered U.S. Mail-Regular U.S. Mail-Certified Fax	 ✓
PATRICK BROWN ESQ HEPWORTH & ASSOCIATES PO BOX 389 TWIN FALLS ID 83303-0389	Hand delivered U.S. Mail-Regular U.S. Mail-Certified Fax	 ✓

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APR 16 [illegible]

CONFERENCE AND HEARING PROCEDURE

APPLICATION FOR PERMIT ISSUES

Section 42-203A, Idaho Code, requires the department to consider the following issues in connection with an application for permit:

1. Will the proposed appropriation injure other water rights?
2. Is the water supply sufficient for the purpose for which it is sought to be appropriated?
3. Was the application made in good faith or for delay or speculative purposes?
4. Does the applicant have sufficient financial resources with which to complete the proposed project?
5. Is the proposed appropriation in the local public interest, which is defined as the affairs of the people in the area directly affected by the proposed use?
6. Is the proposed use contrary to conservation of water resources within the state of Idaho?

BURDEN OF PROOF

The applicant has the initial burden of proof for issues 1, 2, 3, 4, and 6 above and must provide evidence for the department to evaluate these criteria. The initial burden of proof on issue 5 above lies with both the applicant and protestant as to factors of which they are most knowledgeable and cognizant. The applicant has the ultimate burden of persuasion, however, for this issue.

PROCEDURE

The department generally conducts an informal conference with the parties to determine the issues and to try to settle a protested matter before a hearing is scheduled. If a hearing is held the department will issue a written decision based on the hearing record.

CONFERENCE

The purpose of a pre-hearing conference is to provide the opportunity for the parties and the department to familiarize themselves with a contested matter and to attempt to resolve the matter. At the conference, the department may also formulate and simplify the issues, identify documents to avoid unnecessary proof, exchange proposed exhibits or prepared testimony, limit witnesses, discuss settlement or make settlement offers, schedule hearings, establish procedure at hearing and address other matters that may expedite orderly conduct and disposition of the proceeding or its settlement. The department may issue a "pre-conference statement order" which requires response to the inquiries.

HEARING

The department will tape record the hearing. Copies of a hearing tape are available upon request and the payment of the cost of reproducing the tape. The hearing likely will be conducted by a hearing officer appointed by the Director rather than by the Director himself. If so, the hearing officer will prepare a recommended order for the Director's consideration. Parties can file exceptions to a recommended order, briefs in support of the exceptions or may request oral argument. Parties may seek judicial review of any final order issued by the Director. Parties may by written stipulation waive the right to a recommended order, particularly when a shortened decision process is desirable or necessary. Such a waiver does not eliminate any rights of the parties in connection with the final order of the Director and judicial review of the order.

EXHIBITS

A party who plans to offer an exhibit as part of the hearing record must provide a copy of the proposed exhibit to the parties and to the hearing officer. As part of the conference a date may be set by which exchange of exhibits and witness lists must occur.

EFFECT OF FAILURE TO APPEAR AT A CONFERENCE OR HEARING

Failure to appear at the time and place set for a conference or hearing by the applicant or protestant(s) may allow the department to dismiss without prejudice the protest(s) or the application. Any and all cost incurred by reason of such non-appearance may be assessed against such non-appearing party.

AMERICANS WITH DISABILITIES ACT

Any hearing scheduled will be conducted in a facility which meets the accessibility requirements of the Americans with Disabilities Act. If you require special accommodations in order to attend, participate in or understand the hearing, please advise the department within (10) days prior to the hearing.

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CONFERENCE AND HEARING PROCEDURE

APPLICATION FOR TRANSFER ISSUES

Section 42-222, Idaho Code, identifies the following potential issues that the department can consider in connection with an application for transfer:

1. Will the proposed transfer injure other water rights?

2. Will the proposed transfer constitute an enlargement in the use of the original right?

3. Is the proposed transfer in the local public interest, where local public interest is defined as the affairs of the people in the area directly affected by the proposed use?

4. Is the proposed use contrary to conservation of water resources within the state of Idaho?

BURDEN OF PROOF

The applicant has the initial burden of proof for issues 1, 2, and 4 above and must provide evidence for the department to evaluate these criteria. The initial burden of proof on issue 3 above lies with both the applicant and protestant as to factors of which they are most knowledgeable and cognizant. The applicant has the ultimate burden of persuasion, however, for this issue.

PROCEDURE

The department generally conducts an informal conference with the parties to determine the issues and to try to settle a protested matter before a hearing is scheduled. If a hearing is held, the department will issue a written decision based on the hearing record.

CONFERENCE

The purpose of a pre-hearing conference is to provide the opportunity for the parties and the department to familiarize themselves with a contested matter and to attempt to resolve the matter. At the conference, the department may also formulate and simplify the issues, identify documents to avoid unnecessary proof, exchange proposed exhibits or prepared testimony, limit witnesses, discuss settlement or make settlement offers, schedule hearings, establish procedure at hearing and address other matters that may expedite orderly conduct and disposition of the proceeding or its settlement. The department may issue a "pre-conference statement order" which requires response to the inquiries.

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State of Idaho
DEPARTMENT OF WATER RESOURCES
Southern Region, 222 Shoshone St. East, Twin Falls, Idaho 83301-6105 (208) 736-3033
Fax (208) 736-3037

PHILIP E. BATT
Governor

KARL J. DREHER
Director

August 30, 1995

EMILY AGBERT
CASSIA COUNTY COURTHOUSE
1459 OVERLAND AVE
BURLEY ID 83318

Dear Ms. Agbert:

This is a follow-up to our telephone conversation of this date to confirm the reservation of the Commissioners Room at the Cassia County Courthouse for a meeting to be held by this office on Thursday, October 12, 1995 from 10:00 a.m.- 5:00 p.m.

If you have any questions please feel free to contact me or Allen Merritt, Southern Regional Office Manager.

Thank you very much for your assistance in this matter.

Very truly yours,

Mary Baldwin
Sr. Secretary

MICROFILMED
SEP 13 1995

State of Idaho
DEPARTMENT OF WATER RESOURCES
Southern Region. 222 Shoshone St. East. Twin Falls. Idaho 83301-6105 (208) 736-3033
Fax (208) 736-3037

PHILIP E. BATT
Governor

KARL J. DREHER
Director

July 18, 1995

ATTN JEFF SESSIONS
ROUND MOUNTAIN RANCH
HC 72 BOX 2346
MALTA ID 83342

RE: APPLICATION FOR PERMIT NO. 43-07321 and TRANSFER NO. 4640 (43-00045 et al)

Dear Mr. Sessions:

Enclosed are copies of protests filed against the above referenced applications filed on behalf of Harold and Ray Jones.

The Department suggests you contact the protestants directly to determine the exact nature of the protests and, if possible, to resolve the matter without action by the Department.

The attachments to this letter describe the issues which the Department must consider in taking action on an application. It also gives a brief description of the conference and hearing procedure followed by the Department in resolving protested applications.

If you have any questions or if this office can be of further assistance, please feel free to contact us.

Very truly yours,

Allen D. Merritt, P.E.
Southern Region Manager

AM:MB
Enclosures

ARCHIVE
JUL 18 1995

CONFERENCE AND HEARING PROCEDURE

APPLICATION FOR PERMIT ISSUES

Section 42-203A, Idaho Code, requires the department to consider the following issues in connection with an application for permit:

1. Will the proposed appropriation injure other water rights?
2. Is the water supply sufficient for the purpose for which it is sought to be appropriated?
3. Was the application made in good faith or for delay or speculative purposes?
4. Does the applicant have sufficient financial resources with which to complete the proposed project?
5. Is the proposed appropriation in the local public interest, which is defined as the affairs of the people in the area directly affected by the proposed use?
6. Is the proposed use contrary to conservation of water resources within the state of Idaho?

BURDEN OF PROOF

The applicant has the initial burden of proof for issues 1, 2, 3, 4, and 6 above and must provide evidence for the department to evaluate these criteria. The initial burden of proof on issue 5 above lies with both the applicant and protestant as to factors of which they are most knowledgeable and cognizant. The applicant has the ultimate burden of persuasion, however, for this issue.

PROCEDURE

The department generally conducts an informal conference with the parties to determine the issues and to try to settle a protested matter before a hearing is scheduled. If a hearing is held the department will issue a written decision based on the hearing record.

CONFERENCE

The purpose of a pre-hearing conference is to provide the opportunity for the parties and the department to familiarize themselves with a contested matter and to attempt to resolve the matter. At the conference, the department may also formulate and simplify the issues, identify documents to avoid unnecessary proof, exchange proposed exhibits or prepared testimony, limit witnesses, discuss settlement or make settlement offers, schedule hearings, establish procedure at hearing and address other matters that may expedite orderly conduct and disposition of the proceeding or its settlement. The department may issue a "pre-conference statement order" which requires response to the inquiries.

HEARING

The department will tape record the hearing. Copies of a hearing tape are available upon request and the payment of the cost of reproducing the tape. The hearing likely will be conducted by a hearing officer appointed by the Director rather than by the Director himself. If so, the hearing officer will prepare a recommended order for the Director's consideration. Parties can file exceptions to a recommended order, briefs in support of the exceptions or may request oral argument. Parties may seek judicial review of any final order issued by the Director. Parties may by written stipulation waive the right to a recommended order, particularly when a shortened decision process is desirable or necessary. Such a waiver does not eliminate any rights of the parties in connection with the final order of the Director and judicial review of the order.

EXHIBITS

A party who plans to offer an exhibit as part of the hearing record must provide a copy of the proposed exhibit to the parties and to the hearing officer. As part of the conference a date may be set by which exchange of exhibits and witness lists must occur.

EFFECT OF FAILURE TO APPEAR AT A CONFERENCE OR HEARING

Failure to appear at the time and place set for a conference or hearing by the applicant or protestant(s) may allow the department to dismiss without prejudice the protest(s) or the application. Any and all cost incurred by reason of such non-appearance may be assessed against such non-appearing party.

AMERICANS WITH DISABILITIES ACT

Any hearing scheduled will be conducted in a facility which meets the accessibility requirements of the Americans with Disabilities Act. If you require special accommodations in order to attend, participate in or understand the hearing, please advise the department within (10) days prior to the hearing.

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State of Idaho
DEPARTMENT OF WATER RESOURCES
Southern Region, 222 Shoshone St. East, Twin Falls, Idaho 83301-6105 (208) 736-3033
Fax (208) 736-3037

PHILIP E. BATT
Governor

KARL J. DREHER
Director

July 18, 1995

ATTN PATRICK D BROWN ESQ
HEPWORTH LEZAMIZ & HOHNHORST
PO BOX 389
TWIN FALLS ID 83303-0389

RE: APPLICATION FOR PERMIT NO. 43-07321 and TRANSFER NO. 4640 (43-00045 et al) filed in the name of Round Mountain Ranch

Dear Mr. Brown:

The protests filed on behalf of Harold and Ray Jones against the approval of the above referenced applications have been received and a copy has been sent to the applicant with the suggestion that he contact you directly to determine the exact nature of the protests and, if possible, to resolve the matter without action by the Department.

The attachments to this letter describes the issues which the Department must consider in taking action on an application. They also give a brief description of the conference and hearing procedure followed by the Department in resolving protested applications.

If you have any questions or if this office can be of further assistance, please feel free to contact us.

Very truly yours,

Allen D. Merritt, P.E.
Southern Region Manager

AM:MB
Enclosures

MICROFILMED
JUL 19 1995

RECEIVED
JUL 17 1995
Department of Water Resources
Southern Region

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

* * * * * * * * * * *

IN RE: APPLICATION FOR WATER PERMIT NO. 95-216 REGARDING NO. 43-07321

APPLICANT: ROUND MOUNTAIN RANCH

NOTICE OF PROTEST

* * * * * * * * * * *

COMES NOW Harold and Ray Jones, by and through their counsel of record, Hepworth, Lezamiz, & Hohnhorst, and files this protest to the above-numbered Application for Water Permit. The protestant's representative for service in this matter is Patrick D. Brown, Hepworth, Lezamiz & Hohnhorst, P. O. Box 389, Twin Falls, Idaho, 83303-0389, telephone number (208)734-7510. This protest is filed based upon the provisions of Idaho Code §§ 42-203(A), 42-222, as well as other laws of the State of Idaho. The protest is filed on the following grounds:

(1) The water supply in the area is insufficient and has been fully appropriated, and any additional appropriations would reduce the quantity of water available to the protestants under their rights, including, rights 43-00037, 43-00084, 43-00085, 43-00259, 43-00260, 43-00286A, and 43-02401, and would further subject the protestants to delivery calls or cut off of their own water in order to supply other seniors at times earlier than otherwise would occur;

MICROFILMED Receipt # 5018296
7/18/95
MB

(2) The application may not be processed pursuant to the April 30, 1993 Order of the Director, Department of Water Resources imposing a moratorium on such applications;

(3) The protestants are being denied due process and the Director is violating his duties by electing to allow the case to proceed, in spite of the moratorium and without making a determination or giving the protestants the opportunity to put on proof regarding that determination to the effect that application falls within an exception to the moratorium; to wit, there has been no evidentiary hearing upon which the department has determined that the development under any permit will have no effect on prior surface or ground water rights, including those of the protestants, nor has there been a showing that the proposed appropriation would be insignificant or would be mitigated;

(4) The proposed application is not an appropriation of private waters pursuant to I.C. § 42-212;

(5) The proposed appropriation will reduce the quantity and quality of water under existing rights;

(6) The application will conflict with local public interest by directly impacting the protestants and others in the area, including the proposed quality and quantity of water delivered and deliverable to

MICROFILMED

their pre-existing rights; and

(7) The proposed appropriation is contrary to conservation of water resources within the State of Idaho as it depletes existing ground and surface water supplies and increases consumption.

Protestants intend to present evidence regarding the negative impact of the proposed appropriation on existing water rights, the aquifer and spring flows, the conservation of water, and the local public interest.

By filing this protest, notice is given to the Department that the protestants intend to appear and cross-examine and otherwise participate in conferences or hearings. In order to prepare to present evidence, discovery is necessary from the applicant and therefore, protestants move the hearing officer to convene a hearing in which the scope and extent of discovery may be considered and from which the hearing officer may issue orders allowing such discovery.

A pre-hearing conference is requested pursuant to Rule 37.01.01.510.

Respectfully submitted this 11 day of July, 1995.

HEPWORTH, LEZAMIZ & HOHNHORST, CHARTERED

By: _____
Patrick D. Brown
Attorneys for Protestants

STATE OF IDAHO)
) ss.
County of Twin Falls)

Patrick D. Brown, being first duly sworn upon oath, deposes and says as follows:

That he is one of the attorneys for the protestants in the above-entitled action; that he has read the above and foregoing Notice of Protest and knows the contents thereof; and that the facts therein stated are true as he verily believes.

Patrick D. Brown

SUBSCRIBED and SWORN to before me this 17th day of July, 1995.

LeAnn L McMillan
NOTARY PUBLIC FOR IDAHO
Residing at: Filer, ID
My Commission Expires: 7/28/95

CERTIFICATE OF SERVICE

The undersigned, a resident attorney of the State of Idaho, with offices at 133 Shoshone Street North, Post Office Box 389, Twin Falls, ID, 83303, and one of the attorneys for the protestants in this matter, certifies that he caused to be served a copy of the above and foregoing NOTICE OF PROTEST on the 17th day of July, 1995, as follows:

By hand delivery to: Idaho Department of Water Resources
222 Shoshone Street East
Twin Falls, ID 83301

By mailing to: Round Mountain Ranch
P. O. HC 72, Box 2346
Malta, ID 83342

Patrick D. Brown

(PDB/51125PWP.713/llm)

FORM NO.202A
REVISED 6-6-91

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

APPLICATION FOR PERMIT ANALYSIS SHEET

INITIAL REVIEW BY MTS DATE 6-1, 1995
APPLICATION NO. 43-07321

REQUIRED INFORMATION

- ✓ Name (If applicant is a corporation or partnership, names must be provided for the director, officers, & other partners.
- ✓ Address
- ✓ Source (see USGS quad for names of water sources)
- ✓ Point of diversion (10 Acres for spring, lot & block descriptions for subdivisions, local name, flow &/or volume.
- ✓ County
- ✓ Quantity (flow &/or volume)
- ✓ Period of use
- ✓ Nature of proposed use (include description of use)
- ✓ Description of diverting works.
- ✓ Time required for beneficial use of water.
- ✓ Place of use or acres irrigated.
- ✓ Map
- ✓ Signature (If applicant is corp., partnership, or munincipality, title of signator is required)
- ✓ Fee
- ✓ Yes ____ No* In form to reciept

++++PROPOSED PRIORITY DATE
5-24-, 19 95

ADDITIONAL INFORMATION

- ____ Overlapping place of use(Describe source & relationship to present application on the back.
- ____ Overlapping point of diversion.
- ____ Yes ✓ No Field check required
  Field check by _____
- ____ Yes ✓ No Field report attached
- ✓ Yes NA No Critical Ground water area
- ____ Yes ✓ No Groundwater management area
- Application pending Yes ✓ No Send Dam safety information
- ____ Yes ✓ No Send power requirement letter
- ____ Yes ✓ No Send fish farm requirement letter
- ____ Yes ✓ No Power residency affidavit.
- ____ Yes ✓ No Power efficiency form
- ✓ Yes ____ No Within trustwater boundary(If yes, attach trustwater supplementary analysis sheet.
- ____ Yes ✓ No Diversion greater than 5 cfs or 500 acre ft. (If yes, attach large diversion supplementary analysis sheet.
- ✓ See reverse side for additional information.

*** REQUEST THE FOLLOWING ADDITIONAL INFORMATION FROM THE APPLICANT:** _____

_____

_____

_____ Date Requested _____, 19___

PROCESSING ✓ Yes ___ No In form for Advertising
___ Yes ___ No No Statewide Advertising
✓ Yes ___ No Fee amount, receipt date & No. recorded on app.

SEND COPIES TO: ___ Idaho Dept of Health & Welfare ___ USDI BLM
___ Idaho Dept of Fish & Game ___ USFS
___ Idaho Dept of Lands ___ Water Dist.
___ Adjudication Bureau Unit ___ Other_____

FINAL REGIONAL PROCESSING REVIEW

___Yes ___No Affidavit of publication received.
___Yes ___No Application published correctly. If not, record action taken. _____

___Yes ___No Publication dates and paper, recorded on App.
___Yes ___No Protests received
Final date for Protest_____
___Yes ___No Protests, dates, resolution of protest, recorded on app.
___Yes ___No Recommendations attached
___Yes ___No Measuring device required
___Yes ___No Access port required
___Yes ___No Will water be delivered by watermaster? If yes, what dist.___
___Yes ___No Special conditions of approval or cover letter below. _____

See below for additional information ___
Date of priority recommended _____,19___
By _____ Date _____,19___

STATE OFFICE REVIEW _____

See below for additional information
By _____ Date _____,19 ____

ADDITIONAL INFORMATION: _____

LOCAL PUBLIC INTEREST

Comments recieved from:

____ City	____ Idaho Fish & Game	____ Irrigation Dist.
____ County	____ Idaho Health & welfare	____ Canal Company
____ Reservations	Div. of Enviromental Quality	____ Other_____

PROJECT IMPACTS/IMPLICATIONS REPORT

COMMENTS:

_____

_____

_____

_____

_____

_____

_____ DATE_____,19____

A43-10824 (43-00182 & 43-00414); 43-10116, 43-00286B & 43-00045 overlap the uses described as irrigation and stockwater.

SOUTH IDAHO PRESS
BURLEY, IDAHO
AFFIDAVIT OF PUBLICATION

County of Cassia)
) ss
STATE OF IDAHO)

Kary D. Miller, being first duly sworn, deposes and says that she is the General Manager of the South Idaho Press, a daily newspaper published at Burley, Idaho, in the county aforesaid and that the paper is of general circulation therein. Deponent further states that the printed notice attached hereto was duly published according to law in the regular editions of The South Idaho Press for two consecutive week(s), commencing with the issue dated June 26 19 95, and ending with the issue dated July 3, 19 95.

Kary D Miller

STATE OF IDAHO)
))
COUNTY OF Cass.)

On this 3rd day of July in the year of 1995 before me, a Notary Public, personally appeared Kary Miller, known or identified to me to be the person whose name is subscribed to the within instrument, and being by me first duly sworn, declared that the statements therein are true, and acknowledged to me that he executed the same.

Kelly Solomon
Notary Public for Idaho
Residing at Burley, ID
My commission expires: May 23, 1997

Cost of Publication	57.24
Notary Fee	50
Total Cost	57.74

OK
MB
7/12/95

MICROFILMED

RECEIVED
JUL 12 1995
Department of Water Resources
Southern Region

95-216

NOTICE OF APPLICATION FOR WATER PERMIT

The following application has been filed to appropriate the public waters of the State of Idaho:

ROUND MOUNTAIN RANCH
HC 72 BOX 2346
MALTA ID 83342
43-07321

Source: Round Mountain Creek tributary to Clear Creek

Diversion Pt: NE1/4NW1/4SE1/4, NW1/4NE1/4SE1/4, S13, T16S, R27E; Cassia County.

Use:
Irrigation storage (26.0 afa)1/1-12/31
Irrigation from storage (26.0 afa) 4/1-11/1
Stockwater Storage(26.0 afa)1/1-12/31
Diversion to storage(1.0 cfs)1/1-12/31

Total Diversion: 1.0 cfs

Date Filed: 5/24/95

In: Reservoir located within N1/2SE1/4, S13, T16S, R27E. Stockwater use within E1/2NE1/4, N1/2SE1/4, S13, T16S, R27E. Irrigation of 266 acres within E1/2NE1/4, NE1/4SW1/4, SE1/4, S13, T16S, R27E; NE1/4NE1/4, S24, T16S, R27E; NW1/4NW1/4, S19, T16S, R28E.

The application proposes to divert surface water from the Snake River Basin presently under a moratorium order dated April 30th, 1993. The order allows the director to consider on a case-by-case basis applications if it can be shown the development will have no effect on prior surface and groundwater rights because of its location, insignificant consumption, or mitigation by the applicant to offset injury to other rights. The permit, if approved, will be subject to all prior water rights and to a future mitigation plan. Any protest must be filed with the Director, Dept. of Water Resources, Southern Region, 222 Shoshone Street East, Twin Falls, ID 83301 together with a protest fee of $25.00 on or before July 17, 1995. The protestant must also send a copy of the protest to the applicant.

Karl J. Dreher, Director

Published in the South Idaho Press on June 26 & July 3, 1995.

NOTICE OF APPLICATION FOR WATER PERMIT

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Karl J. Dreher, Director

Published in South Idaho Press on 6/26 & 7/3/95.

MICROFILMED

State of Idaho
DEPARTMENT OF WATER RESOURCES
Southern Region, 222 Shoshone St. East, Twin Falls, Idaho 83301-6105 (208) 736-3033
Fax (208) 736-3037

PHILIP E. BATT
Governor

KARL J. DREHER
Director

June 19, 1995

SOUTH IDAHO PRESS
PO BOX 190
BURLEY ID 83318

Gentlemen:

Enclosed you will find a legal notice which we wish to have published in your newspaper. We have inserted the required publication dates. If time allows, please submit a galley proof for review before publication.

We have attempted to submit this legal as camera ready. Please call me at your earliest convenience and prior to your staff re-typing the legal if it does not meet your specifications so I can possibly make adjustments.

After sending us a galley proof, proceed with the publication on the dates we have inserted, assuming the notice is correct. If we have any corrections, we will notify you before the first publication. If you cannot publish the notice on the proposed dates, please contact us immediately.

