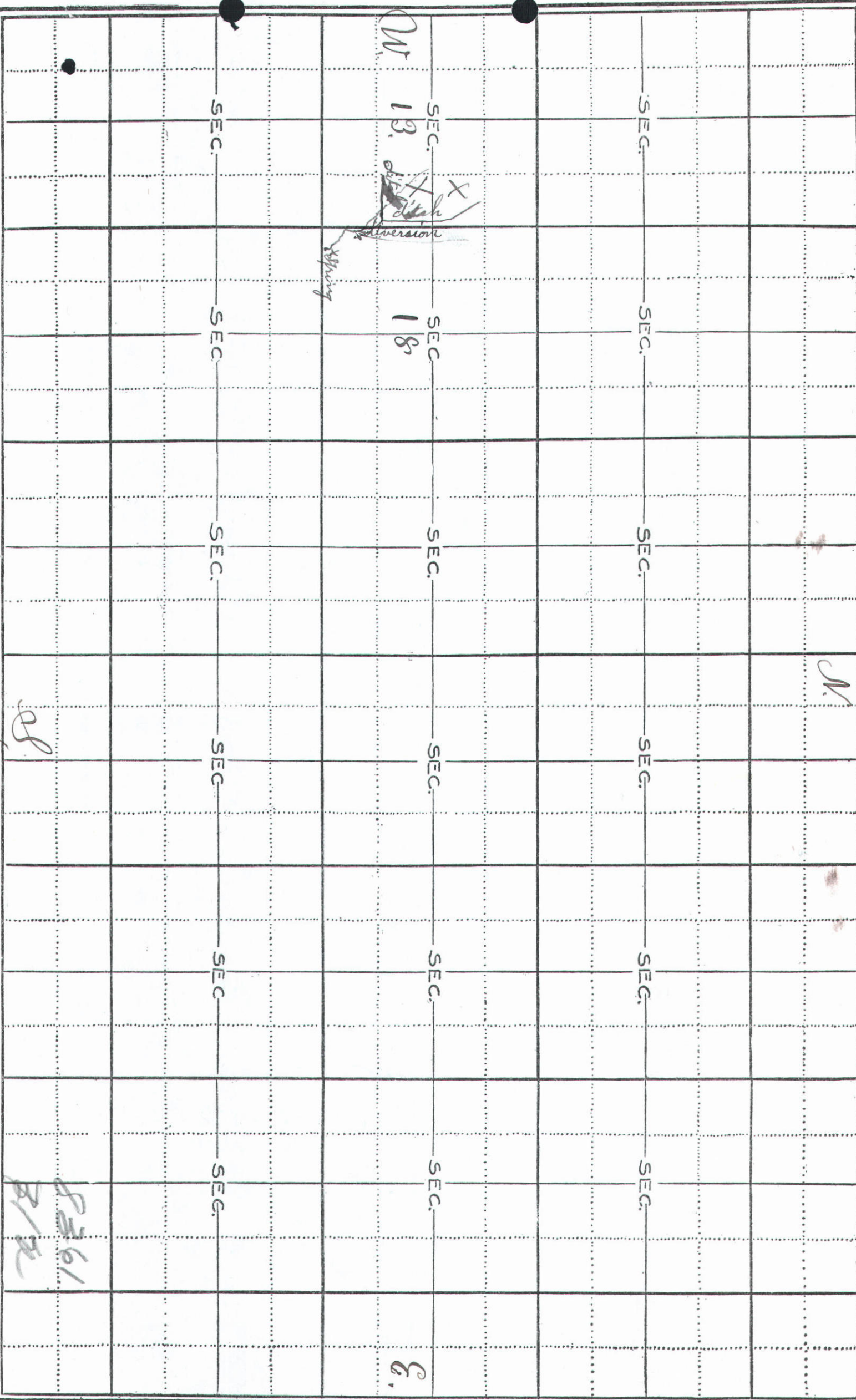


Name of Applicant.....



STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

TRANSFER OF WATER RIGHT

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

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

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

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

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

LOCATION OF POINT(S) OF DIVERSION:

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

PLACE OF USE: IRRIGATION

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

Total number of acres irrigated: * 266

CONDITIONS OF APPROVAL AND REMARKS

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

Dated this 7th day of November, 1997.


 KARL J. DREHER
 Director

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE

STATE OF IDAHO

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

FINAL ORDER

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

ANALYSIS

Applicant's Exceptions

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

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

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

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

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

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

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

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

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

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

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

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

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

Protestants' Exceptions

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

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

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

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

Miscellaneous Amendments

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

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

FINDINGS OF FACT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSIONS OF LAW

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

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

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

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

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

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

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

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

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

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

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

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

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

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

. . . .

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ORDER

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

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

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

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

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

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

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

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

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

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

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

1. The change authorized by this transfer shall be accomplished within one (1) year of the date of this approval.
2. Failure to comply with the conditions of this transfer is cause for the director to issue an order to show cause why the approval of the transfer should not be rescinded.
3. Partial approval of this transfer does not preclude the opportunity for review of the validity of water rights nos. 43-00045, 43-00182, 43-00414, and 43-00286 in the ongoing Snake River Basin Adjudication and does not confirm Snake River Basin Adjudication claim no. A43-10116.
4. Prior to diversion of water under this approval, the right holder shall install suitable measuring devices or other means acceptable to the Department at all authorized points of diversion to determine the total rate of diversion.
5. The total instantaneous rate of diversion of water from all points of diversion under transfer no. 4640 shall not exceed 28.10 cfs, nor shall the total combined annual volume of diversion exceed 1064.0 acre feet.
6. That portion of the total diversion rate authorized in excess of 5.32 cfs is limited to use for conveyance losses in delivery of water right nos. 43-00045, 43-00182, 43-00414, and 43-00286, and claim no. A43-10116.