In order to receive payment, an affidavit of publication must be submitted to the Department along with the publication bill.

Very truly yours,

Mary Baldwin
Sr. Secretary

Enclosure

MICROFILMED

NOTICE OF APPLICATION FOR WATER PERMIT

The following application has been filed to appropriate the public waters of the State of Idaho:

ROUND MOUNTAIN RANCH
HC 72 BOX 2346
MALTA ID 83342

43-07321

Source: Round Mountain Creek tributary to Clear Creek

Diversion Pt: NE1/4NW1/4SE1/4, NW1/4NE1/4SE1/4, S13, T16S, R27E; Cassia County.

Use:

Irrigation storage	(26.0 afa)	1/1-12/31
Irrigation from storage	(26.0 afa)	4/1-11/1
Stockwater Storage	(26.0 afa)	1/1-12/31
Diversion to storage	(1.0 cfs)	1/1-12/31

Total Diversion: 1.0 cfs

Date Filed: 5/24/95

In: Reservoir located within N1/2SE1/4, S13, T16S, R27E. Stockwater use within E1/2NE1/4, N1/2SE1/4, S13, T16S, R27E. Irrigation of 266 acres within E1/2NE1/4, NE1/4SW1/4, SE1/4, S13, T16S, R27E; NE1/4NE1/4, S24, T16S, R27E; NW1/4NW1/4, S19, T16S, R28E.

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Karl J. Dreher, Director

Published in South Idaho Press on 6/26 & 7/3/95.

MICROFILMED

State of Idaho
DEPARTMENT OF WATER RESOURCES
Southern Region, 222 Shoshone St. East, Twin Falls, Idaho 83301-6105 (208) 736-3033
Fax (208) 736-3037

PHILIP E. BATT
Governor

KARL J. DREHER
Director

June 16, 1995

ATTN JEFF SESSIONS
ROUND MOUNTAIN RANCH
HC 72 BOX 2346
MALTA ID 83342

Re: Application for Permit No. 43-07321

Dear Mr. Session:

The Department of Water Resources acknowledges receipt of your water right application for permit. The application has been assigned the above referenced identification number. Please refer to this number in all further correspondence.

This office has scheduled advertising the application in the South Idaho Press for 6/26 & 7/3/95. A period of ten days following the second publication will be allowed for the submittal of protests.

If the application is protested you will be sent a copy of the protest. The protest must be resolved before the application is approved or denied. If the protest is not resolved voluntarily, this Department will conduct a conference and/or hearing on the matter.

If the application is not protested, it will be forwarded to our State Office in about five weeks. State office personnel will conduct a complete review prior to final processing of the application and will notify you of the outcome of this review. When a permit is issued, you will be sent a copy. A typical processing time for an unprotested application is about eight weeks.

Please feel free to contact this office if you have any questions regarding this procedure.

Very truly yours,

Mel Schulte
Sr. Water Resource Agent

MS:MB

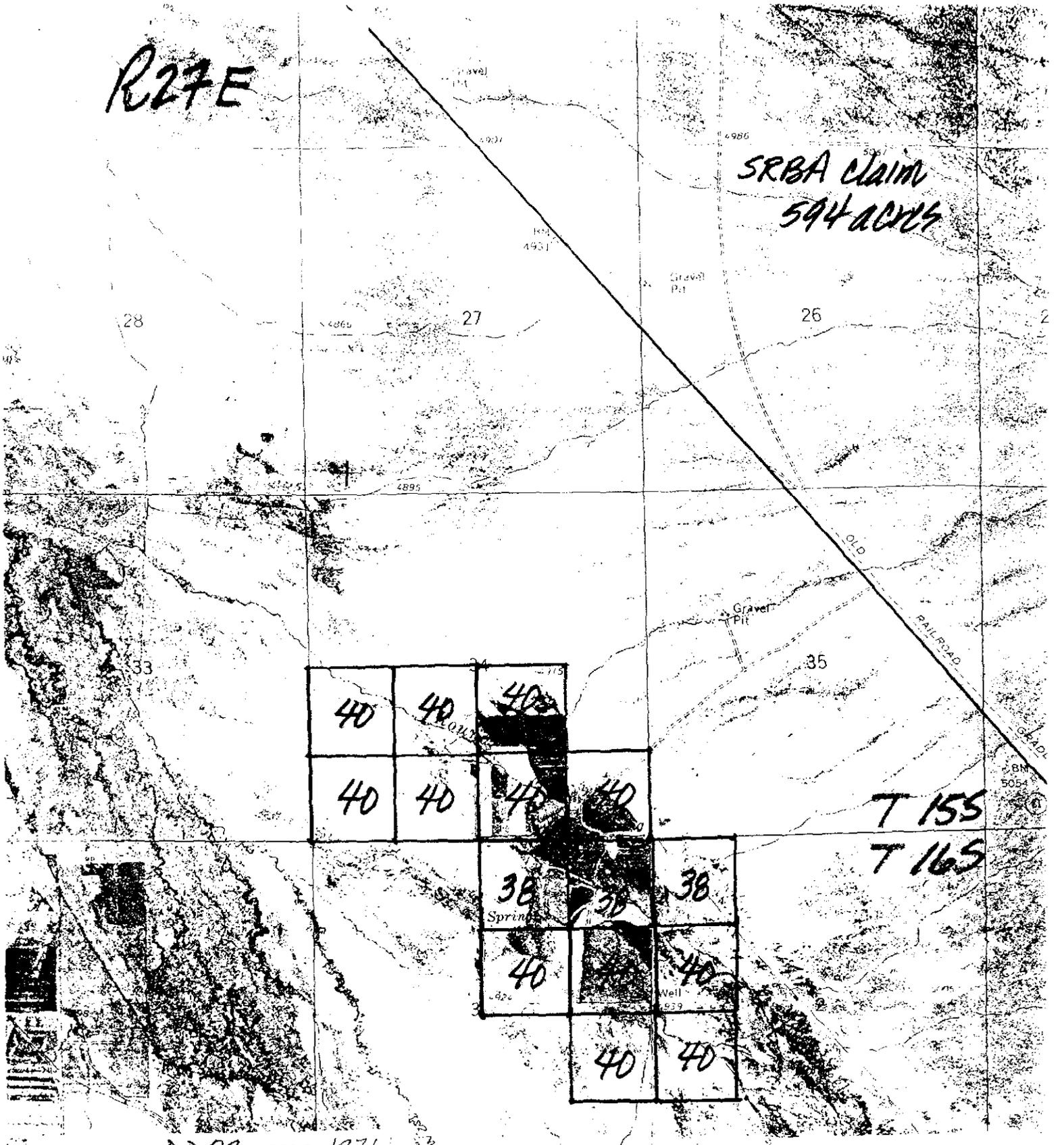
From: DWR60::AMERRITT 24-MAY-1995 15:30:08.30
To: DWR03::NYOUNG,DWR03::GSAXTON,DWR03::BFLEENOR,MBALDWIN,DJONES,CSKINNER
CC: AMERRITT
Subj: SESSIONS DAM ON ROUND MOUNTAIN CREEK NEAR UTAH LINE

THIS DAY JEFF SESSIONS CAME INTO THE OFFICE AND FILED AN AMENDED APPLICATION FOR TRANSFER (WE HAD NEVER ADVERTISED THE FIRST), AN APPLICATION FOR PERMIT FOR STORAGE AND A SMALL DAM APPLICATION.

I WOULD LIKE THE ADVERTISING OF THE TRANSFER AND THE PERMIT TO BE DONE AT THE SAME TIME. I WILL HOLD THE SMALL DAM APPLICATION WITH THE PERMIT FILE TO BE FORWARDED TO BOISE AS A PACKAGE FOR APPROVAL IF THE WATER RIGHT PERMIT IS RECOMMENDED FOR APPROVAL. I WILL SEND A COPY OF THE SMALL DAM APPLICATION TO MIKE STUBBLEFIELD FOR HIS EARLY REFERENCE. I ALSO PLAN TO NOTIFY RAY JONES THRU HIS LAWYER, PAT BROWN, THAT THE APPLICATIONS HAVE BEEN FILED.

ALLEN

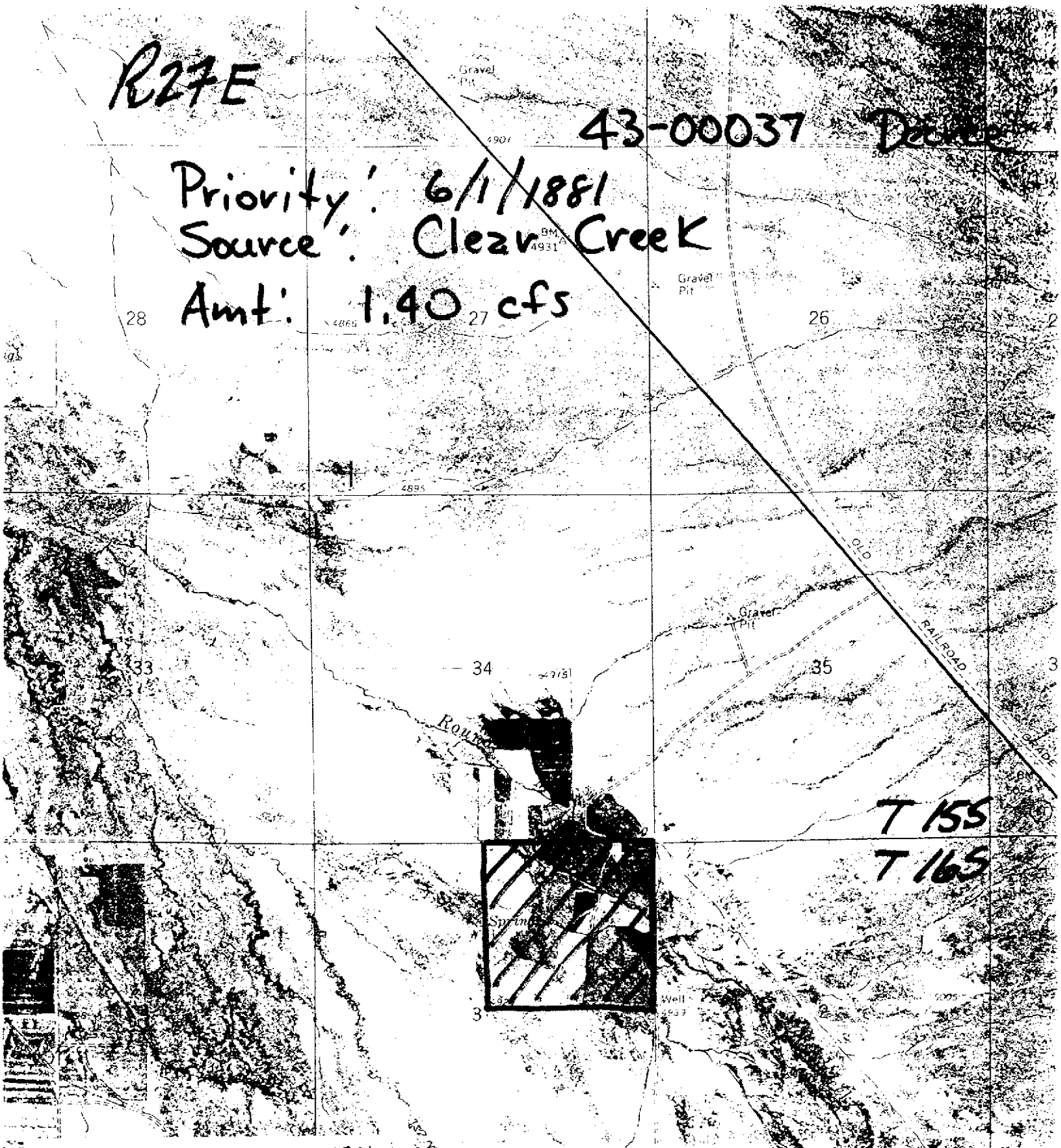
MICRO



MAPS USED: DD 82 DATE: 1976
ASCS
ORTHO USGS-NAF
NAPP
BLM

DD 82

043-00137



MAPS USED: DATE: 1976

ASCS

ORTHO USGS-NAF

NAPP

BLM

DD 82

43-00037



MAPS USED: DD 82 DATE: 1976
ASCS
ORTHO USGS - NAF
NAPP
BLM

A43-000RU DDA-Initial Boundary

10. Place of Use: Continued

Township	Range	Section	1/4 of 1/4		Lot	Use	Acres
16S	27E	26	SW	SW	UTAH	IRR	34.0 ℄ OUT
					Section Acres		142.0
		27	NE	NE		IRR	38.0
			NW	NE		IRR	39.0
			SW	NE		IRR	40.0
			SE	NE		IRR	40.0
			NE	SW	partial	IRR	40.0 30
			NW	SW	"	IRR	40.0 30
			SW	SW	UTAH	IRR	30.0 ℄ OUT
			SE	SW	"	IRR	40.0 ℄ OUT
			NE	SE	partial	IRR	40.0 30
			NW	SE	"	IRR	40.0 30
			SW	SE	UTAH	IRR	40.0 ℄ OUT
			SE	SE	"	IRR	40.0 ℄ OUT
					Section Acres		467.0
					Total Acres		609.0

11. Place of use in counties: CASSIA

12. Do you own the property listed above as place of use? YES

13. Other Water Rights Used:
A43-00085 & A43-00286 PART

14. Remarks:
USE OF THIS DECREE HAS EXISTED FOR MANY YEARS ON THE LAND DESCRIBED; PRIOR TO THE DESIGNATION OF THE AREA AS A CRITICAL GROUNDWATER AREA. SOME OF THE LAND IDENTIFIED IS DELIVERED WATER FROM CLEAR CREEK FROM DIVERSIONS WITHIN THE STATE OF UTAH.

15. Basis of Claim: DECREED
Case Number:
Court :
Decree date:

ALBION-IDAHO LAND CO. (Decree Plaintiff) vs JOBE ADAMS ET AL (Decree Defendant)

MICROFILMED
MAR 0 2 1993

A43-00084 PRI EXHIBIT TUCK HEARING

DECREE - pg. 17

43-00084

Source: Clear Cr.

Amount: 1.4 CFS

P/D: D

POU: N½ NE, SWNE §27
NWNW §28

T16S R27E

priority: 6-14-1911

T16S

MAPS USED: DD 83 DATE: 1976

ASCS

ORTHO USGS - STREVELL SW

NAPP

BLM

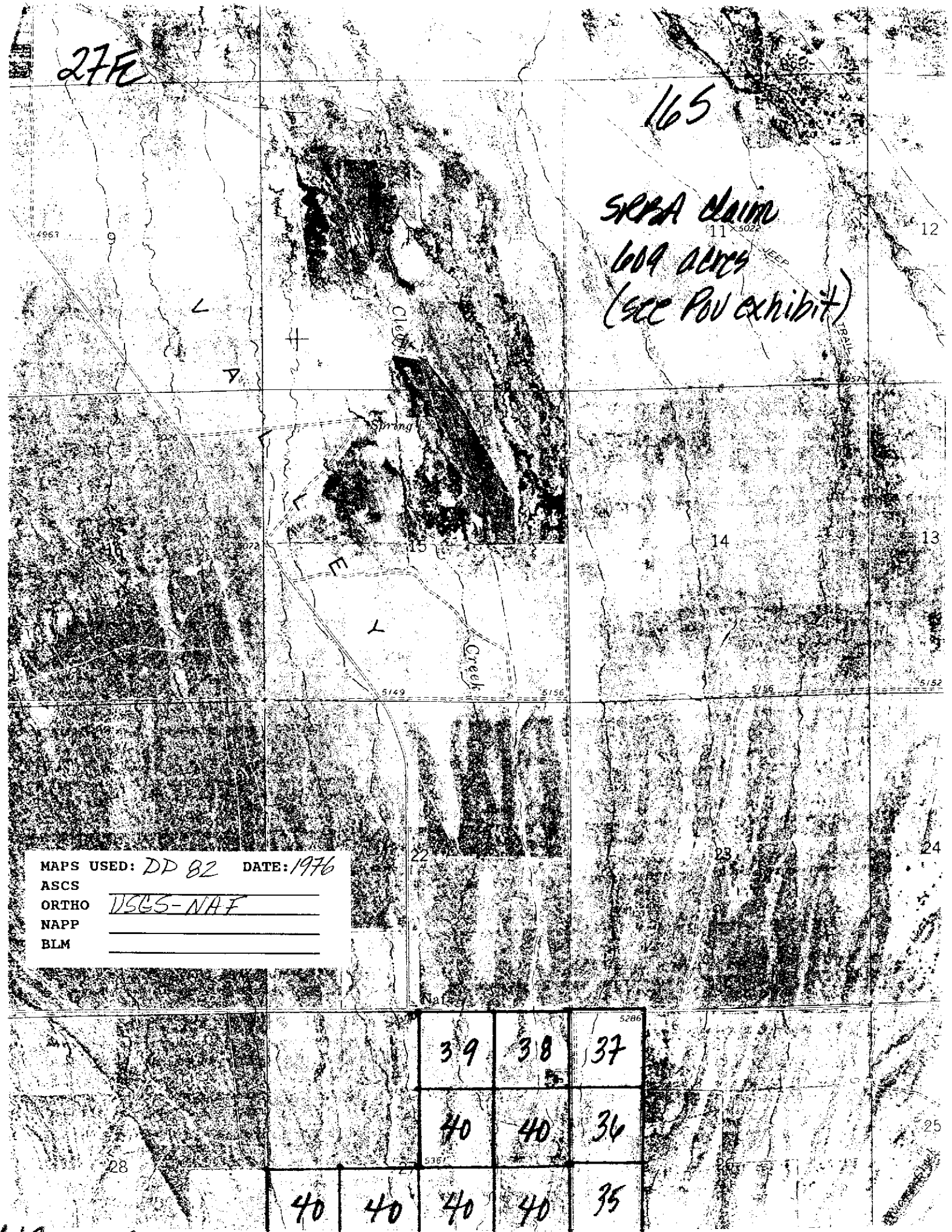
MAPS USED: DATE: 1976

ASCS

ORTHO USGS - NAF

NAPP

BLM


27E
165
SRSA Claim
609 acres
(see POU exhibit)
Spring
Creek
MAPS USED: DD 82 DATE: 1976
ASCS
ORTHO USGS-NAF
NAPP
BLM
39
38
37
40
40
36
40
40
40
40
35

10. Place of Use: Continued

Township	Range	Section	1/4 of 1/4		Lot	Use	Acres
16S	27E	26	SW	SW		IRR	34.0 ✓ OUT
					Section Acres		142.0
		27	NE	NE		IRR	38.0
			NW	NE		IRR	39.0
			SW	NE		IRR	40.0
			SE	NE		IRR	40.0
			NE	SW	partial	IRR	40.0
			NW	SW	"	IRR	40.0
			SW	SW	UTAH	IRR	30.0 ✓ OUT
			SE	SW	"	IRR	40.0
			NE	SE	partial	IRR	40.0
			NW	SE	"	IRR	40.0
			SW	SE	UTAH	IRR	40.0 ✓ OUT
			SE	SE	"	IRR	40.0 ✓ OUT
					Section Acres		467.0
					Total Acres		609.0

11. Place of use in counties: CASSIA

12. Do you own the property listed above as place of use? YES

13. Other Water Rights Used:
A43-00084 & A43-00286 PART .

14. Remarks:
USE OF THIS DECREE HAS EXISTED FOR MANY YEARS ON THE LAND DESCRIBED; PRIOR TO THE DESIGNATION OF THE AREA AS A CRITICAL GROUNDWATER AREA. SOME OF THE LAND IDENTIFIED IS DELIVERED WATER FROM CLEAR CREEK FROM DIVERSIONS WITHIN THE STATE OF UTAH.

15. Basis of Claim: DECREED
Case Number:
Court :
Decree date:

ALBION-IDAHO LAND CO. (Decree Plaintiff) vs JOBE ADAMS ET AL (Decree Defendant)

MICROFILMED
MAR 0 2 1993

A43-00085 PLAINTIFF EXHIBIT

DEGREE - pg. 17
43-00085
Source: Clear Cr.
Amount: 1.8 CFS
Priority: 7-14-1912
P/D: 8
POU: N½NE, SWNE §27
NWNW §28
T16S R27E

T16S

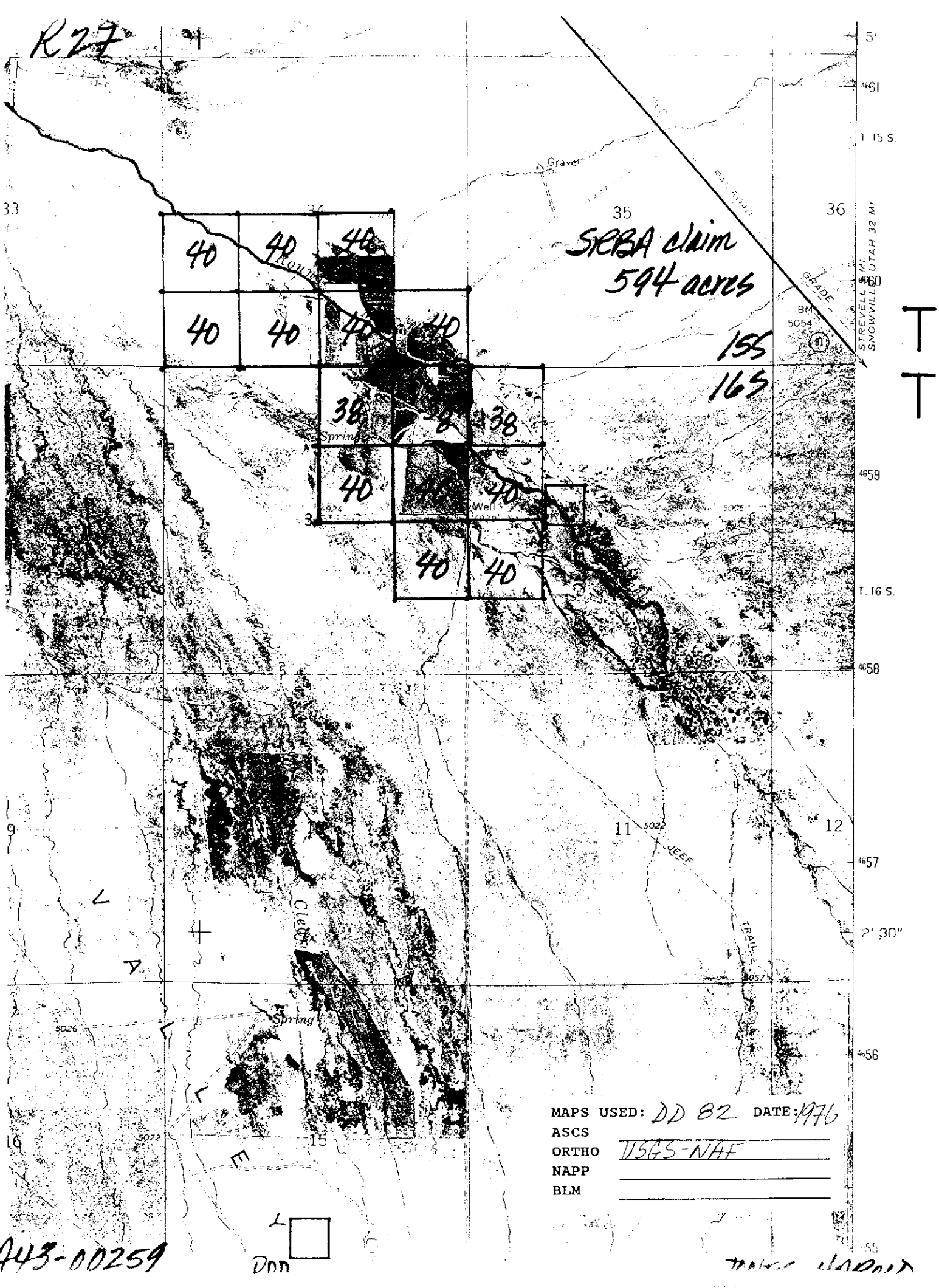
MAPS USED: DD 82 DATE: 1976
ASCS
ORTHO USGS-NAF
NAPP
BLM

MAPS USED: DD 83 DATE: 1976
ASCS
ORTHO USGS-STREVELL SW
NAPP
BLM

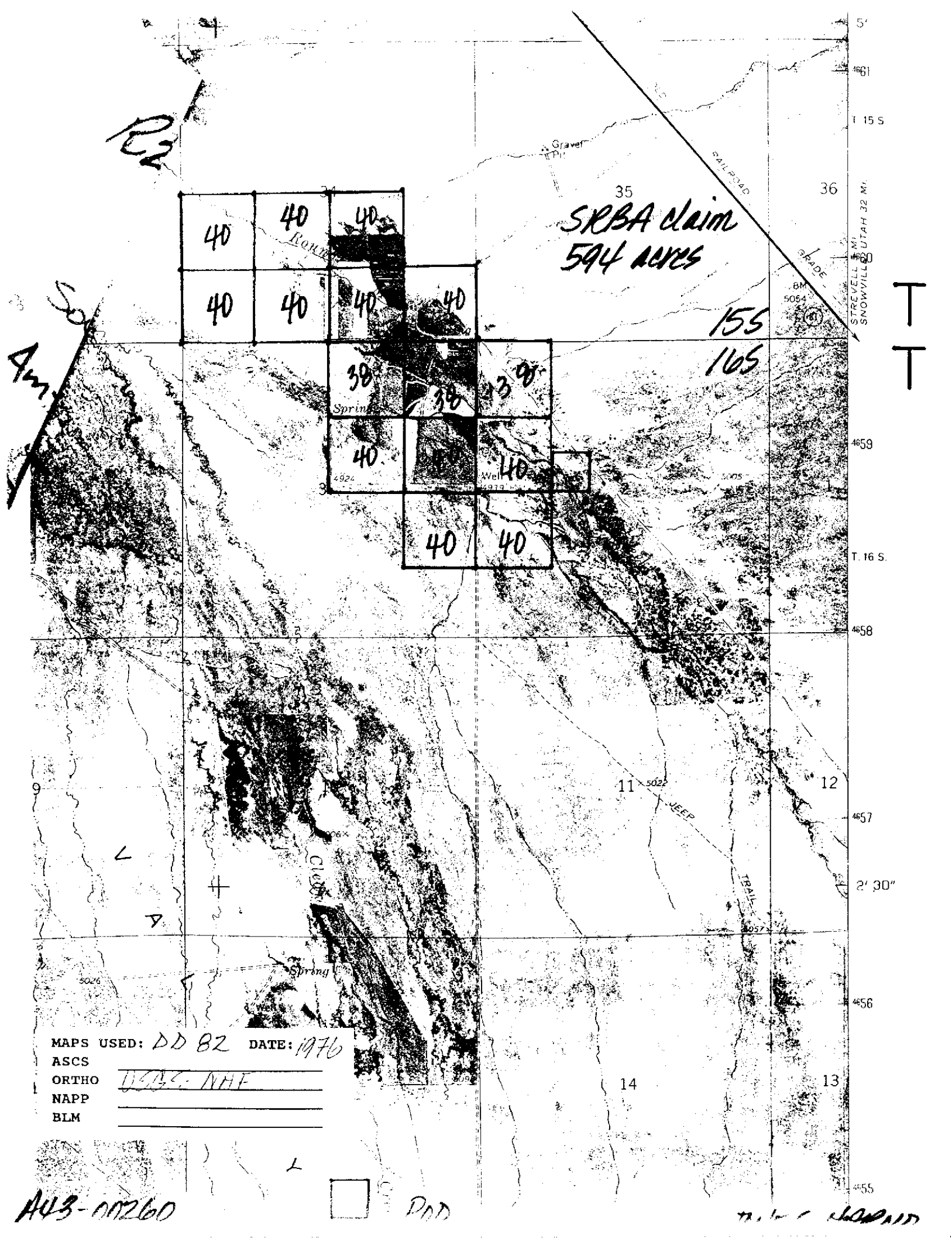
43-00085

R27E R28E

JAMES HARROLD

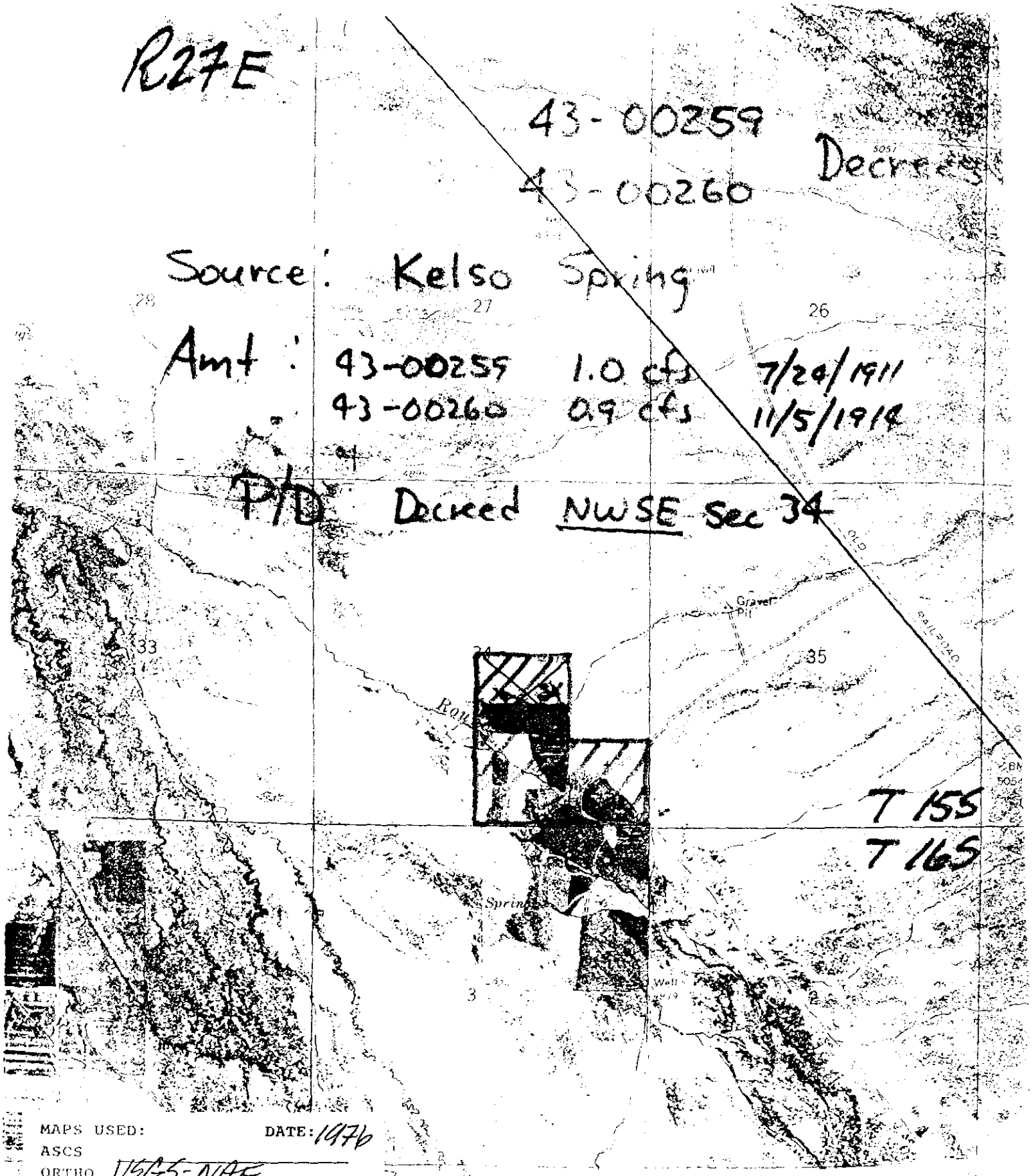

K27
SRBA claim
594 acres
155
165
40
40
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38
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T
T
T. 15 S.
T. 16 S.
33
34
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36
9
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12
15
16
4661
4660
4659
4658
4657
4656
4655
5026
5022
5057
5072
Spring
Well
Creek
JEEP TRAIL
GRADE
STREVELL 5 MI.
SNOWVILLE UTAH 32 MI
MAPS USED: DD 82 DATE: 1976
ASCS
ORTHO USGS-NAF
NAPP
BLM
A43-00259

R27E
43-00259
43-00260
Decrees
Source: Kelso Spring
Amt: 43-00259 1.0 cfs 7/24/1911
43-00260 0.9 cfs 11/5/1914
P/D: Decreed NWSE Sec 34
T 15S
T 16S
MAPS USED:
DATE: 1976
ASCS
ORTHO USGS - NAF
NAPP
BLM
43-00259
CC: 43-00260
DD 82



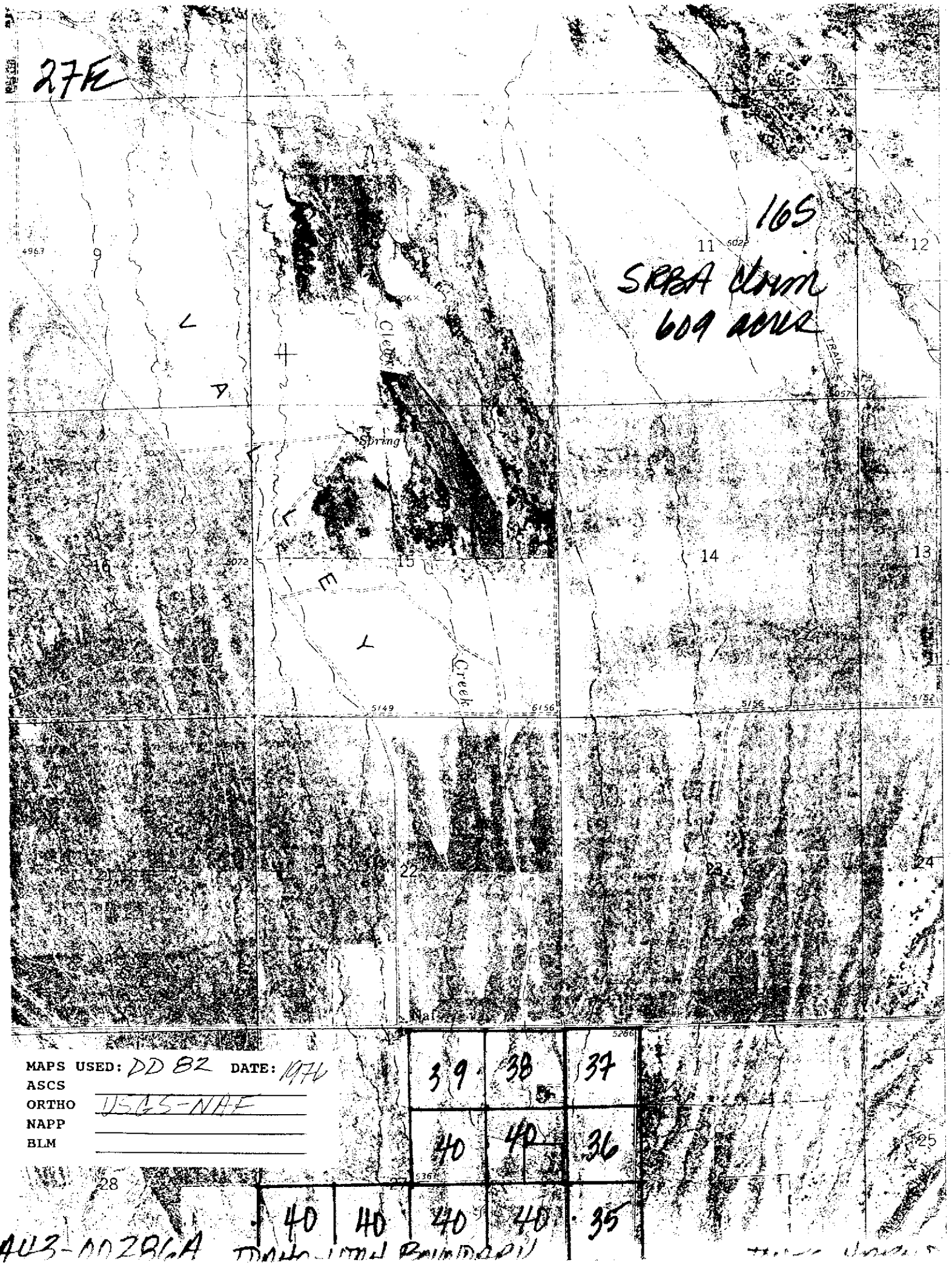
MAPS USED: DD 82 DATE: 1976
ASCS
ORTHO USGS NHF
NAPP
BLM

AU3-00260



DD 62

43-00260 ORIGINAL IN 43-11259


27E
16S
SRBA claim
609 acre
Spring
Creek
Creek
TRAIL
MAPS USED: DD 82 DATE: 1974
ASCS
ORTHO USGS-NAF
NAPP
BLM
39
38
37
40
40
36
40
40
40
40
35

10. Place of Use: Continued

Township	Range	Section	1/4 of 1/4		Lot	Use	Acres
16S	27E	26	SW	SW		IRR	34.0 ⅞ OUT
					Section Acres		142.0
		27	NE	NE		IRR	38.0
			NW	NE		IRR	39.0
			SW	NE		IRR	40.0
			SE	NE		IRR	40.0
			NE	SW	partial	IRR	40.0 30
			NW	SW	"	IRR	40.0 30
			SW	SW	UTAH	IRR	30.0 ⅞ OUT
			SE	SW	"	IRR	40.0 ⅞ OUT
			NE	SE	partial	IRR	40.0 30
			NW	SE	"	IRR	40.0 30
			SW	SE	UTAH	IRR	40.0 ⅞ OUT
			SE	SE	"	IRR	40.0 ⅞ OUT
					Section Acres		467.0
					Total Acres		609.0

11. Place of use in counties: CASSIA

12. Do you own the property listed above as place of use? YES

13. Other Water Rights Used:
A43-00084 & A43-00085

14. Remarks:
USE OF THIS DECREE HAS EXISTED FOR MANY YEARS ON THE LAND DESCRIBED; PRIOR TO THE DESIGNATION OF THE AREA AS A CRITICAL GROUNDWATER AREA. SOME OF THE LAND IDENTIFIED IS DELIVERED WATER FROM CLEAR CREEK FROM DIVERSIONS WITHIN THE STATE OF UTAH. THIS CLAIM IS BASED ON A PORTION OF DECREE 43-0286.

15. Basis of Claim: DECREED
Case Number:
Court :
Decree date: 10/18/1928

ALBION-IDAHO LAND CO. (Decree Plaintiff) vs JOBE ADAMS ET AL (Decree Defendant)

MICROFILMED
MAR 03 1993

WR5809NP
No. 43-00286

IDAHO DEPARTMENT OF WATER RESOURCES
WATER RIGHT PROFILE REPORT

DATE: 07/19/94
PAGE: 1

OWNER CODE	NAME & ADDRESS	PRIORITY DATE	WATER USE	USE PERIOD FROM	USE PERIOD TO	DIVERSION RATE	DIVERSION VOLUME
C	SETTLERS LAND & WATER CO.	11/23/1911	IRRIGATION	00-00	00-00	60.00 CFS	
				TOTAL DIVERSION:		60.00 CFS	

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

Place of use Legal Description for: IRRIGATION

			NE				NW				SW				SE				
			NENE	NWNE	SWNE	SENE	NENW	NWNW	SWNW	SENW	NESW	NWSW	SWSW	SESW	NESE	NWSE	SWSE	SESE	
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	Lt Ac	Lt Ac	Lt Ac	Lt Ac	SUM
16S	27E	2	01-I	02-I	I	I	03-I	04-I	I	I	I	I	I	I	I	I	I	I	
16S	27E	3					03-I	04-I	I	I	I	I	I	I	I	I	I	I	
16S	27E	4						04-I	I		I	I	I	I	I	I	I	I	
16S	27E	5	01-I	02-I	I	I	03-I			I	I			I	I	I	I	I	
16S	27E	8	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	
16S	27E	9	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	
16S	27E	10	I	I		I	I	I											
16S	27E	11	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	
16S	27E	12		I	I		I	I	I	I	I	I	I	I	I	I	I		
16S	27E	13		I	I		I	I	I	I	I	I	I	I		I	I	I	
16S	27E	14	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	
16S	27E	15												I					
16S	27E	16	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	
16S	27E	17	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	
16S	27E	21													I	I	I	I	
16S	27E	22	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	
16S	27E	23					I	I	I	I	I	I	I	I	I				
16S	27E	24	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	
16S	27E	25						I											
16S	27E	26	I	I			I	I											
16S	27E	27	I				I	I	I	I						I	I		

Pou County: CASSIA

Dates: App. Received: Priority Date: 11/23/1911
Proof Due Date: Proof Made Date:
Exam Made Date: Exam Sent to S.O.:
Licensed Date:

Misc: Water District Number: 43B Field Exam Fee:

Raft River Unit

43-00286A

T16S

DECREE pg 34
43-00286
Source: Clear Cr.
Amount: 60 CFS
P/D: D
POU:
Priority: 11-23-1911

Settlers Land & Water Company
1911-Nov. 23 00286 60 s.f.

To be diverted from Clear Creek for the irrigation of all of Sec. 2, S½ and NW¼, Sec. 3, S½ and NW¼, Sec. 4, E½, E½W½, NW¼NW¼, Sec. 5, all of Sec. 8, all of Sec. 9, N½NW¼, N½NE¼, SE¼NE¼, Sec. 10, all of Sec. 11, W½, W½NW¼, W½SE¼, NE¼SE¼, Sec. 12, W½NE¼, W½, W½SE¼, SE¼SE¼, Sec. 13, all of Sec. 14, S½SW¼, Sec. 15, all of Sec. 16, all of Sec. 17, SE¼, Sec. 21, all of Sec. 22, W½SE¼ and SE¼, Sec. 23, all of Sec. 24, N½, N½SE¼, E½NE¼, Sec. 27, N½NW¼, NE¼NE¼, Sec. 26, N½N½, Sec. 25, all in Twp. 16 N., R. 27 E.B.M. DECREE FILE: 43-A-1 (2)

MAPS USED: DD 82 DATE: 1976
ASCS
ORTHO USGS-NAE
NAPP
BLM

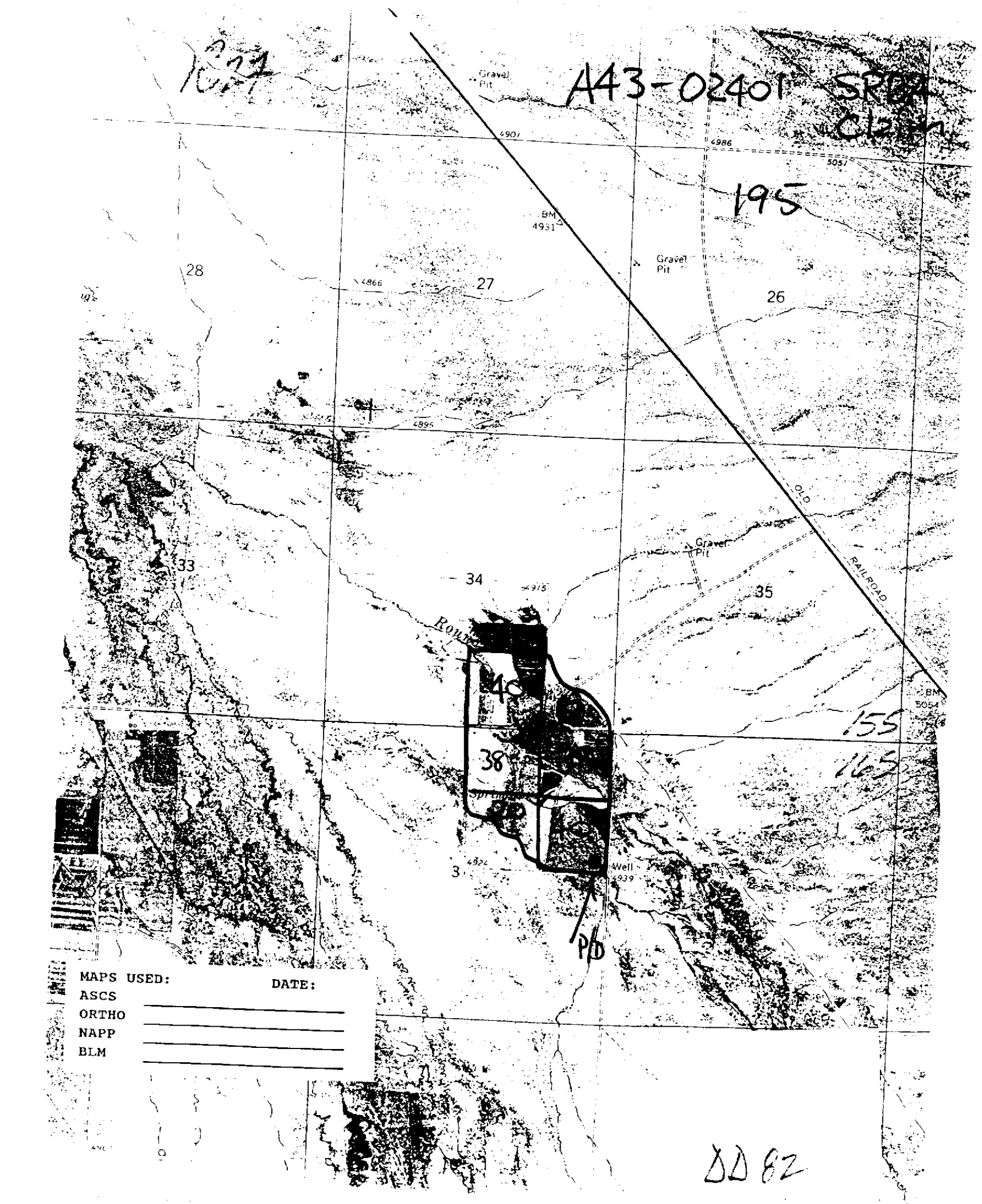
MAPS USED: DD 83 DATE: 1976
ASCS
ORTHO USGS-STREVELL SW
NAPP
BLM

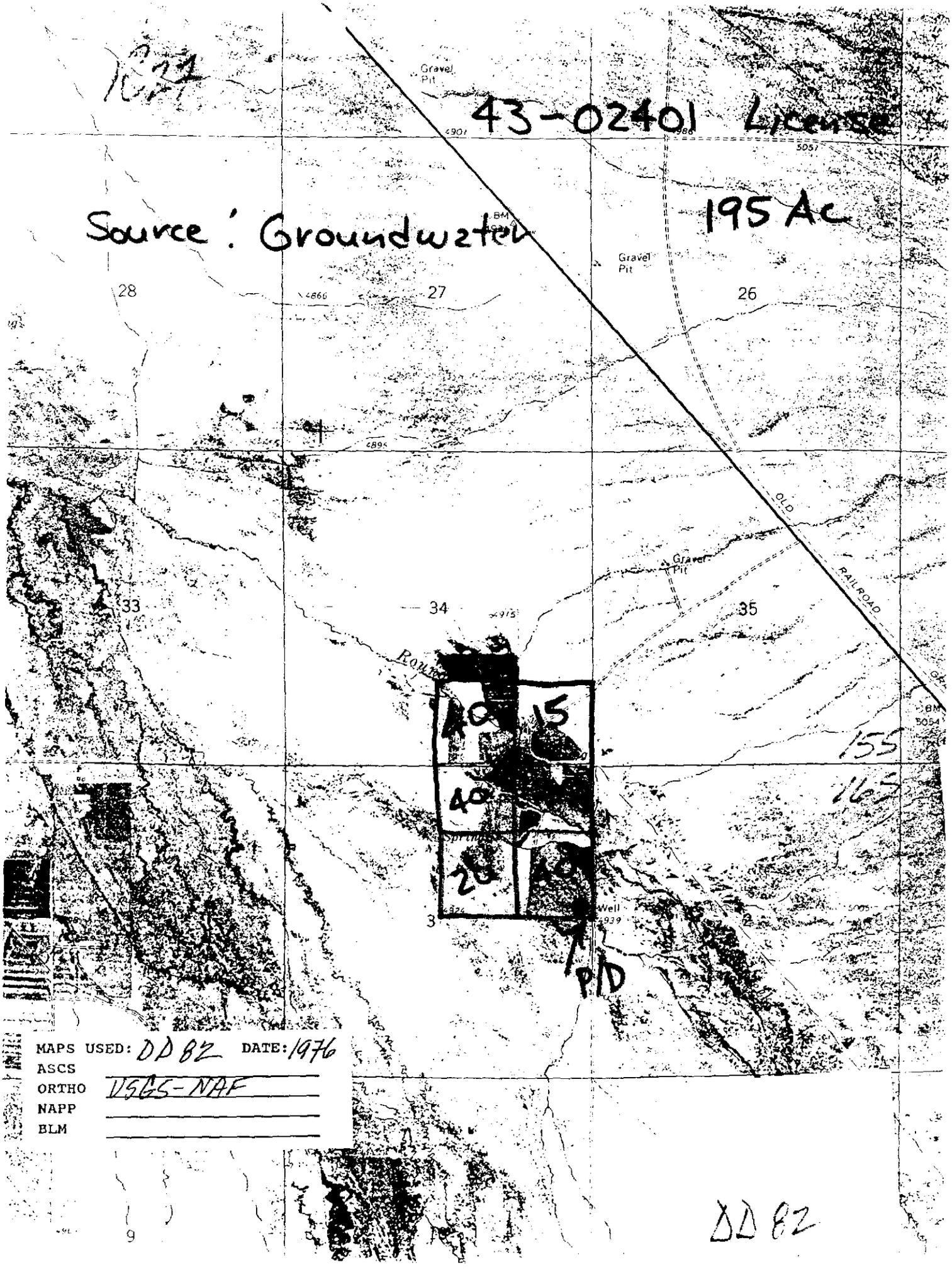
R27E R28E

Produced by the Geo... Survey
in cooperation wit... ation Service

43-0102B6A

JONES HAROLD


A43-02401 SR84
195
Gravel Pit
4901
4986
5051
BM 4931
28
27
26
4866
4895
Gravel Pit
OLD RAILROAD
33
34
35
4915
Gravel Pit
BM 5054
155
165
40
38
3
4824
Well 4939
P/D
MAPS USED:
DATE:
ASCS
ORTHO
NAPP
BLM
DD 82


43-02401 License
Source: Groundwater
195 Ac
Gravel Pit
28
27
26
33
34
35
OLD RAILROAD
40
15
40
20
40
155
165
Well
3
2
P/D
MAPS USED: DD 82 DATE: 1976
ASCS
ORTHO USGS-NAF
NAPP
BLM
DD 82
9

Form 23

STATE OF IDAHO

DEPARTMENT OF RECLAMATION

BOISE, IDAHO

REPORT OF ENGINEER

Permit No. [illegible]

This proof is for [illegible] In Water District No.

1. Name of applicant [illegible] J. J. Medley, III

2. Source of water supply: Subterranean flow [illegible]

3. Location of point of diversion: Is in the [illegible] SE¼NE¼ of Section 3

T. 16 S., R. 27 E. B. M. County of Cassia

4. Describe works as they exist, giving dimensions and capacities of same: 32" x 20"

h = 20' Lift = 160' (approx.)

30 hp. G.E. Motor #KA5J 22.9015

Layne Bowler Turbine #20426

10" x 8" Nibbinay pipe to Ditch with open latches

[illegible] fields by gravity

5. Water is used for: Irrigation and domestic purposes

6. State whether or not water has been turned into works of diversion: Yes

7. List legal subdivisions of lands to be irrigated. If proof is for beneficial use, give exact number of acres under cultivation in each forty-acre tract. (Describe manner and place of use if other than irrigation):

SW¼ NW¼, E½NW¼ Section [illegible], Township 15 South, Range 27 East, B. M. - 260 Acres

NE¼ of Section 3, Township 16 South, Range 27 East, B. M. - 160 Acres

(Submit map on attached plat, showing location and details of above description.)

8. What large stream would the water here appropriated finally reach?

Remarks:

[illegible] application.

This examination was made on the [illegible] day of [illegible], 19[illegible]

(Signed) [illegible] Examiner.

State of Idaho
License and Certificate of Water Right

Water License No. G-24589

Water District No. _____

Amount 1.74 c.f.s.

Priority November 30, 1953

THIS IS TO CERTIFY that I. J. NEDOO, III - Assignee - HAROLD A. JONES of Naf, Idaho, made application for a permit to appropriate the public waters of the State of Idaho, dated November 30, 19 53; that Permit No. G-24589 was issued under said application; that Certificate of Completion of works, with a carrying capacity of 1.74 second feet, was issued thereunder on March 25, 19 65, showing that said works were completed on the 28th day of November, 19 58; and that on the 28th day of November, 1958,

I. J. Nedoo, III - Assignee HAROLD A. JONES of Naf, State of Idaho, made proof to the satisfaction of the State Reclamation Engineer of Idaho, of the right to use the waters of a well, a tributary of subterranean flow, for the purpose of irrigation & domestic, under Use Permit No. G-24589 of the Department of Reclamation and that said right to the use of said waters has been perfected in accordance with the laws of Idaho, and is hereby confirmed by the State Reclamation Engineer of Idaho and entered of record in Volume 13 of Licenses at page 8115, on the 25 day of March, 19 65;

The right hereby confirmed dates from November 30, 19 53;

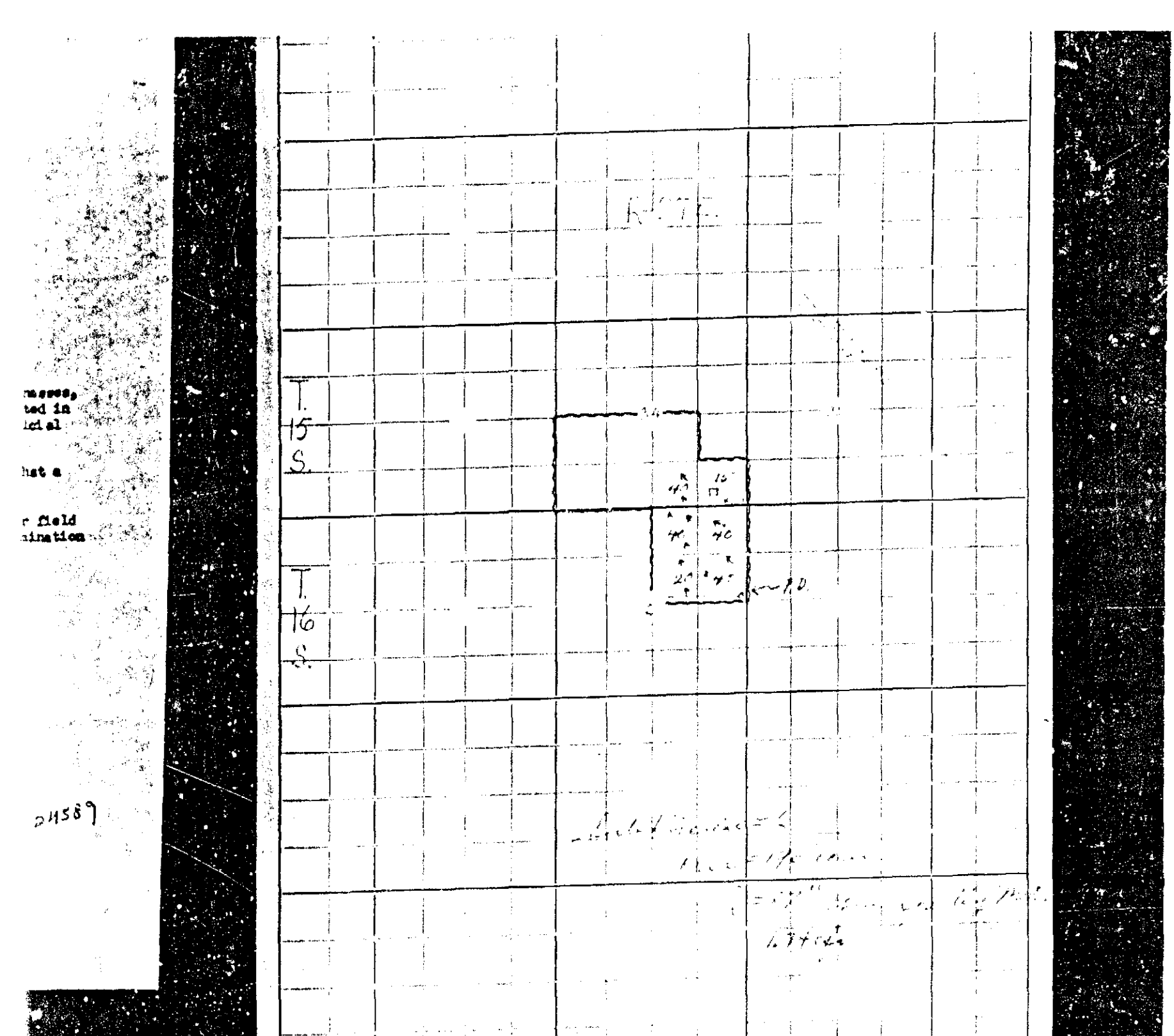
The Point of Diversion is located

In the SE ¼ NE ¼ Sec. 3, Tp. 16 S, R. 27 E, B. M. Cassia County

That the amount of water to which such right is entitled and hereby confirmed, for the purposes aforesaid, is limited to an amount actually needed and beneficially used for said purposes, and shall not exceed 1.74 cubic feet per second.

Description and location of use:

Twp.	Range	Sec.	Forty-acre Tract	No. Acres Described in Permit	No. Acres Actually Irrigated
15 S	27 E	34	SE¼ SE¼	40	15
			SW¼ SE¼	40	40
16 S	27 E	3	N½ NE¼	80	80
			SE¼ NE¼	40	40
			SW¼ NE¼	40	20
			Total number of acres to be irrigated:		195


T.
15
S.
T.
16
S.

PUMP TEST AND SYSTEM INSPECTION
Bonneville Power Administration
Raft River Electric, Coop.

Name.....:Ray Jones, Home	Inspection #...:RRE269
Address.....:	Inspection Date:08/07/92
City and State.:Malta ID	BPA Area/Dist..:IDAHO FALLS
Utility.....:Raft River Electric	# Irrig Acres..: 120
Account #.....: 3501	Crop Type(s)...:alf.spgr.grass
Inspector(s)...:R. WELLS	No. of Laterals: 3
Pumps in System: 2	Analysis Update:09/26/92

>This System IS ELIGIBLE for BPA Cost Sharing under the KW/GPM option.

****

NOTE!! This report documents irrigation system performance and may be used to evaluate retrofit measures. Retrofits resulting in energy conservation may be eligible for Cost Sharing under Bonneville Power Administration's Waterwise Program. Enclosed redesign information suggests changes in system performance; Irrigators should CRITICALLY REVIEW THESE RECOMMENDATIONS!

NOTES ON SYSTEM LAYOUT AS TESTED:

This is a pretty shot system pumping system driving a pretty good distribution system.

The well has the potential for cascading water severe enough to cause air entrainment. The static level is at 9 feet and the pumping level is at 65 plus feet; the well is located near a natural stream.

The capacity of this well is 900 gpm or less. At the time of this test, the capacity is less. To keep from exceeding the shaft and motor capacity, I recommend a well booster arrangement. When the water supply at this location improves after the current drought, the well may be used to run 2 or 3 lines with out the booster providing a bypass is provided around the current booster position.

I don't recommend using the present booster to provide the small boost suggested. It is too big.

In any case, both motors need service. If you are lucky, you will be able to just dip and bake. Make sure to reattach conduits to the motors so that they will be yarmit proof! Install a screen at the base of the well motor.

----------R Wells 8/12/92

UPDATED 09/26/92 INITIAL PUMP TEST FORM

Bonneville Power Administration

Raft River Electric. Coop. Page 2A

Inspection #...:RRE269

Ray Jones, Home

A. # of Pumps in System 2 Pump # 1

MAIN_<WELL BOOSTER_____ SERIES_<W/BSTR PARALLEL_____

B. NAMEPLATE MOTOR DATA

1.	Make.....:	General Electric
2.	Frame #....:	365P
3.	Rated HP...:	30
4.	Rated Volts:	440
5.	Rated Amps.:	37.1
6.	RPM.....:	1770
7.	Meter #....:	3501
8.	U/T Frame?.:	U

C. PUMP AND WATER SUPPLY DATA

1.	Make.....:	Layne & Bowler
a	Centrifugal:	
b	Turbine-Sub:	Vertiline
2.	Model #....:	8?
3.	Hd/Serial#.:	sn20426
4.	Rated Head.:	? ft.
5.	Rated Flow.:	600? gpm
6.	Implr Dia..:	? in.
7.	Intake Dia.:	in.
8.	Column Len.:	150+10 ft.
9.	# of Stages:	3? #
10.	Col.Tub.Sft:	8x2.0x1+3/16
11.	Well Depth.:	? ft.
12.	Casing Dia.:	? in.
13.	Disch.Dia..:	? in.
14.	Records....:	?

D. ELECTRICAL POWER INPUT DATA

		(One Motor)	
1.	Disc Revolutions...:	10	rev
2.	Meter Constant Kh..:	57.6	w.sec/r
3.	CTR.....:	1	X
4.	PTR/Multiplier.....:	1	X
5.	Time.....:	38.60	sec

kW Metered= 53.7 kWe (Utility Meter) <FORCE?: NO

		1-2	1-3	3-2	Average
6.	Line Voltage.....:	476.00	475.00	475.00	LV AVE.= 475.3
7.	Amperage.....:	33.00	35.00	33.00	LA AVE.= 33.7
8.	Power Factor..(%)..:	83.00	85.00	82.00	PF AVE.= 83.3

kW Measured= 23.1 kWe (Pump Panel)

E. MEASURED FLOW AND PRESSURE

1.	Measurement Device.:	Collins 2 pt	
2.	Pipe Inside Diam...:	7.80	in.
3.	Average Velocity...:	3.25	fps
4.	Flow Reading.....:	484	gpm
5.	Discharge Pressure.:	-3.0	psi

F. WATER LEVEL AND FRICTION LOSSES

1.	Pumping Lift.....:	65.0	
2.	Suction Head.....:		ft.
3.	Static Water .....:	?	ft.
4.	Water Level Fluct..:	?	ft.
5.	Misc Frict Losses..:	1.73	ft.

G. TESTED PUMPING PLANT CONDITIONS

1.	Total Dynamic Head.:	59.8	ft.
2.	Flow... MI= 54	484	gpm
3.	Water Horsepower...:	7.3	WHP
4.	Panel Horsepower...:	23.1	BHP

COMMENTS

- Motor Supply Voltage .... OK
- Motor Current Within Rating
- Power Factor Level is ... OK
- Voltage Balance In Tolerance
- Current Balance In Tolerance
- Power Factor Balance is . OK
- Est. Full-Load Motor Eff 89.2%
- Est.Isolated Pump Eff is 27.7%
- Est. of Full BHP Load is 92.1%

NOTES

- > 50 MI = One CFS, in ID
- > (Motor Shaft OUTPUT is BHP) <
- > (Pump Shaft INPUT is BHP) <
- > (Pump Water OUTPUT is WHP) <
- > (Isolated Eff.is Curve Eff) <
- > (MTR LOAD is < SYSTEM LOAD) <
- > Little or No Air in Discharge.

A moment of silence, please!

Does Mtr kW = Tot.Load? /ES

Total Sys. BHP Reqmd = 71.0

UPDATED 09/26/92

INITIAL PUMP TEST FORM
Bonneville Power Administration
Raft River Electric, Coop.

Inspection #...:RRE269
Ray Jones, Home

A. # of Pumps in System 2 — Pump # 2

MAIN_____ BOOSTER_<xxx SERIES_<w/well PARALLEL_____

B. NAMEPLATE MOTOR DATA

1.	Make.....:	Marathon
2.	Frame #....:	F286JP
3.	Rated HP...:	40
4.	Rated Volts:	460
5.	Rated Amps.:	48
6.	RPM.....:	3500
7.	Meter #....:	3501
8.	U/T Frame?.:	T

C. PUMP AND WATER SUPPLY DATA

1.	Make.....:	Berkley
a	Centrifugal:	BM#51637
b	Turbine-Sub:	?
2.	Model #....:	
3.	Hd/Serial#.:	sn7743878
4.	Rated Head.:	200 ft.
5.	Rated Flow.:	600 gpm
6.	Impl'r Dia..:	8.25 in.
7.	Intake Dia.:	5 in.
8.	Column Len.:	ft.
9.	# of Stages:	#
10.	Col.Tub.Sft:	
11.	Well Depth.:	ft.
12.	Casing Dia.:	in.
13.	Disch.Dia..:	4 in.
14.	Records....:	GJ Vertiline

D. ELECTRICAL POWER INPUT DATA (Two Motor)

1.	Disc Revolutions...:	10	rev
2.	Meter Constant Kh..:	57.6	w.sec/r
3.	CTR.....:	1	X
4.	PTR/Multiplier.....:	1	X
5.	Time.....:	38.60	sec

kW Metered= 53.7 kWe (Utility Meter) <FORCE?: NO

		1-2	1-3	3-2	Average
6.	Line Voltage.....:	476.00	475.00	475.00	LV AVE.= 475.3
7.	Amperage.....:	46.00	43.00	44.00	LA AVE.= 44.3
8.	Power Factor..(%)..:	82.00	85.00	83.00	PF AVE.= 83.3

kW Measured= 30.4 kWe (Pump Panel)

E. MEASURED FLOW AND PRESSURE

1.	Measurement Device.:	Collins 2 pt	
2.	Pipe Inside Diam...:	7.80	in.
3.	Average Velocity...:	3.25	fps
4.	Flow Reading.....:	484	gpm
5.	Discharge Pressure.:	44.0	psi

F. WATER LEVEL AND FRICTION LOSSES

1.	Pumping Lift.....:	-1.0	
2.	Suction Head.....:	-6.9	ft.
3.	Static Water .....:	?	ft.
4.	Water Level Fluct..:	?	ft.
5.	Misc Frict Losses..:	0.00	ft.

G. TESTED PUMPING PLANT CONDITIONS

1.	Total Dynamic Head.:	107.6	ft.
2.	Flow... MI= 54	484	gpm
3.	Water Horsepower...:	13.2	WHP
4.	Panel Horsepower...:	40.8	BHP

COMMENTS

Motor Supply Voltage .... OK
Motor Current Within Rating
Power Factor Level is ... OK
Voltage Balance In Tolerance
Current Balance In Tolerance
Power Factor Balance is . OK
Est. Full-Load Motor Eff 89.5%
Est.Isolated Pump Eff is 36.1%
Est. of Full SHP Load is 91.3%

NOTES

> 50 MI = One CFS, in ID
> (Motor Shaft OUTPUT is SHP) <
> (Pump Shaft INPUT is BHP) <
> (Pump Water OUTPUT is WHP) <
> (Isolated Eff.is Curve Eff) <
> (MTR LOAD is < SYSTEM LOAD)
> Little or No Air in Discharge

A race horse pump. See Curve.
Vacuum leak at suction.
Pump is cavitating.
Does Mtr kW = Tot.Load? YES
Total Hrs. PMP Ownd

SET SYSTEM_ 120 ac|Lat#_ 3 Inspection #...:RRE269
CENTER PIVOT_____ ac|Pvt#_____ Ray Jones, Home

H. CONTROL FIELD ELEVATIONS AND RUNOFF ASSESMENT -- (See Sketch)

1.	Highest Irrigated Field Elevation Under System.....:	4351 ft.
2.	Lowest Irrigated Field Elevation Under System.....:	4338 ft.
3.	Elevation of critical sprinkler as tested.....:	4351 ft.
4.	Potential critical sprinkler elevation.....:	4351 ft.
5.	Is Any Flow or Pressure Control Recommended?	NO.
6.	Does significant runoff occur now?	NO.
7.	After retrofit, will runoff be a problem?	NO, Not Expected
8.	Can Management Practices Decrease Runoff?	No, FLAT FIELD

I. RECOMMENDED MINIMUM PRESSURE AT CRITICAL POINT -- @ Lat.# L-3

1.	Low Pressure Sprinkler Recommendation.....:	45 psi, at nozzle
2.	Flow or Pressure control loss (2-5psi).....:	0 psi, at device
3.	Required Operating Pressure on Critical Lateral ...:	45 psi

J. SYSTEM LATERAL DATA and CRITICAL LATERAL ACCESSMENT - (From Page 4B)

1.	System Noz. Discharge Assumming No Wear and Uniform Nozzles:		480
2.	Total System Leak and Nozzle Wear Losses...:	4 gpm, or	0
3.	Total Acreage of Effective Coverage AFTER RETROFIT..(acres):		120
4.	Total Acreage of Pivot Coverage AFTER RETROFIT.....(acres):		0
5.	Pivot Discharge not in Set System Leak Analysis.....(gpm):		0
6.	Average Gross Pivot Applied Capacity (0.371 in/day target).:		0.000

K. CRITICAL SPRINKLER PRESSURES

1.	First Sprinkler Pressure.....:	37.0 psi<@Lat L-3
2.	Last Sprinkler Pressure.....:	14.0 psi
3.	LOWEST/AVERAGE/OTHER PRESSURE.....:	18.0 psi
4.	Mainline Pressure Adjustment.....:	19.8 psi <Pressure will rise.
5.	Elevation Adjustment.....:	0.0 psi <See Sketch
6.	ADJUSTED CRITICAL PRESSURE.....:	37.8 psi

L. POTENTIAL HEAD SAVINGS BEFORE MODIFICATIONS -- (See Page 4A)

		psi	feet
1.	ADJUSTED CRITICAL PRESSURE.....:	37.8	87.3
2.	REQUIRED OPERATING PRESSURE.....:	45.0	104.0
	---(NOTE! Negative number indicates increased pressure suggested.)---		
3.	POTENTIAL TOTAL HEAD SAVINGS.....:	-7.3	-16.7

TESTED INSTANTANEOUS NOZZLE APPLICATION RATES under SYS.LATERALS(in/hr):

	--L1--	--L2--	--L3--	--L4--	--L5--	--L6--	--L7--	--L8--
Beg.Noz	0.261	0.263	0.274					
End.Noz	0.175	0.174	0.168					
	--L9--	-L10-	-L11-	-L12-	-L13-	-L14-	-L15-	-L16-
Beg.Noz								
End.Noz								
	-L17-	-L18-	-L19-	-L20-				
Beg.Noz					Gross Set System Delivery Cap.			
End.Noz					is Increased: 0.210 (gpm)			

UPDATE09/26/92 LATERAL FLOW CALCULATIONS AND ADJUSTMENTS

Bonneville Power Administration

Raft River Electric, Coop.

Nozzle Spacing: 40 * 60

Inspection #...:RRE269

Ray Jones, Home

This page proportions set system flow based on nozzle size and pressure.

Proposed Sch.1: 11.5 hrs.set, Return Time: 7.0 days, Req.Qnoz: 6.07

Proposed Sch.2: 23.5 hrs.set, Return Time: 14.0 days, Req.Qnoz: 5.94

*-(Flow Control="F"; Brass ="B")

Lateral Number #	V	Nozzle Size (in)	Nozzle Number #	Beg. Press (psi)		End Press (psi)	Large Leaks (gpm)	Nozzle Disch. q=gpm	Lateral Disch. Q=gpm	Adj. Lat.Q (gpm)
1 Lateral	F	5	32	38	*	17		5.00	160	161
2 Lateral	F	5	32	39	*	17		5.00	160	161
3 Lateral	F	5	32	37	*	14		5.00	160	161
4 Lateral	B				*			0.00	0	0
5 Lateral	B				*			0.00	0	0
6 Lateral	B				*			0.00	0	0
7 Lateral	B				*			0.00	0	0
8 Lateral	B				*			0.00	0	0
9 Lateral	B				*			0.00	0	0
10 Lateral	B				*			0.00	0	0
11 Lateral	B				*			0.00	0	0
12 Lateral	B				*			0.00	0	0
13 Lateral	B				*			0.00	0	0
14 Lateral	B				*			0.00	0	0
15 Lateral	B				*			0.00	0	0
16 Lateral	B				*			0.00	0	0
17 Lateral	B				*			0.00	0	0
18 Lateral	B				*			0.00	0	0

MAINLINE RETROFIT OPTIONS
Bonneville Power Administration
UPDATED 09/26/92

Inspection #...:RRE269
Ray Jones, Home

M. MAINLINE CALCULATION PROCEDURES:

1. Calculate the velocity in each mainline section with laterals positioned for maximum head conditions.
2. Calculate friction loss in each mainline section.
3. Resize (or size for parallel pipeline) all mainline sections with a velocity greater than 7 fps to reduce velocity to less than 5 fps.
4. Calculate the effect these changes will have on total head.
5. Use the PROPOSED flow for the retrofit condition to determine eligibility.
6. Check calculations with independent analysis especially involving parallel, branching, or loop pipe systems (see HELP).

(In Critical Path?, "?" = "X")

Mainline Section Number		Length (ft)	Inside Dia (in)	C* Value	Flow (gpm)	Velocity (fps)	Hf/100 (ft)	Total Frictn (ft)	Head Redctn (ft)
1	Current>?	1320	8.00	150	322	2.06	0.18	2.31	
	Retrofit								2.3
2	Current>?	1320	6.00	150	161	1.83	0.20	2.60	
	Retrofit								2.6
3	Current>?	660	6.00	150	161	1.83	0.20	1.30	
	Retrofit								1.3
4	Current>?	660	4.00	150	161	4.11	1.41	9.33	
	Retrofit								9.3
5	Current>?								
	Retrofit								0.0
6	Current>?								
	Retrofit								0.0
7	Current>?								
	Retrofit								0.0
8	Current>?								
	Retrofit								0.0
9	Current>?								
	Retrofit								0.0
10	Current>?								
	Retrofit								0.0

SUM of POTENTIAL ML HEAD REDUCTION (marked with "X" over "?" >>>| 0.0

*Steel.: C=100 *CTE Steel.: C=090 *Asbestos Cement.: C=130
Alum..: C=120 >> Hf/100=1054(gpm^1.852)/(C^1.852*dia^4.8655) <<
*PVC...: C=150 *Brushed Zn: C=130 *Polypropolyene..: C=140
*Other.: See hydraulic handbook

Ray Jones, Home Inspection #...:RRE269

N. POTENTIAL PUMPING HEAD REDUCTION (by item) HEAD SAVINGS

1. Install low pressure sprinklers or nozzles = -16.7 ft.
2. Retrofit high energy loss pipe & fittings .:
   a. Mainline Friction Loss Savings = 0.0 ft.
   b. Fittings Loss Saving (show work)= 0.0 ft.
   c. Partially Closed Valve Savings = ? ft.
   d. TOTAL (a+b+c) ..... ----> = 0.0 ft. .
3. Potential System Head Requirement Reduction (1+2d) = -16.7 ft.

O. PUMPING PLANT TESTED AND PROPOSED PERFORMANCE SUMMARY

1.Existing: Pump #	TDH	GPM (Add'l Sys.EHP=)	WHP	EHP 0.0	SHP	W-W EFF	(notes)
1	59.8	484	7.3	31.0	27.6	23.6	
2	107.6	484	13.2	40.8	36.5	32.3	
3	0.0	0	0.0	0.0	0.0	0.0	
4	0.0	0	0.0	0.0	0.0	0.0	
5	0.0	0	0.0	0.0	0.0	0.0	
6	0.0	0	0.0	0.0	0.0	0.0	
7	0.0	0	0.0	0.0	0.0	0.0	
8	0.0	0	0.0	0.0	0.0	0.0	
TOTAL	167.4	484	20.5	71.7	64.1	28.5%	<< System
		484 gal/min=		54 MI's in ID			

2. Proposed Pump #	TDH	GPM	WHP	E S T I M A T E D EHP	SHP	W-W EFF	(notes)
1	177.0	650	29.1	43.4	38.7	67.0	
2	40.0	650	6.6	9.2	8.3	71.0	
3	0.0	0	0.0	0.0	0.0	0.0	
4	0.0	0	0.0	0.0	0.0	0.0	
5	0.0	0	0.0	0.0	0.0	0.0	
6	0.0	0	0.0	0.0	0.0	0.0	
7	0.0	0	0.0	0.0	0.0	0.0	
8	0.0	0	0.0	0.0	0.0	0.0	
TOTAL	217.0	650	35.6	52.6 sys	47.0	67.7%	<< System

0.0 << Alternate System TDH when system changes orctate.
>Pg 3 >> 952 gpm or 106 MI's <<Recommended Flow for Peak IR.
217 = 45*1.31+12*2.31+75+10 = new tdh req

P. SYSTEM OPERATING and PERFORMANCE INFORMATION
1. Average Pumping Efficiency (existing) = (WHPe/EHPe) * 100 = 28.5%
2. Average Pumping Efficiency (proposed) = (WHPp/EHPp) * 100 = 67.7%
3. Variations in existing (measured) application rates on Pg.3 and 4b.
4. Ave. Operating Hours per Year (based on kWh usage)= 1712 Av.Hrs/Yr
5. Average Pumped In.per AcreYear (based on kWh use) = 17.0 Acre Ins.
6. Estimated Resulting Increase in Annual Power Bill =$ 0 /Yr.
7. Calc'd Energy Cost per Acre Ft. of Tested System =$ 24.52 /Acre Ft.
8. Estimated Energy Cost per Acre Ft. of New System =$ 13.42 /Acre Ft.
9. Total (Ave) Energy Cost per Acre of Tested System =$ 34.93 /Acre

Ray Jones, Home Inspection #....:RRE269

Q. RECENT HISTORICAL kWh USAGE AND RATE DATA

1. Annual Metered kWh usage

	N/A	Year	kWh	kW
a.		1991	71472	56
b.		1990	125472	56
c.		1989	107952	56
d.		1988	104400	56
e.	x	1987	15439	56
f.		Average	102324	kWh/Yr

2. Rate Data

a.	HP Charge/month....:	3.72	dollars
b.	kWh/hp @ no Charge.:	0.00	
c.	Fixed Cost/kWh.....:	2.20	cents
d.	HP Charge/yr.....:	8.95	dollars
e.	Total Nameplate HP.:	70	hp/meter
f.	Average cost/kWh...:	4.08	cents

R. TESTED SYSTEM PERFORMANCE COMPARISON TO PROPOSED

		a. Existing	b. Proposed
1.	Total Head (01 and 02)	167.4 FTe	217.0 FTp
2.	Flow (01 and 02)	484 GPMe	650 GPMp
3.	System Energy Efficiency	28.5 %e	67.7 %p
4.	Total Input Kilowatts	53.5 kWe	39.2 kWp
5.	System Elec.Horsepower	71.7 EHPe	52.6 EHPp
6.	MOTOR SHAFT HORSEPOWER	64.1 SHPe	47.0 SHPp

(Pumping Plant Load is considered Total System kW Load.)

S. ENERGY SAVINGS, ENERGY CAP AND MINIMUM GUARANTEE

1. Estimated kWh Saved Annually and Estimated Energy Cap:

	>Est.Energy Savings by! >Corrective Measure...! >Using Annual kWh Ave.!	ESTIMATED Measure kWh Savings	Eligible Cost Share? (Y/N)	Cost Share Energy Cap ($)
a.	Low Pressure Savings (N1/R1a)*Avg kWh/Yr =	0	Yes	$0
b.	Mainline Savings (N2a/R1a)*Avg kWh/Yr=	0	No	$0
c.	Fittings Savings (N2b/R1a)*Avg kWh/Yr=	0	No	$0
d.	Flow Savings (Flow diff)*kWh/GPMe=	0	No	$0
e.	Efficiency Savings (Eff diff)*kWh/EFFp =	46444	Yes	$10,218
f.	TOTAL POTENTIAL kWh	46444	SAVED (kWh Cap)	$10,218 kW/gpm SAVINGS
g.	Net kWh savings (using kW option)	= 27278 kWh	or	24.7%
h.	Alternate savings (kW/GPM option)	= 46444 kWh	or	45.4% < < <

2. MINIMUM GUARANTEE = $15 * (Installed Nameplate HP) =
= $15 * (70) = 1050 dollars

-(To be ELIGIBLE, cost share potential must be greater than GUARANTEE.)-
NOTE:Annual variations in pumping requirments will alter actual savings.
Consider other benefits and cost while evaluating recommended retrofits.
--- Crop value is not included here in these "energy cost estimates". ---
>The 5 year present worth of proposed energy savings at 10%:is *

PT12392.2-rdw
ver 07/12/92

POST PUMP TEST FORM

Bonneville Power Administration

Raft River Electric, Coop.

-Irrigator Name:Ray Jones, Home
-Analysis Date.:09/26/92
-Irrig Acres...: 120 State > ID
A. # of Pumps in System 2

Inspection #...:RRE270pt
Inspection Date:09/26/92
Old Inspection#:RRE269
Pump # 1

MAIN_<well> BOOSTER_____ SERIES_<w/bstr PARALLEL_____
>---(See other pumps as indicated.)---<

B. NAMEPLATE MOTOR DATA

1.	Make.....:	General Electric
2.	Frame #....:	365P
3.	Rated HP...:	30
4.	Rated Volts:	440
5.	Rated Amps.:	37.1
6.	RPM.....:	1760
7.	Meter #....:	3501
8.	U/T Frame?.:	u

C. PUMP AND WATER SUPPLY DATA

1.	Make.....:	L & B Head
a	Centrifugal:	
b	Turbine-Sub:	Vertiline
2.	Model #....:	10RM
3.	Hd./Serial#:	sn20426
4.	Rated Head.:	172 ft.
5.	Rated Flow.:	650 gpm
6.	Impl'r Dia..:	full
7.	Intake Dia.:	in.
8.	Column Len.:	150 ft.
9.	# of Stages:	4
10.	Col.Tub.Sft:	8x2x1+3/16
11.	Well Depth.:	? ft.
12.	Casing Dia.:	16 in.
13.	Disch.Dia..:	8 in.
14.	Records....:	SJ Vertiline

D. ELECTRICAL POWER INPUT DATA

(one motor)

1.	Disc Revolutions...:	10	rev	
2.	Meter Constant Kh..:	57.6	w.sec/r	
3.	CTR.....:	1	X	
4.	PTR/Multiplier.....:	1	X	
5.	Time.....:	39.72	sec	

kW Metered= 52.2 kWe (Utility Meter) <FORCE?: No

		1-2	1-3	2-3	Average
6.	Line Voltage.....:	476.0	475.0	475.0	LV AVE.= 475.3 Volts
7.	Amperage.....:	39.0	41.0	41.0	LA AVE.= 40.3 Amps
8.	Power Factor..(%)..:	88.0	87.0	89.0	PF AVE.= 88.0 % Lag

kW Measured= 29.2 kWe (Pump Panel)

E. MEASURED FLOW AND PRESSURE DATA

1.	Measurement Device.:	Collins	
2.	Pipe Inside Diam...:	7.80	in.
3.	Average Velocity...:	4.95	fps
4.	Flow Reading.....:	738	gpm
5.	Discharge Pressure.:	16.0	psi

^^^^

F. WATER LEVEL AND FRICTION LOSSES

1.	Pumping Lift.....:	101.0	
2.	Suction Head.....:		ft.
3.	Static Water.....:	9.0	ft.
4.	Water Level Fluct..:	?	ft.
5.	Misc Frict Losses..:	3.5	ft.

G. TESTED PUMPING PLANT CONDITIONS

1.	Total Dynamic Head.:	141.5	ft.
2.	Flow... MI= 82	738	gpm
3.	Water Horsepower...:	26.3	WHP
4.	Input Horsepower...:	39.2	EHP
5.	Est.Motor Shaft HP.:	34.7	SHP
6.	Pumping Plant Eff..:	67.3	%

COMMENTS

Average Supply Voltage .. OK
Motor Current Within Rating
Voltage Balance In Tolerance
Current Balance In Tolerance
Power Factor Balance is . OK
Power Factor Level is ... OK
Est. Full Load Motor Eff 98.5%
Est. Pump (w/o motor)Eff 78.9%
Est. of Full BHP Load is 115.5%

NOTES

> 50 MI = One CFS. in ID <
> (Motor Shaft OUTPUT is SHP) <
> (Pump Shaft INPUT is BHP) <
> (Pump Water OUTPUT is WHP) <
> (Pump Eff.is Est.Curve Eff) <
> (MTR LOAD is < SYSTEM LOAD) <
> Little or No Air in Discharge.

Does Mtr kW = Tot.Load? Yes
Total Sys. EHP Demand = 39.2
SHP - (Sft.Loss) = BHP = 33.4
Est. Total Sft HP Loss = 1.29

Raft River Electric, Coop.

-Irrigator Name:Ray Jones, Home | Inspection #...:RRE270pt
-Analysis Date.:09/26/92 | Inspection Date:09/26/92
-Irrig Acres...: 0 State > ID | Old Inspection#:RRE269
A. # of Pumps in System 2 | Pump # 2

MAIN_____ BOOSTER_<XXXXX SERIES_<w/well PARALLEL_____
>---(See Page PT2a and other pumps as indicated.)---<

B. NAMEPLATE MOTOR DATA

1.	Make.....:	Marathon
2.	Frame #....:	286JP
3.	Rated HP...:	40
4.	Rated Volts:	460
5.	Rated Amps.:	48
6.	RPM.....:	3500
7.	Meter #....:	3501
8.	U/T Frame?.:	T

D. ELECTRICAL POWER INPUT DATA (one motor)

1.	Disc Revolutions...:	10	rev
2.	Meter Constant Kh..:	57.6	w.sec/r
3.	CTR.....:	1	X
4.	PTR/Multiplier.....:	1	X
5.	Time.....:	39.72	sec

kW Metered= 52.2 kWe (Utility Meter)

		1-2	1-3	2-3	
6.	Line Voltage.....:	476.0	475.0	475.0	LV AVE.= 475.3 Volts
7.	Amperage.....:	31.9	30.3	31.5	LA AVE.= 31.2 Amps
8.	Power Factor..(%)..:	89.0	91.0	88.0	PF AVE.= 89.3 % Lag

kW Measured= 23.0 kWe (Pump Panel)

E. MEASURED FLOW AND PRESSURE DATA

1.	Measurement Device.:	Collins	
2.	Pipe Inside Diam...:	7.80	in.
3.	Average Velocity...:	4.95	fps
4.	Flow Reading.....:	738	gpm
5.	Discharge Pressure.:	50.0	psi

F. WATER LEVEL AND FRICTION LOSSES

1.	Pumping Lift.....:	-1.0	
2.	Suction Head.....:	37.0	ft.
3.	Static Water.....:	?	ft.
4.	Water Level Fluct..:	?	ft.
5.	Misc Frict Losses..:	0.0	ft.

G. TESTED PUMPING PLANT CONDITIONS

1.	Total Dynamic Head.:	77.5	ft.
2.	Flow... MI= 82	738	gpm
3.	Water Horsepower...:	14.4	WHP
4.	Input Horsepower...:	30.8	EHP
5.	Est.Motor Shaft HP.:	27.4	SHP
6.	Pumping Plant Eff..:	46.9	%

C. PUMP AND WATER SUPPLY DATA

1.	Make.....:	Berkley
a	Centrifugal:	BM#51637
b	Turbine-Sub:	
2.	Model #....:	BZ3PL
3.	Hd./Serial#:	sn77-43878
4.	Rated Head.:	? ft.
5.	Rated Flow.:	? gpm
6.	Implr Dia..:	6+15/16
7.	Intake Dia.:	4 in.
8.	Column Len.:	ft.
9.	# of Stages:	1
10.	Col.Tub.Sft:	
11.	Well Depth.:	ft.
12.	Casing Dia.:	in.
13.	Disch.Dia..:	4 in.
14.	Records....:	GJ Vertiline

<FORCE?: No

COMMENTS

Average Supply Voltage .. OK
Motor Current Within Rating
Voltage Balance In Tolerance
Current Balance In Tolerance
Power Factor Balance is . OK
Power Factor Level is ... OK
Est. Full Load Motor Eff 88.8%
Est. Pump (w/o motor)Eff 53.0%
Est. of Full BHP Load is 68.4%

NOTES

> 50 MI = One CFS, in ID
> (Motor Shaft OUTPUT is SHP) <
> (Pump Shaft INPUT is BHP) <
> (Pump Water OUTPUT is WHP) <
> (Pump Eff.is Est.Curve Eff) <
> (MTR LOAD is ≤ SYSTEM LOAD) <
> Little or No Air in Discharge.

This is the original booster trimed to the max.

Does Mtr kW = Tot.Load? Yes
Total Sys. BHP Demand = 30.8
SHP - (Sft.Loss) = BHP = 27.3
Est. Total Sft HP Loss = 3.10

Raft River Electric, Coop.

kWH Average Fm: RRE269 102324 kWH/Yr. Inspection #....:RRE270pt
See Stage 1 #...:RRE269
H. ACTIONS TAKEN Stage 2 Test Dt.:09/26/92

1.	Replace Suction Fittings	YES	NO X
2.	Replace Discharge Fittings	YES	NO X
3.	Low Pressure or Reduced Pressure Spkrs ..	YES x	NO x
4.	Retrofit Mainline	YES	NO x
5.	Pumping Plant Efficiency Improvements ...	YES x2	NO
6.	Remove Booster Pump	YES	NO X
7.	Is there a Runoff Problem Now?	YES	NO x

I. FINAL PUMPING PLANT(S) PERFORMANCE SUMMARY

Pump #	TDH	GPM	WHP	Pmp.EHP(+sys)	SHP	EFF
1	141.5	738	26.3	39.2	34.7	67.3
2	77.5	738	14.4	30.8	27.4	46.9
3	0.0	0	0.0	0.0	0.0	0.0
4	0.0	0	0.0	0.0	0.0	0.0
5	0.0	0	0.0	0.0	0.0	0.0
6	0.0	0	0.0	0.0	0.0	0.0
7	0.0	0	0.0	0.0	0.0	0.0
8____	0.0	0	0.0	0.0 (sys)	0.0 ____	0.0
TOTAL >>	218.9	738	40.8	70.0 0.0	62.0	58.3%<Sys

(See Pumping Eff.Below)

J. BEFORE AND AFTER PUMPING PLANT COMPARISONS

		a. INITIAL	b. PROPOSED	c. FINAL
1.	Total Head (TDH) =	167.4 FT	211.0 FT	218.9 FT
2.	Flow (GPM) =	484.0 GPM	2300.0 GPM	738 GPM
3.	Pumping Plant Efficiency =	28.5 %	72.9 %	58.3 %
4.	Input Kilowatts (kW) =	53.5 kW	54.3 kW	52.2 kW
5.	Input Horsepower (EHP) =	71.7 EHP	72.8 EHP	70.0 EHP
6.	ESTIMATED Brake HP (BHP) =	64.5 BHP	65.5 BHP	62.0 BHP

217 650 67.7 39.2 52.6 47.0

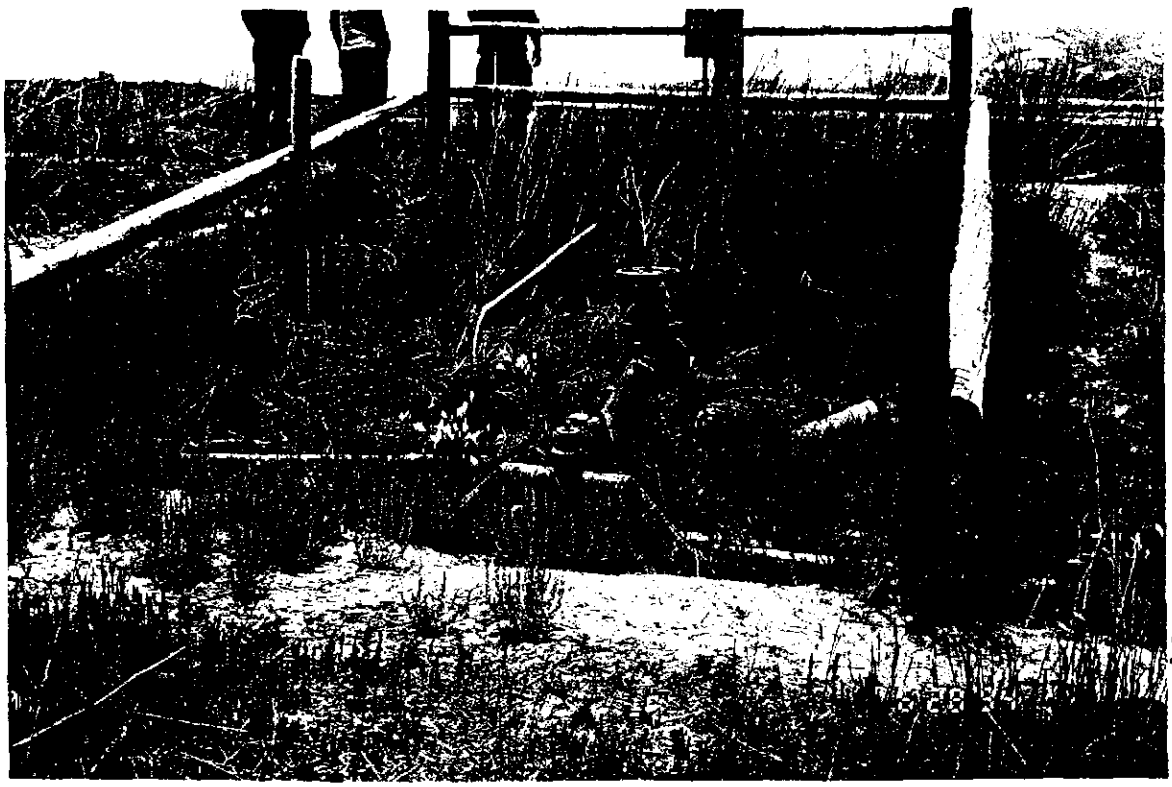
K. ENERGY SAVINGS AND COST SHARING POTENTIAL

1.	Average Retrofit Pumping Efficiency = (WHPe/EHPe %) =	58.3 %
2.	Target Stage 1 Retrofit System Efficiency (proposed)=	726.9 %
3.	Energy Savings Based on Actual Horsepower Reduction =	2500 kWh
4.	Energy Savings Based on Reduced System kW/GPM ratio =	36857 kWh
5.	Minimum Guarantee from Stage 1 Analysis ..... $=	1050 min.
6.	Calc'd Average Cost per kWh from Stage 1(RRE269) c=	4.09 /kWh
7.	Energy Cost per Ac.Ft. of Retrofit System (aprox.) =	15.70 /AF.
8.	Energy Cost per Ac.Ft. of Original System(average) =	24.54 /AF.
9.	Approx.Pumping Capacity Compared to Peak Irrig.Req. =	81.4 %
10.	Expected (approx.) increase in Annual Power Costs $=-102	

>-The Performance of this System Qualifies for BPA Cost Sharing!-<

>Comments: The load on the well motor is high but, providing the
> water supply is available, the system will be able to supply
> four and one-half lines instead of three lines as in the stage 1;
> this will be possible with about the same energy cost as before.
>
>

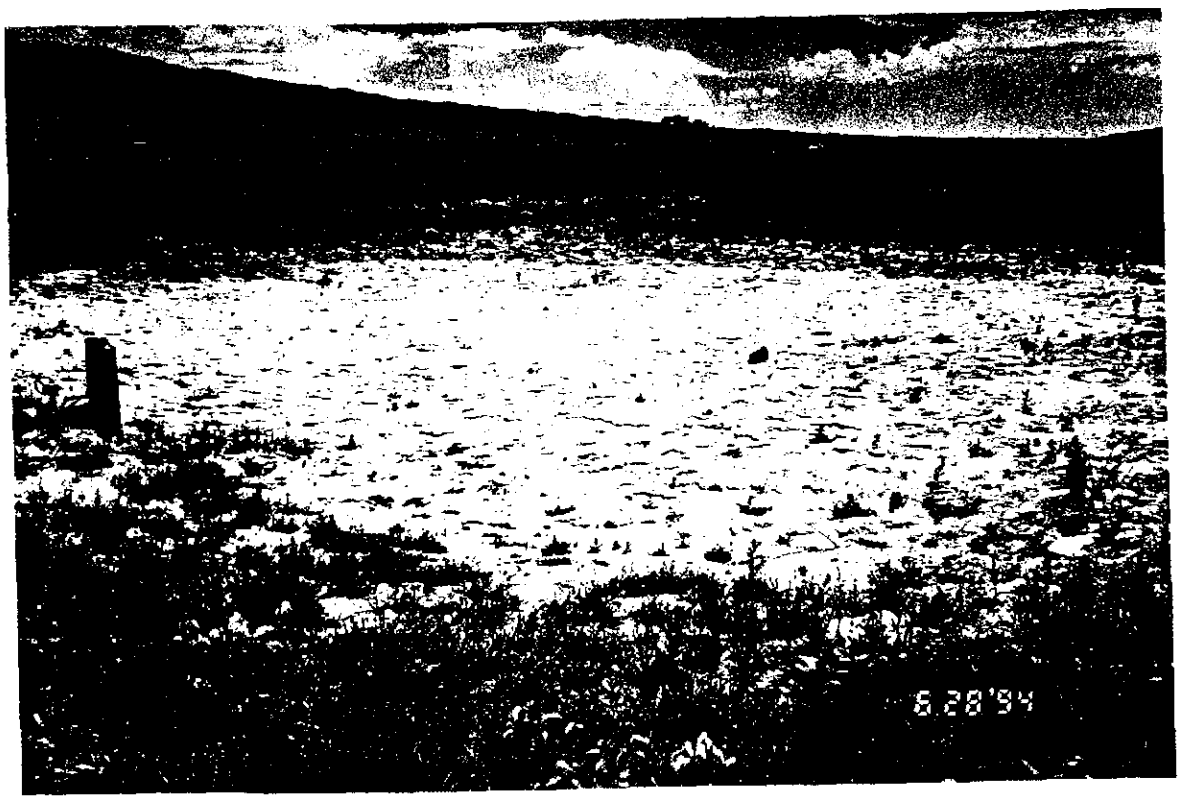
06-28-94



facing So. 934
NWSE pond

ROLL #1

#7



facing E 934
NWSE pond.

#6

PLR-00022 of of

TONES HAROLD

06-28-94
1·40



#5
5,4,3

Panorama from N.E. along ditch to the transformer in the W. ground to sewage collection & orange block down channel to S.

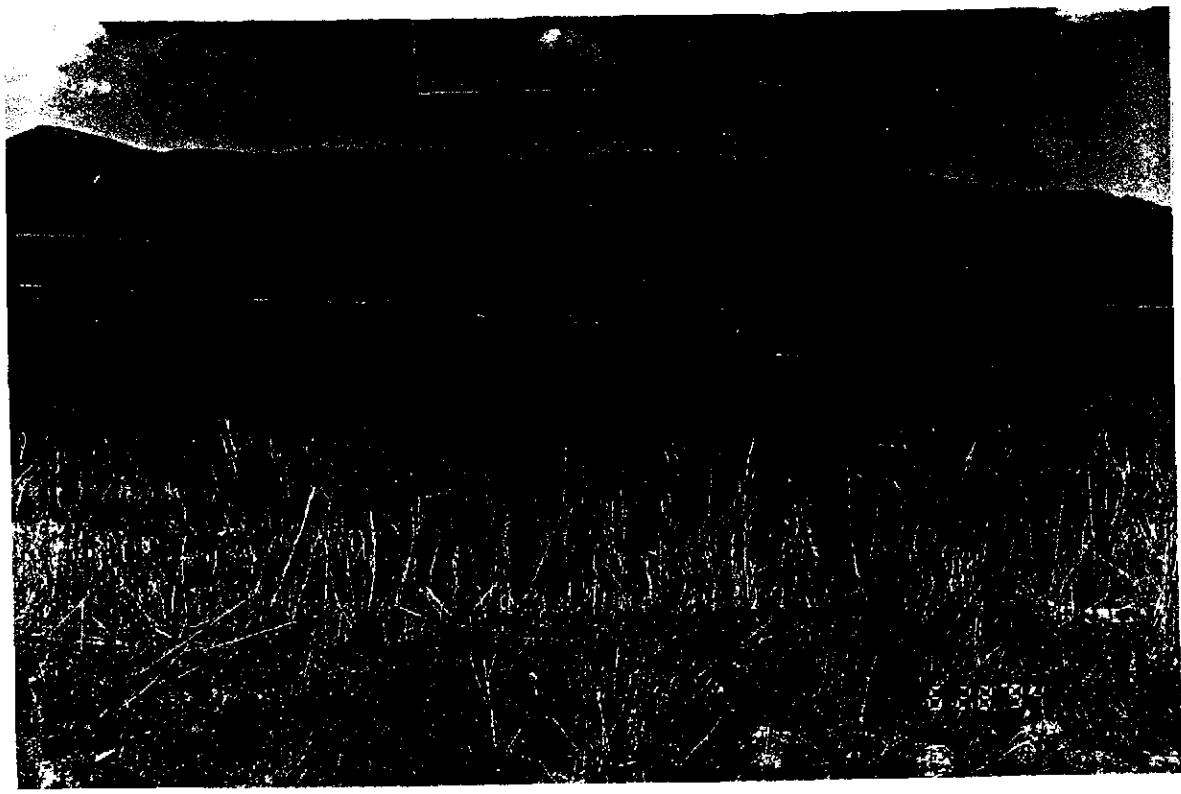
DU2-00033 pg 1

06-28-94



facing No. along the ditch

#2



facing W. towards transformer on pole.

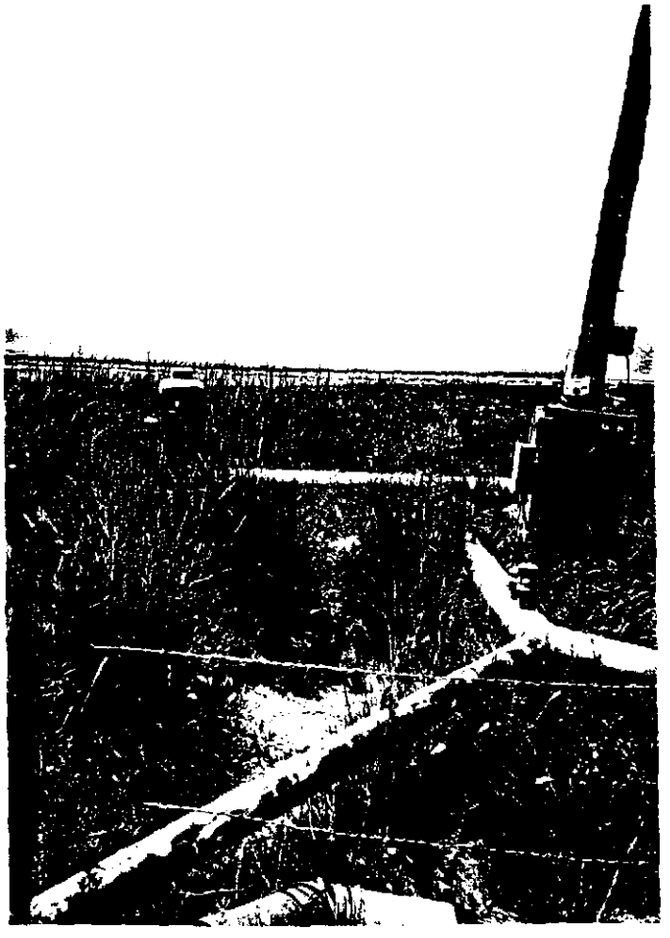
#1

A43-00037 et al

JONES, HAROLD

06-28-94

1.53



well/pump @ Clear Cr. pdl # 3501 - buried line looking W. over the set up "Ledger" in background @ W. edge of sprinkled pasture per Kopin Wells Locate @ blue dot on map on 6 line btwn. 2 + 3.

#13

2.10



looking over the Channel to the SO

#12

443-10123 of 1

JAMES HARRIS

06-28-94



#11

2.10

Looking NE: stick in the ground to the right of Ray Jones is the previous height of water here - states that previously water used to go over top of the embankment.



#10

3.28

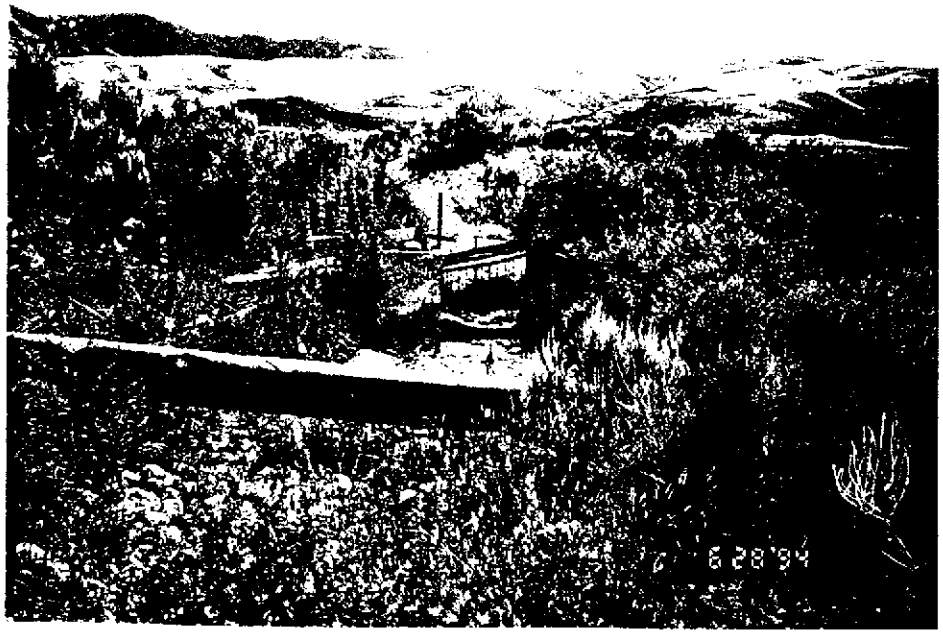
Looking SO. from diversion below home place

443-

JONES, HAROLD

06-28-94

3.30



#9

looking So. into UTAH across the pipe for the UTAH water.
approx 1/4 mile So.

3.50



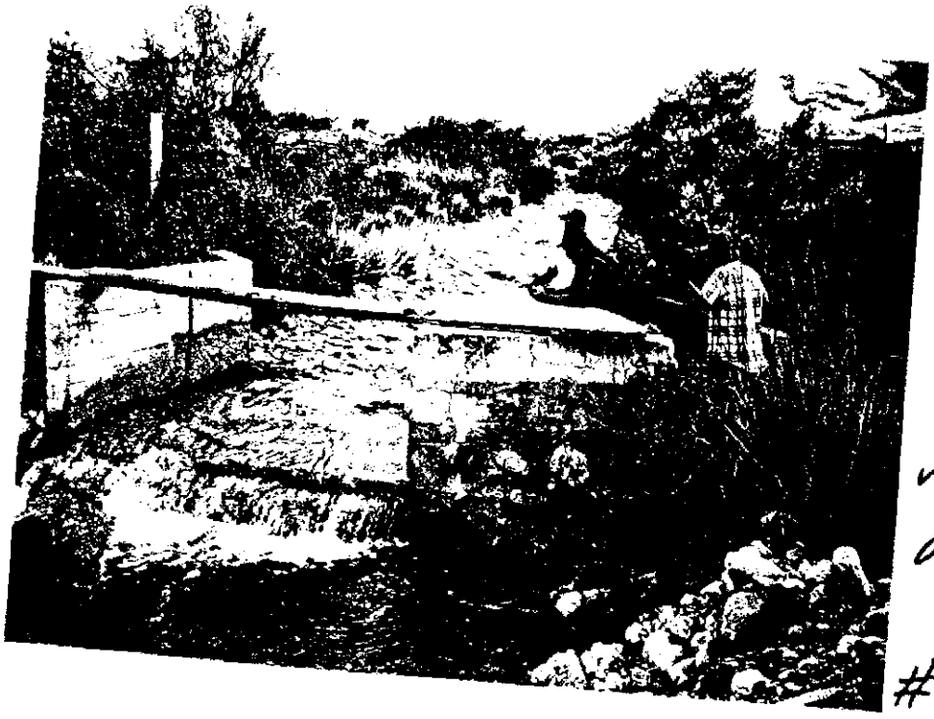
#8

looking So. into UTAH - diversion Channel just W. of house site.

A43-00027 pt 1

JONES, HAROLD

06-28-94



#7

4.00

in UTAH looking SO. over the diversion - note ADM in red cap standing in the diversion.



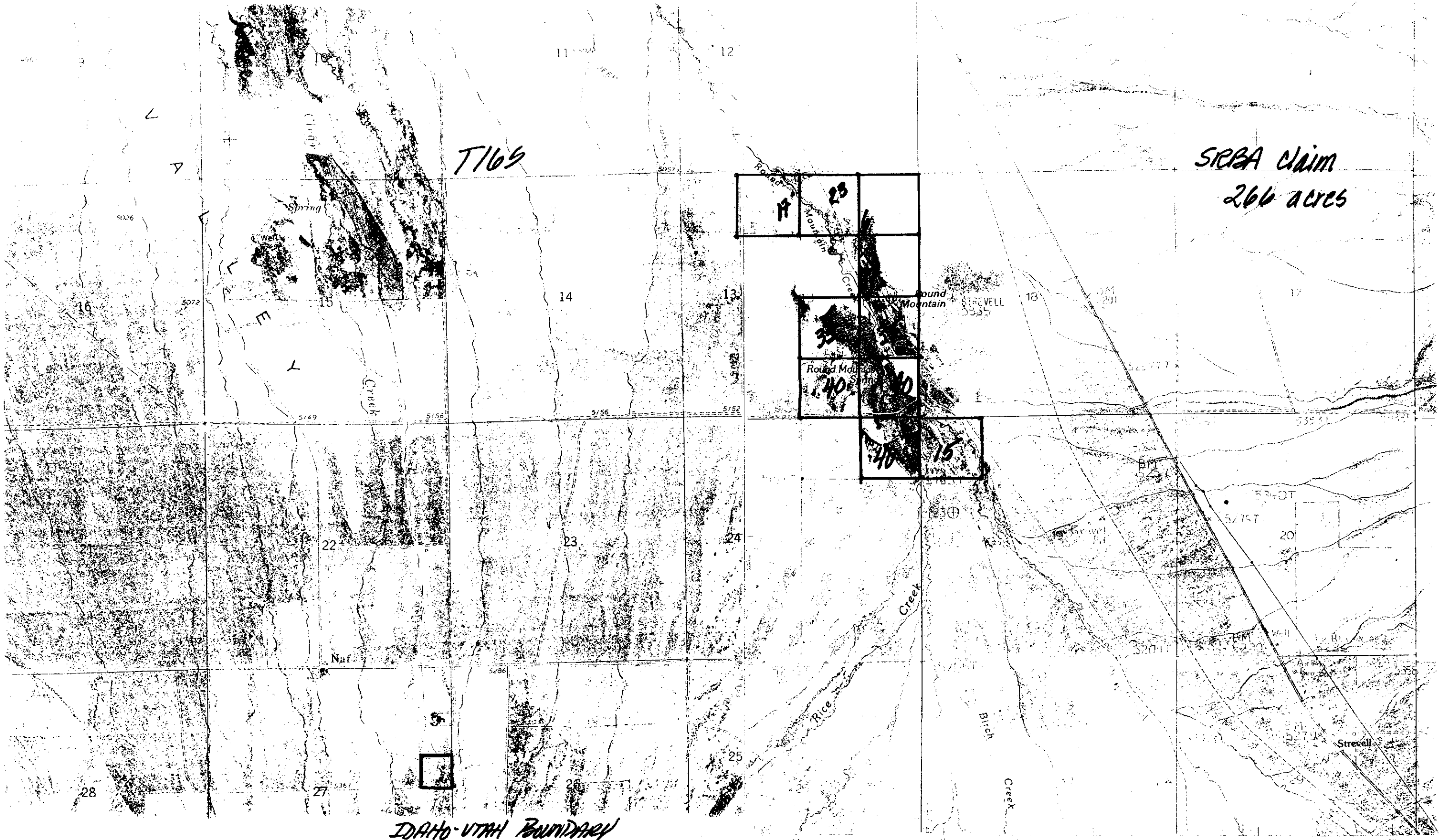
#8

4.05

looking NW from a distance of about 25 yards SO of the diversion above. This is described as PD #2.

A43-00023 ~ 1

JONES HAROLD



MAPS USED: DD 82 DATE: 1976
ASCS
ORTHO USGS-NAF
NAPP
BLM

MAPS USED: DD 83 DATE: 1976
ASCS
ORTHO USGS-STREVELL SW
NAPP
BLM

A43-00045

JONES, MERLE

T16S

DECREE - pg 14
43-00045
Source: Clear Cr.
AMOUNT: 1.7 CFS
P/D: D
POU: W½ SE, SESE §13
NENE §24
T16S R27E
PRIORITY: 6-1-1882

MAPS USED: DD 82 DATE: 1976
ASCS
ORTHO USGS-NAF
NAPP
BLM

MAPS USED: DD 83 DATE: 1976
ASCS
ORTHO USGS-STREVELL SW
NAPP
BLM

R27E R28E

Produced by the Geological Survey
In cooperation with the [illegible] Conservation Service

A43-00045

JONES MERCLE

SRBA claim
266 acres

T16S

R27E R28E

MAPS USED: DD 82 DATE: 1976
ASCS
ORTHO USGS - NAF
NAPP
BLM

MAPS USED: DD 83 DATE: 1976
ASCS
ORTHO USGS - STICKVELL SW
NAPP
BLM

IDAHO-UTAH BOUNDARY

A43-002866

JONES, MERLE

T16S

DECREE pg 34
43-00286
Source: Clear Cr.
Amount: 60 CFS
P/D: ∞
POU:
Priority: 11-23-1911

Settlers Land & Water Company
1911-Nov. 23 00286 60 s.f.

To be diverted from Clear Creek for the irrigation of All of Sec. 2, S½ and NE¼, Sec. 3, S½ and W½NW¼, Sec. 4, E½, E½NW¼, SW¼NW¼, Sec. 5, all of Sec. 8, all of Sec. 9, N½NW¼, N½NE¼, SE¼NE¼, Sec. 10, all of Sec. 11, W½, W½NW¼, W½NE¼, NW¼SE¼, Sec. 12, W½NE¼, W½, W½SE¼, SE¼SE¼, Sec. 13, all of Sec. 14, S½NE¼, Sec. 15, all of Sec. 16, all of Sec. 17, SE¼, Sec. 21, all of Sec. 22, NE¼SE¼ and E½, Sec. 23, all of Sec. 24, W½, W½E½, E½E½, Sec. 27, N½NW¼, NW¼NE¼, Sec. 28, N½N½, Sec. 29, all in Twp. 16 S. R. 27 E.B.M. DECREE FILE: 43-A-I (2)

MAPS USED: DD 82 DATE: 1976
ASCS
ORTHO USGS-NAE
NAPP
BLM

MAPS USED: DD 83 DATE: 1976
ASCS
ORTHO USGS-STREVELL SW
NAPP
BLM

R27E R28E

Produced by the Geological Survey
In cooperation with the Soil Conservation Service

A43-00286B

JONES MERLE

WR5809NP
No. 43-00286

IDAHO DEPARTMENT OF WATER RESOURCES
WATER RIGHT PROFILE REPORT

DATE: 07/19/94
PAGE: 1

OWNER CODE	NAME & ADDRESS	PRIORITY DATE	WATER USE	USE PERIOD FROM	USE PERIOD TO	DIVERSION RATE	DIVERSION VOLUME
C	SETTLERS LAND & WATER CO.	11/23/1911	IRRIGATION	00-00	00-00	60.00 CFS	
					TOTAL DIVERSION:	60.00 CFS	

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

Place of use Legal Description for: IRRIGATION

			NE				NW				SW				SE				
			NENE	NWNE	SWNE	SENE	NENW	NWNW	SWNW	SENW	NESW	NWSW	SWSW	SESW	NESE	NWSE	SWSE	SESE	
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	Lt Ac	Lt Ac	Lt Ac	Lt Ac	SUM
16S	27E	2	01-I	02-I	I	I	03-I	04-I	I	I	I	I	I	I	I	I	I	I	
16S	27E	3					03-I	04-I	I	I	I	I	I	I	I	I	I	I	
16S	27E	4						04-I	I		I	I	I	I	I	I	I	I	
16S	27E	5	01-I	02-I	I	I	03-I			I	I			I	I	I	I	I	
16S	27E	8	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	
16S	27E	9	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	
16S	27E	10	I	I		I	I	I											
16S	27E	11	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	
16S	27E	12		I	I		I	I	I	I	I	I	I	I	I	I	I		
16S	27E	13		I	I		I	I	I	I	I	I	I	I		I	I	I	
16S	27E	14	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	
16S	27E	15												I					
16S	27E	16	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	
16S	27E	17	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	
16S	27E	21													I	I	I	I	
16S	27E	22	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	
16S	27E	23					I	I	I	I	I	I	I	I	I				
16S	27E	24	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	
16S	27E	25						I											
16S	27E	26	I	I			I	I											
16S	27E	27	I				I	I	I	I						I	I		

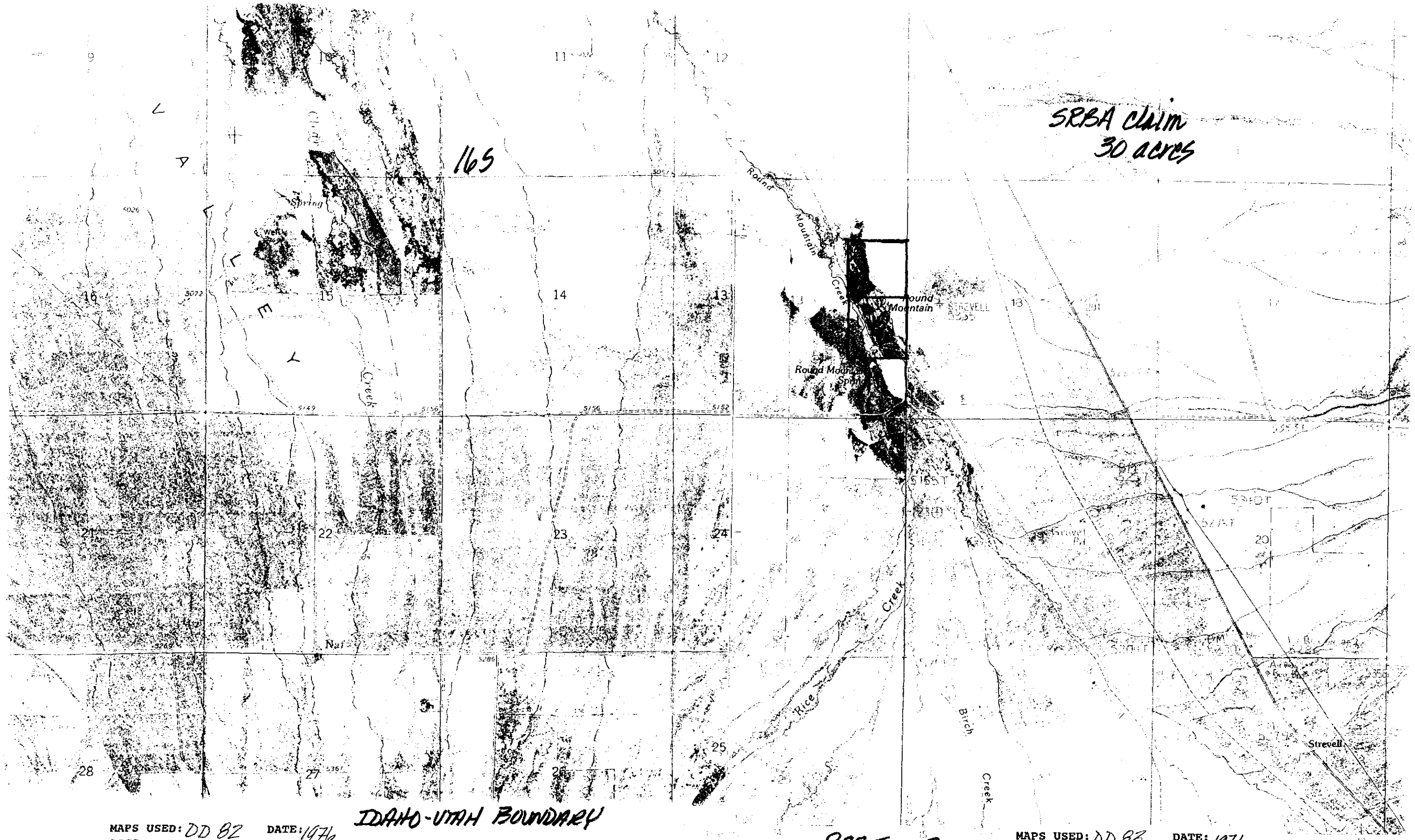
Pou County: CASSIA

Dates: App. Received: Priority Date: 11/23/1911
Proof Due Date: Proof Made Date:
Exam Made Date: Exam Sent to S.O.:
Licensed Date:

Misc: Water District Number: 43B Field Exam Fee:

JONES MAPLE

43-00286B



MAPS USED: DD 82 DATE: 1976
ASCS
ORTHO USGS-NAE
NAPP
BLM

MAPS USED: DD 83 DATE: 1976
ASCS
ORTHO USGS-STREVELL SW
NAPP
BLM

A43-02061

JAMES MERLE

LICENSE
43-02061
Source: Round Mtn. Springs 1+2
Amount: .16 CFS
PRIORITY: 4-19-1910
P/D: NESE § 13 16S 27E
(see cc of microfiche)
of original exam.

MAPS USED: DD 82 DATE: 1976
ASCS
ORTHO USGS-NAF
NAPP
BLM

MAPS USED: DD 83 DATE: 1976
ASCS
ORTHO USGS-STREVELL SW
NAPP
BLM

R27E R28E

Produced by the Geological Survey
in cooperation with the Soil Conservation Service

A43-02061

JONES, MERRILL

REPORT OF ENGINEER

Permit No 5691

1. State name of applicant and number of permit: ~~Sam~~ James Mathews

2. State source of water supply: Round Mt. Springs Alt. No. 2.

3. Location of point of diversion: N.E. ¼ of S.W. ¼ Sec. 13, T. 16 S. R. 27 E. B.M.

4. State whether or not the works of diversion are fully completed and in accordance with terms of permit: Works of diversion are fully completed in accordance with permit.

5. Describe works as they exist, giving dimensions of same as follows:

(a) Width of conduit at bottom: 1½ ft.

(b) Width at water line: 2 ft.

(c) Depth of water: 1½ ft.

(d) Grade per mile: 10 ft.

(e) Capacity of ditch: 3½ inches ~~miner's inch~~ second feet.

6. State whether or not water has been turned into works of diversion and if so, to what extent: The water, and I would say more than 30 inches runs into his reservoir and dam continually. The water at any & unless has been running continuously since

7. Give exact location of lands to be irrigated. Give exact number of acres under cultivation in each forty acre tract: 9 ½ has irrigated 17 acres on west side of SE¼ NE¼ Sec 13 and 1.5 acres on North side of NE¼ SE¼ Sec 13 T 15/16 S. R. 27 E. M. ½ of the above mentioned 5 acres are under cultivation and 3 of the above mentioned 1.5 acres are under cultivation. Side hill on the remainder of same land. Boundaries

8. Submit map on enclosed plat, source of supply, point of diversion, route of ditch or ditches and cross hatch lands to be irrigated.

Remarks:

Oscar Sjoberg

STATE OF [illegible]

[illegible] being first duly sworn, deposes and says that the statements [illegible] to the best of his knowledge and belief.

12th day of February 1913

My Com. Exp. Dec 11 – 1915 [illegible] Notary Public.

RECEIVED
FEB 12 1913
STATE ENGINEER

5-691

443-02061

T. 16 S. R. 27 E. B.M.

T. 16 S. R. 28 E. B.M.

SEC. SEC. SEC. SEC. SEC. SEC.

The tract colored red on the
map hereto is the 30 acres that 30 water rights
have been beneficially applied to. The
30 acres of land herein intended for
the future cultivation and 20 acres that are
actually under cultivation the present
year and the estimated land to be cultivated
in the ensuing season make the
total 50 acres.

Reservoir
Dam

Spruce No 2

569'

Spruce No 1

The tract colored green on the map hereto is the
NE¼ SE¼ Sec 13 T. 16 S. R. 27 E. B.M.
It comprises 40 acres and is the property of
Pasture land and the entire tract is
to be irrigated from the natural flow of
pasture Ditch No 1 and the Ditch from Reservoir

SCALE 1" = 1 MILE DRAW PLAN IN INK.

HMB-00100

Report of Engineer

1. State name of applicant and number of permit: James Mathews - Permit 5691

2. State source of water supply: Round Mountain Springs

3. Location of point of diversion: SE4 SE4 Sec.13, Tp. 16 S., R. 27 E.B.M.

(Fully completed)

4. State whether or not the works of diversion are *fully* completed and in accordance with terms of permit: Fully completed

5. Describe works as they exist, giving dimensions of same as follows:

(a) Width of conduit at bottom: 1½'

(b) Width at water line: 2'

(c) Depth of water: 4"

(d) Grade per mile: 6'

6. State whether or not water has been turned into works of diversion and if so, to what extent: Full extent.

7. Give exact location of lands to be irrigated. ~~Give exact location of each forty-acre tract~~ SE¼NE¼ NE¼SE¼ Sec 13, T.16S. R.27E.B.M.
Lands under cultivation NE¼SE¼ Sec 13, T.16S. R.27E.B.M.

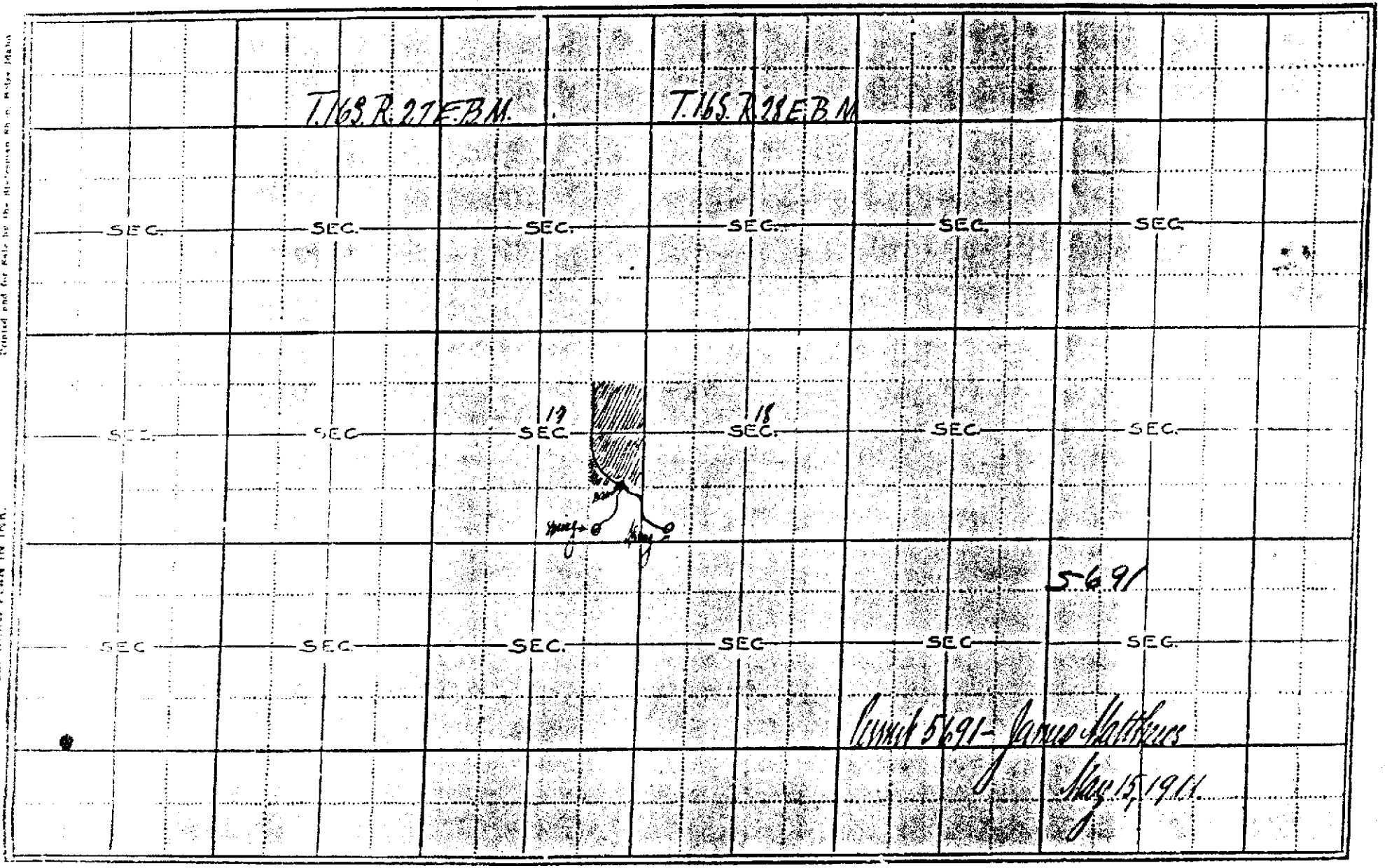
8. Submit map on enclosed plat, source of supply, point of diversion, route of ditch or ditches and cross hatch lands to be irrigated.

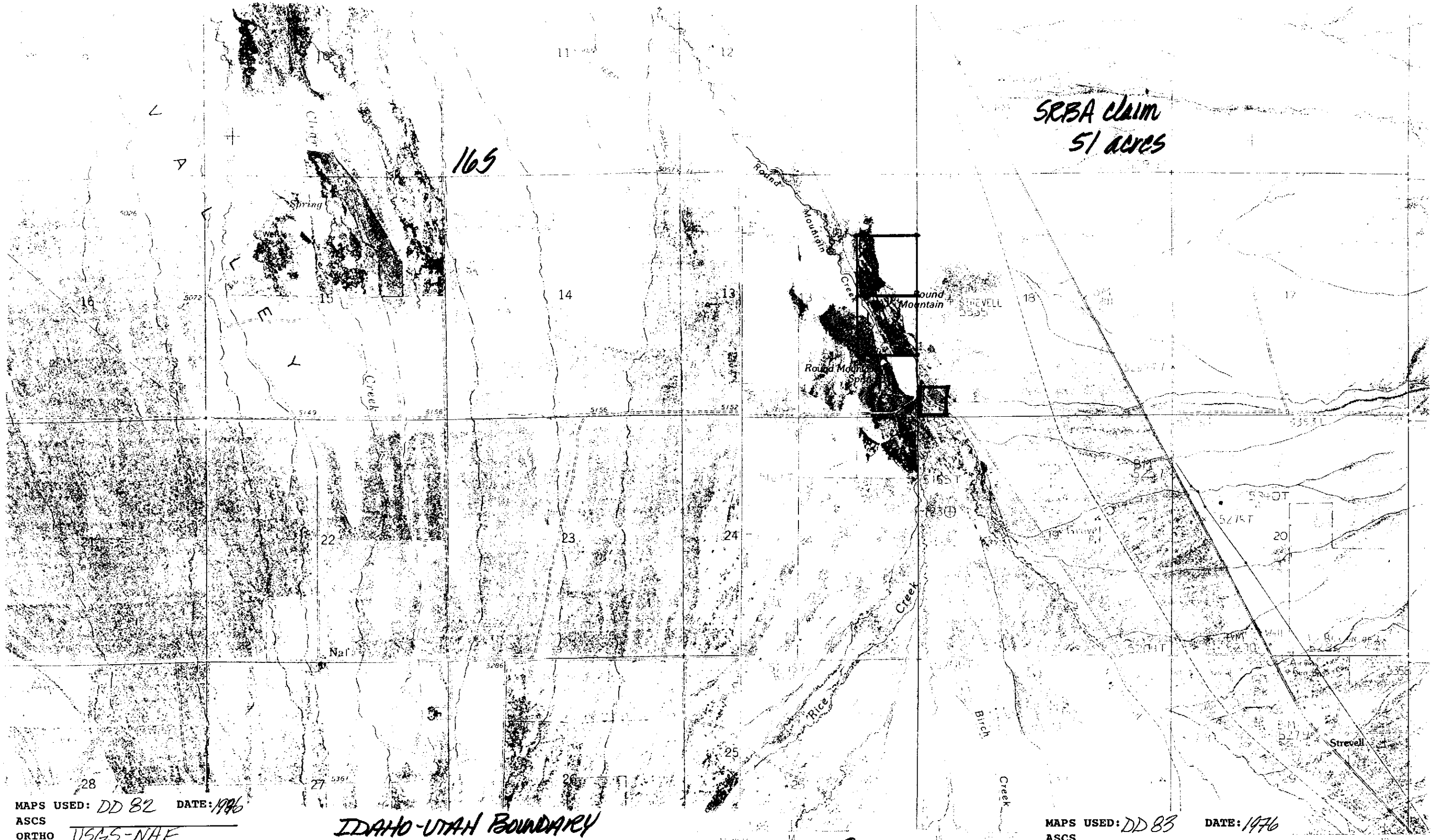
Remarks: Dam 3½' high
100' long on bottom
125' long on top

RECEIVED
MAY 18 1911
OFFICE OF STATE ENGINEER

Bernard Mack
Water Com. 2nd Div.

STATE OF IDAHO, } ss.
County of ____ that the state-


T.16S. R.21E.B.M.
T.16S. R.18E.B.M.
SEC.
SEC.
SEC.
SEC.
SEC.
SEC.
19
18
SEC.
SEC.
SEC.
SEC.
SEC.
SEC.
SEC.
SEC.
SEC.
SEC.
SEC.
SEC.
5-691
Permit 5691 - James Matthews
May 15, 1911
SCALE: 2 INCHES=1 MILE. DRAW PLAN IN INK.



MAPS USED: DD 82 DATE: 1976
ASCS
ORTHO USGS-NAE
NAPP
BLM

MAPS USED: DD 83 DATE: 1976
ASCS
ORTHO USGS-STREVELLSW
NAPP
BLM

A43-02110

JONES, MERLE

T16S

R27E R28E

LICENSE
43-02110
Source: Round Mountain Spring
P/D: SWSWSW §18
T16S R28E
POU: SENE §13
NESE
T16S R27E
Priority: 5-23-1912
(see microfiche of exam attached)

Produced by the Geological Survey
In cooperation with [illegible] Conservation Service

A43-02110

JONES, MERLE

SRBA claim
266 acres

MAPS USED: DD 82 DATE: 1976
ASCS
ORTHO USGS-NAF
NAPP
BLM

MAPS USED: DD 83 DATE: 1976
ASCS
ORTHO USGS-STREVELL SW
NAPP
BLM

R27E R28E

□ POD

A43-10116

JONES MERLE

REPORT OF ENGINEER

1. Name and address of applicant and number of permit: James Mathews No 8361

2. State source of water supply: Reservoir No 2

3. Location of point of diversion: N.W. ¼ of S.W. ¼ sec. 18 T. 16 S. R 25 E. B. M. County of Cassia

4. State whether or not the works of diversion are *fully* completed and in accordance with terms of permit: Works are completed according to terms of permit

5. Describe works as they exist, giving dimensions of same as follows:

(a) Width of conduit at bottom: 1½ ft

(b) Width at water line: 2 ft

(c) Depth of water: ½ ft

(d) Grade per mile: 6 ft

(e) Capacity of ditch: 1 second foot ~~second feet~~

6. State whether or not water has been turned into works of diversion and if so, to what extent: No water has been turned in

7. Give exact location of lands to be irrigated. Give exact number of acres under cultivation in each forty acre tract: 35 acres in N.E. ¼ of S.E. ¼ of Sec 13 T 16 S. R. 27 E. B. M. 16 acres S.E. ¼ of N.E. ¼ Sec 13 T 16 S. R. 27 E. B. M.

8. Submit map on enclosed plat source of supply, point of diversion, route of ditch or ditches and cross hatch lands to be irrigated.

Remarks:

Marion Jessop

STATE OF IDAHO,
County of Cassia } ss.

Marion Jessop being first duly sworn upon oath says that the statements contained in the within report are correct to the best of his knowledge and belief.

Subscribed and sworn to before me this 19th day of March 1917

My Commission Expires Dec 20th 1917 E.B. Underwood Notary Public

A45-0210

Name of Applicant

SEC.	SEC.	SEC.
SEC.	SEC.	SEC.
SEC.	SEC.	SEC.
SEC.	SEC.	SEC.
SEC.	SEC.	SEC.
SEC.	SEC.	SEC.

H05-0211D

SRBA claim
266 acres

T16S

R27E R28E

MAPS USED: DD 82 DATE: 1976
ASCS
ORTHO USGS-NAF
NAPP
BLM

MAPS USED: DD 83 DATE: 1976
ASCS
ORTHO USGS-STREVELL SW
NAPP
BLM

POD

A43-10824

T16S

12

DECREE(S)

— 43-001824
Source: Round Mountain Creek
Priority: 2-17-1912 Amount: 1.5 CFS
P/D: &
POU: SESW, SWSE §12
NWNE, NENW §13
T16S R28(orig) R27 (altered by hand)

— 43-00414
Source: Round Mountain Creek
Priority: 4-1-1909 Amount: .6 CFS
P/D: &
POU: NESE, E½NE §13
SESE §12
T16S R27

MAPS USED: DD 82 DATE: 1976
ASCS
ORTHO USGS-NAE
NAPP
BLM

MAPS USED: DD 83 DATE: 1976
ASCS
ORTHO USGS-STREVELL SW
NAPP
BLM

R27E R28E

Produced by the Geological Survey
In cooperation with the Soil Conservation Service

A43-10824

JONES, NEVADA

07-07-94



ROLL 2A 2.45

looking E. over channel @ spill 1962 water @ home-site.

#3



behind shed - looking W. over the channel.

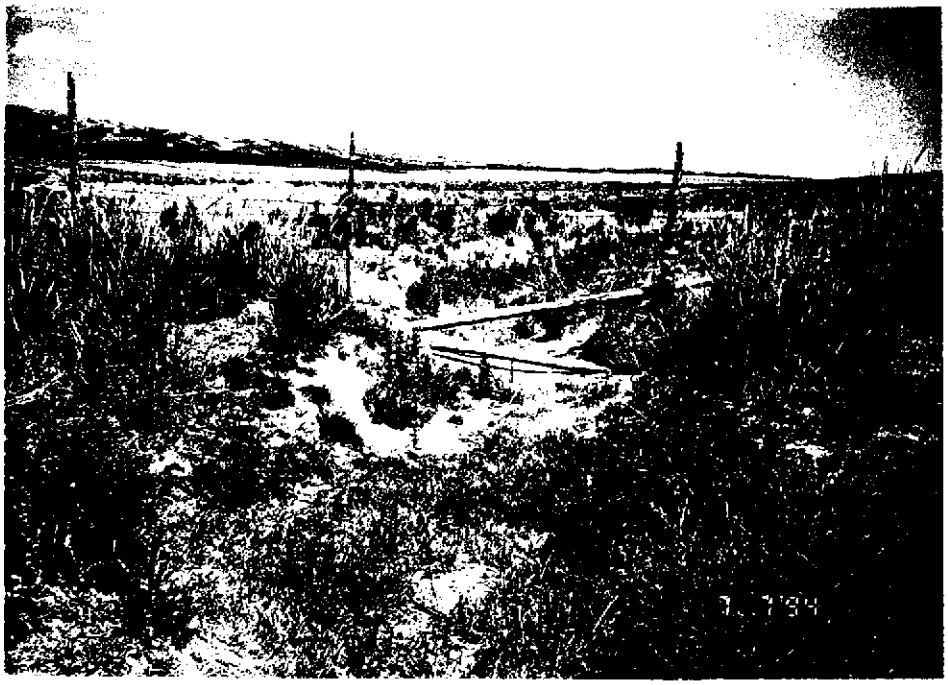
#2



looking NW. to the reservoir from NW. of the shed.

#1

07-07-94
3:50
end of Round Mountain Creek



#2

the drain location looking W. into So. field where the vertical culverts are spaced along the perimeter.



#1

A43-00045 et al

JONES, MEDREE

07-07-94

3:45



#4

looking No. towards mobil home @ entrance lane to campsite over the spring collection pipe in center of pool.



#3

looking So. over both channels that come into the pool shown above.

A43- PAGE of 61

JONES, MERLE

07-07-94

3.15



#6

Looking So. to the mesquite - over the pipeline - tree said to be original POD.



#5

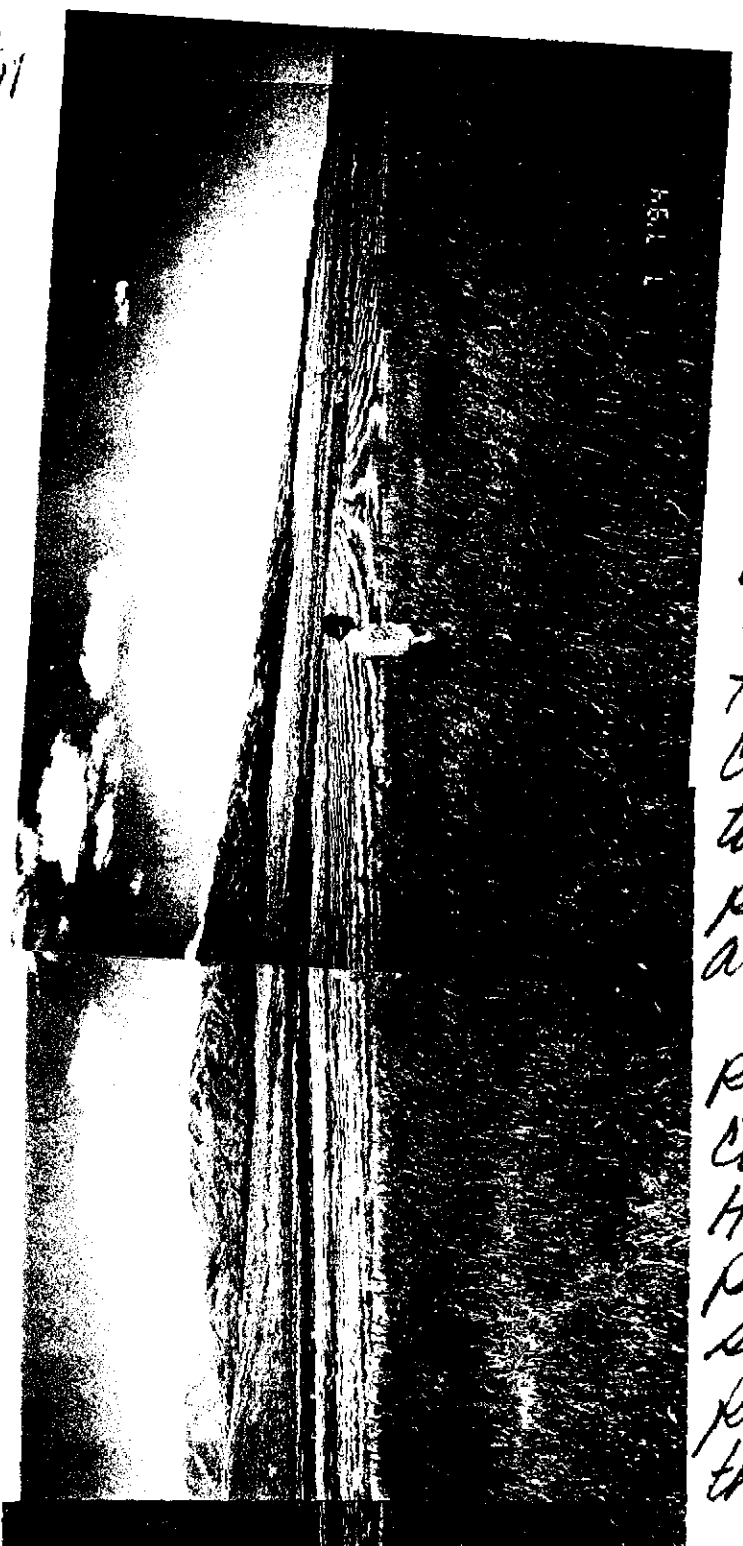
from bottom of the property, o. end, looking almost due So. - this is the corner of the high water fields claims to be historically irrigated.

443-11045 of 11

JONES, MERLE

Roll #4

#11

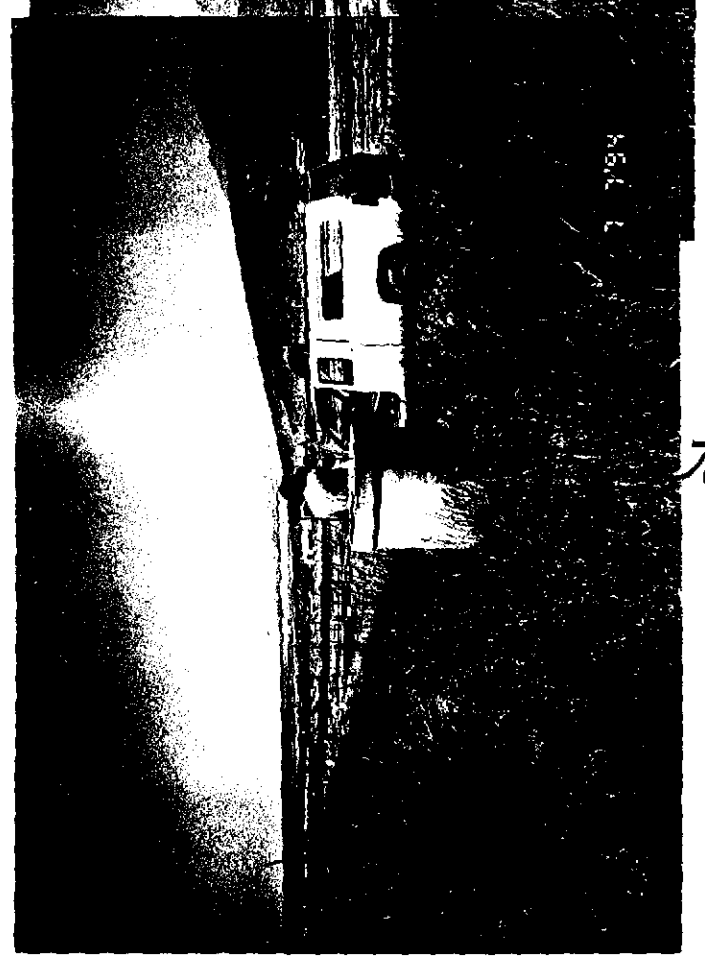


07-07-94

4.05

Looking No. down farm line over vertical culvert.

#12



Panorama shot around from No. to E. - this ditch can serve field to the E. or to pipe line - there are 3 in this field

pipeline/ditch come from the Harold Jones place what was etzel No. of property under the E/W. road.

#13

743-00045 et al

JONES, MERLE

07-07-94

5.05

panorama shot going from So. to No. while facing W.





07-07-94 2:55



Looking SE – Round Mountain Spring flows into reservoir from behind shed.

Roll 3

#13



Looking NO. over the reservoir from pic #13

#12



Looking NO. over pump jack NO. of Shed.

#11

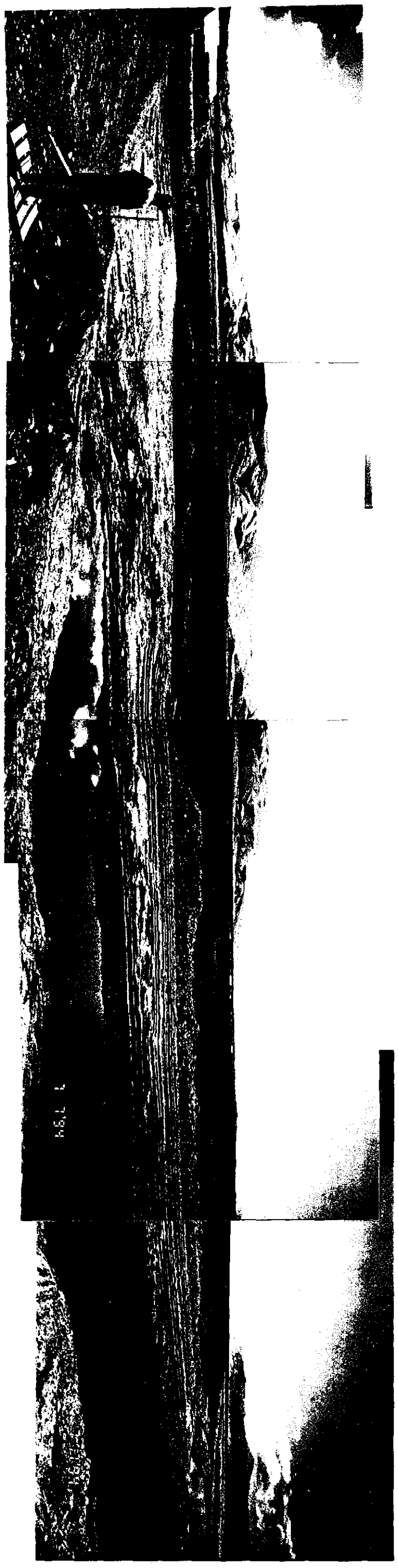
A43-00045 et al

JONES, MERLE

Pix #5:
1 thru 7

07-07-94
3:05

Panorama shot from the SE. end of the reservoir around to the W.



13-00045 CT al

JONES, MERCER

LEGISLATURE OF THE STATE OF IDAHO

Fifty-second Legislature — Second Regular Session — 1994

Moved by Newcomb

Seconded by Linford

IN THE HOUSE OF REPRESENTATIVES
HOUSE AMENDMENT TO H.B. NO. 986

AMENDMENT TO SECTION 1

On page 1 of the printed bill, delete lines 34 through 36 and insert: "~~other--natural-water-sources;-be-governed-by-this-title~~ in water districts in accordance with the prior appropriation doctrine. The provisions of chapter 6, title 42, Idaho Code,".

IN THE HOUSE OF REPRESENTATIVES

HOUSE BILL NO. 986

BY WAYS AND MEANS COMMITTEE

AN ACT

RELATING TO WATER DISTRIBUTION; AMENDING SECTION 42-602, IDAHO CODE, TO CLARIFY THAT THE DIRECTOR OF THE DEPARTMENT OF WATER RESOURCES IS AUTHORIZED TO DISTRIBUTE WATER PURSUANT TO THE PROVISIONS OF CHAPTER 6, TITLE 42, IDAHO CODE, ONLY WITHIN ORGANIZED WATER DISTRICTS; AMENDING SECTION 42-1701A, IDAHO CODE, TO CLARIFY THAT SUBSECTION (3) APPLIES TO DECISIONS, DETERMINATIONS, ORDERS OR ACTIONS OF THE DIRECTOR; AMENDING SECTION 42-237a, IDAHO CODE, TO REVISE POWERS OF THE DIRECTOR OF THE DEPARTMENT OF WATER RESOURCES; AMENDING SECTION 42-237g, IDAHO CODE, TO PROVIDE FOR THE USE OF ADMINISTRATIVE ENFORCEMENT ACTIONS; AMENDING SECTION 42-351, IDAHO CODE, TO PROVIDE A PROCEDURE FOR ADMINISTRATIVE ENFORCEMENT ACTIONS AGAINST PERSONS ALLEGED TO BE DIVERTING WATER OR TO HAVE DIVERTED WATER WITHOUT A WATER RIGHT OR NOT IN CONFORMANCE WITH THE CONDITIONS OF A VALID WATER RIGHT; DECLARING AN EMERGENCY AND PROVIDING APPLICATION.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. That Section 42-602, Idaho Code, be, and the same is hereby amended to read as follows:

42-602. DIRECTOR OF THE DEPARTMENT OF WATER RESOURCES TO SUPERVISE WATER DISTRIBUTION WITHIN WATER DISTRICTS. ~~It shall be the duty of t~~The director of the department of water resources ~~to~~ shall have ~~immediate~~ direction and control of the distribution of water from all ~~of the streams, rivers, lakes, ground water and other natural water sources in this state~~ natural water sources within a water district to the canals, ditches, pumps and other facilities diverting therefrom. Distribution of water within water districts created pursuant to section 42-604, Idaho Code, shall be accomplished ~~either (1)~~ by watermasters appointed as provided in this chapter and supervised by the director~~; or (2) directly by employees of the department of water resources under authority of the director in those areas of the state not constituted into water districts as provided in this chapter. The director must execute the laws relative to the distribution of water in accordance with rights of prior appropriation as provided in section 42-106, Idaho Code.~~

The director of the department of water resources shall~~, in the distribution of~~ distribute water ~~from the streams, rivers, lakes, ground water and other natural water sources, be~~ in water districts in accordance with the prior appropriation doctrine as governed by this title, the constitution and common law of this state. The provisions of chapter 6, title 42, Idaho Code, shall apply only to distribution of water within a water district.

SECTION 2. That Section 42-1701A, Idaho Code, be, and the same is hereby amended to read as follows:

42-1701A. HEARINGS BEFORE DIRECTOR -- APPEALS. (1) All hearings required by law to be held before the director shall be conducted in accordance with

the provisions of chapter 52, title 67, Idaho Code, and rules of procedure promulgated by the director.

(2) The director, in his discretion, may direct that a hearing be conducted by a hearing officer appointed by the director. In such event, the hearing officer shall have the duty to make a complete record of the evidence presented and duly received at the hearing and to prepare a proposal for decision in accordance with chapter 52, title 67, Idaho Code, and rules of procedure promulgated by the director.

(3) Unless the right to a hearing before the director or the water resource board is otherwise provided by statute, any person aggrieved by any decision, determination, order or action of the director of the department of water resources or any applicant for any permit, license, certificate, approval, registration, or similar form of permission required by law to be issued by the director, who is aggrieved by a denial or conditional approval ordered by the director, and who has not previously been afforded an opportunity for a hearing on the matter shall be entitled to a hearing before the director to contest the denial or conditional approval upon filing with the director, within fifteen (15) days after receipt of the denial or conditional approval, a written petition stating the grounds for contesting the action by the director and requesting a hearing. The hearing shall be held and conducted in accordance with the provisions of subsections (1) and (2) of this section. Judicial review of any final order of the director issued following the hearing may be had pursuant to subsection (4) of this section.

(4) Any person who is aggrieved by a final decision or order of the director is entitled to judicial review. The judicial review shall be had in accordance with the provisions and standards set forth in chapter 52, title 67, Idaho Code.

SECTION 3. That Section 42-237a, Idaho Code, be, and the same is hereby amended to read as follows:

42-237a. POWERS OF THE DIRECTOR OF THE DEPARTMENT OF WATER RESOURCES. In the administration and enforcement of this act and in the effectuation of the policy of this state to conserve its ground water resources, the director of the department of water resources in his sole discretion, is empowered:

a. To require all flowing wells to be so capped or equipped with valves that the flow of water can be completely stopped when the wells are not in use.

b. To require both flowing and nonflowing wells to be so constructed and maintained as to prevent the waste of ground waters through leaky wells, casings, pipes, fittings, valves or pumps either above or below the land surface.

c. To prescribe uniform scientific methods to determine water levels in and calculate waters withdrawn from wells.

d. To go upon all lands, both public and private, for the purpose of inspecting wells, pumps, casings, pipes, and fittings, including wells used or claimed to be used for domestic purposes.

e. To order the cessation of use of a well pending the correction of any defect that the director of the department of water resources has ordered corrected.

f. To commence actions to enjoin the illegal opening or excavation of wells or withdrawal or use of water therefrom and to appear and become a party to any action or proceeding pending in any court or administrative agency when it appears to the director of the department of water resources that the determination of such action or proceeding might result in depletion of the ground water resources of the state contrary to the public policy expressed in

this act.

g. To supervise and control the exercise and administration of all rights ~~hereafter--acquired~~ to the use of ground waters and in the exercise of this discretionary power he may ~~by-summary-order,~~ initiate administrative proceedings to prohibit or limit the withdrawal of water from any well during any period that he determines that water to fill any water right in said well is not there available. To assist the director of the department of water resources in the administration and enforcement of this act, and in making determinations upon which said orders shall be based, he may establish a ground water pumping level or levels in an area or areas having a common ground water supply as determined by him as hereinafter provided. Water in a well shall not be deemed available to fill a water right therein if withdrawal therefrom of the amount called for by such right would affect, contrary to the declared policy of this act, the present or future use of any prior surface or ground water right or result in the withdrawing of the ground water supply at a rate beyond the reasonably anticipated average rate of future natural recharge. However, the director may allow withdrawal at a rate exceeding the reasonably anticipated rate of future natural recharge if the director finds it is in the public interest and if it satisfies the following criteria:

1. A program exists or likely will exist which will increase recharge or decrease withdrawals within a time period acceptable to the director to bring withdrawals into balance with recharge.

2. Holders of senior rights to use ground water will not be caused thereby to pump water from below the established reasonable pumping level or levels.

In connection with his supervision and control of the exercise of ground water rights the director of the department of water resources shall also have the power to determine what areas of the state have a common ground water supply and whenever it is determined that any area has a ground water supply which affects the flow of water in any stream or streams in an organized water district, to incorporate such area in said water district; and whenever it is determined that the ground water in an area having a common ground water supply does not affect the flow of water in any stream in an organized water district, to incorporate such area in a separate water district to be created in the same manner provided for in section 42-604 of title 42, Idaho Code. The administration of water rights within water districts created or enlarged pursuant to this act shall be carried out in accordance with the provisions of title 42, Idaho Code, as the same have been or may hereafter be amended, except that in the administration of ground water rights either the director of the department of water resources or the watermaster in a water district or the director of the department of water resources outside of a water district shall, upon determining that there is not sufficient water in a well to fill a particular ground water right therein by order, limit or prohibit further withdrawals of water under such right as hereinabove provided, and post a copy of said order at the place where such water is withdrawn; provided, that land, not irrigated with underground water, shall not be subject to any allotment, charge, assessment, levy, or budget for, or in connection with, the distribution or delivery of water.

SECTION 4. That Section 42-237g, Idaho Code, be, and the same is hereby amended to read as follows:

42-237g. PENALTIES. Any person violating any provision of this chapter, or any decision of the director of the department of water resources, or order of a local ground water board, shall be guilty of a misdemeanor and any con-

tinuing violation shall constitute a separate offense for each day during which such violation occurs, but nothing in this section or in the pendency or completion of any criminal action for enforcement hereof shall be construed to prevent the institution of any administrative enforcement action or civil action for injunctive or other relief for the enforcement of this chapter or the protection of rights to the lawful use of water.

SECTION 5. That Section 42-351, Idaho Code, be, and the same is hereby amended to read as follows:

42-351. ILLEGAL DIVERSION OR USE OF WATER -- INJUNCTIVE RELIEF -- ~~CEASE AND--DESIST--ORDERS~~ ADMINISTRATIVE ENFORCEMENT ACTION. (1) If the director of the department of water resources finds, on the basis of available information, that a person is diverting water or has diverted water from a natural watercourse or from a ground water source without having obtained a valid water right to do so or is applying water or has applied water not in conformance with ~~the conditions of~~ a valid water right, then the director of the department of water resources shall have the discretion to take action against such person. The director may file an action seeking injunctive relief or may ~~issue an order directing the person to cease and desist the activity or activities alleged to be in violation of applicable law or of any existing water right. A cease and desist order may direct compliance with applicable law and with any existing water right or may provide a time schedule to bring the person's action into compliance with applicable law and with any existing water right~~ commence an administrative enforcement action by issuing the person a written notice of violation directing the person to cease and desist the activity or activities alleged to be in violation of applicable law or any existing water right. The notice of violation shall be served upon the alleged violator in person or by certified mail. The notice of violation shall identify the alleged violation and specify whether that person is diverting water or has diverted water without a water right or is applying water or has applied water not in conformance with a valid water right. The notice of violation shall state the remedy, including any restoration and mitigation measures, and the civil penalty the director seeks for redress of the violation and contain a statement of findings of fact and conclusions of law that provide a factual and legal basis for the initiation of the administrative enforcement action.

~~(2) Any order to cease and desist shall contain a statement of findings of fact and of conclusions of law that provide a factual and legal basis for the order of the director of the department of water resources.~~

~~(3) The director of the department of water resources shall serve a copy of any such order on the person who is the subject of the cease and desist order by personal service or by certified mail. Service by certified mail shall be complete upon receipt of the certified mail. Personal service may be completed by department personnel or a person authorized to serve process under the Idaho rules of civil procedure.~~

~~(4) The person who is the subject of the cease and desist order shall have a right to an administrative hearing before the department, if requested in writing within fourteen (14) days from the date of service of the cease and desist order, and the right to judicial review, all as provided in section 42-1701A, Idaho Code.~~

~~(5) If the person who is the subject of the cease and desist order fails to comply with the order within the time limit set in the order the director may seek, by and through the attorney general, injunctive relief in the district court pending the outcome of the department proceeding. In such action,~~

~~brought-against-a-person-for-diverting-water-without-having-obtained--a--valid water--right--to-do-so;-the-director-need-not-allege-or-prove-that-irreparable injury-to-the-state-or-to-other-water-users-will-occur-should-the--preliminary injunction-or-permanent-injunction-not-be-issued;-or-that-the-remedy-at-law-is inadequate;--and--the--preliminary--injunction;--or-permanent-injunction-shall issue-without-such-allegations-and-without-such-proof.~~ The notice of violation shall inform the person to whom it is directed of an opportunity to confer with the director or the director's designee in a compliance conference concerning the alleged violation. A written response may be required within fifteen (15) days of a receipt of the notice of violation by the person to whom it is directed. If a recipient of a notice of violation contacts the department within fifteen (15) days of the receipt of the notice, the recipient shall be entitled to a compliance conference. The conference shall be held within twenty (20) days of the receipt of the notice unless a later date is agreed upon between the parties. If a compliance conference is not requested, the director may proceed with a civil enforcement action as provided in subsection (4) of this section.

(3) The compliance conference shall provide an opportunity for the recipient of a notice of violation to explain the circumstances of the alleged violation and, where appropriate, to present a proposal for remedying the damage caused by the violation and assuring future compliance. If the recipient and the director agree on a plan to remedy damage caused by the alleged violation and to assure future compliance, they may enter into a consent order formalizing their agreement. The consent order may include a provision providing for payment of any agreed civil penalty. The consent order shall be effective immediately upon signing by both parties and shall preclude any civil enforcement action for the same alleged violation. If a party does not comply with the terms of the consent order, the director may seek and obtain in any appropriate district court, specific performance of the consent order and such other relief as authorized by law. If the parties cannot reach agreement of a consent order within sixty (60) days after the receipt of the notice of violation, or if the recipient does not request a compliance conference, the director may commence and prosecute a civil enforcement action in district court in accordance with subsection (4) of this section.

(4) The director may initiate a civil enforcement action through the attorney general as provided in subsection (6) of this section. Civil enforcement actions shall be commenced and prosecuted in the district court in and for the county in which the alleged violation occurred, and may be brought against any person who is alleged to be diverting water or has diverted water without a water right or applying water or has applied water not in conformance with the conditions of a valid water right. The director shall not be required to bring an administrative enforcement action before initiating a civil enforcement action. If the person who is the subject of the notice of violation fails to cease and desist the activity or activities constituting the alleged violation within the time limits set in the notice of violation, the director may seek, by and through the attorney general, injunctive relief in the district court pending the outcome of the administrative enforcement action. In such action, brought against a person for diverting water without having obtained a valid water right to do so, the director need not allege or prove that irreparable injury to the state or to other water users will occur should the preliminary injunction not be issued, or that the remedy at law is inadequate, and the preliminary injunction, or permanent injunction shall issue without such allegations and without such proof.

(5) Any person determined in a civil enforcement action to have willfully and knowingly or after notice diverted water without a water right or applied

water not in conformance with a valid water right shall be liable for a civil penalty as provided in section 42-352, Idaho Code. No action taken pursuant to this section shall relieve any person from any civil action and damages that may exist for injury or damages resulting from diverting water without a water right or applying water not in conformance with the conditions of a valid water right.

SECTION 6. An emergency existing therefor, which emergency is hereby declared to exist, this act shall be in full force and effect on and after its passage and approval, and shall apply to all calls for distribution of water pending at the time of passage and approval.