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

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

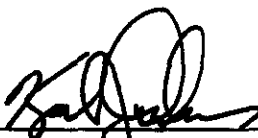
1. These rights when combined with all other rights shall provide no more than 4.0 acre feet annually per acre for the lands above.
2. Water right nos. 43-00045, 43-00182, and 43-00414, and claim no. A43-10116 when combined shall be limited to irrigation of not more than 231 acres, and when combined with water right 43-00286(part), shall be limited to irrigation of not more than 266 acres.

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

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

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

Signed this 7th day of November, 1997.



KARL J. DREHER

Director

CERTIFICATE OF MAILING

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

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

Harold & Ray Jones
HC 72
Malta, ID 83342

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

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



JULIE L. YARBROUGH

Senior Secretary

No. 43-00045

WATER RIGHT PROFILE REPORT

OWNER CODE	NAME & ADDRESS	PRIORITY DATE	WATER USE	USE PERIOD FROM TO	DIVERSION RATE	DIVERSION VOLUME
C	ALBION IDAHO LAND CO.	06/01/1982	IRRIGATION	00/00 00/00	1.700 CFS	

Water Source: CLEAR CREEK

Tributary to: RAFT RIVER

Stage: DECREASED

[illegible]

No. A43-00045

ADJUDICATION CLAIM PROFILE REPORT

OWNER	NAME & ADDRESS	PRIORITY	WATER USE	USE PERIOD	DIVERSION	DIVERSION
CODE		DATE		FROM TO	RATE	VOLUME
-----	-----	-----	-----	-----	-----	-----
C	MERLE JONES	06/01/1982	IRRIGATION	04-01 11-01	1.70 CFS	

Water Source: CLEAR CREEK.

Tributary to: RAFT RIVER

Stage: DETECTED

Point(s) of Diversion:

T16S R27E S27

CASSIA County

T				ME				NW				SW				SE				SUM											
R		S		NENE		MNE		SUNE		SENE		NENW		MNW		SWNW		SENW		NWSW		SESW		NWESE		MWESE		SWESE		SUM	
---		---		---		---		---		---		---		---		---		---		---		---		---		---		---		---	
16S	27E	13	:	06	23	:	17	:	17	:	:	:	:	:	:	:	:	:	:	:	:	:	:	:	:	:	:	:	:	:	211.0
16S	27E	24	:	40	:	:	:	:	:	:	:	:	:	:	:	:	:	:	:	:	:	:	:	:	:	:	:	:	:	:	40.0
16S	28E	19	:	:	:	:	:	:	:	:	:	:	:	:	:	:	:	:	:	:	:	:	:	:	:	:	:	:	:	:	15.0
																		TOTAL ACRES				266.0									

TOTAL ACRES

No. 43-00286 WATER RIGHT PROFILE REPORT
OWNER CODE NAME & ADDRESS PRIORITY DATE WATER USE USE PERIOD FROM 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										SUM																			
HENE					SWNE					SENE					HENW					NWV					SWV					SEV					NESE					NWSE					SWSE					SESE					SUM				
T		R		S		Lt		Ac		Lt		Ac		Lt		Ac		Lt		Ac		Lt		Ac		Lt		Ac		Lt		Ac		Lt		Ac		Lt		Ac		SUM																	
16S		27E		2		01-1		02-1		1		1		03-1		04-1		1		1		1		1		1		1		1		1		1		1		1		1		1																	
16S		27E		4		01-1		02-1		1		1		03-1		04-1		1		1		1		1		1		1		1		1		1		1		1		1		1																	
16S		27E		5		01-1		02-1		1		1		03-1		04-1		1		1		1		1		1		1		1		1		1		1		1		1		1																	
16S		27E		8		1		1		1		1		03-1		04-1		1		1		1		1		1		1		1		1		1		1		1		1		1																	
16S		27E		9		1		1		1		1		03-1		04-1		1		1		1		1		1		1		1		1		1		1		1		1		1																	
16S		27E		10		1		1		1		1		03-1		04-1		1		1		1		1		1		1		1		1		1		1		1		1		1																	
16S		27E		11		1		1		1		1		03-1		04-1		1		1		1		1		1		1		1		1		1		1		1		1		1																	
16S		27E		13		1		1		1		1		03-1		04-1		1		1		1		1		1		1		1		1		1		1		1		1		1																	
16S		27E		14		1		1		1		1		03-1		04-1		1		1		1		1		1		1		1		1		1		1		1		1		1																	
16S		27E		15		1		1		1		1		03-1		04-1		1		1		1		1		1		1		1		1		1		1		1		1		1																	
16S		27E		16		1		1		1		1		03-1		04-1		1		1		1		1		1		1		1		1		1		1		1		1		1																	
16S		27E		17		1		1		1		1		03-1		04-1		1		1		1		1		1		1		1		1		1		1		1		1		1																	
16S		27E		21		1		1		1		1		03-1		04-1		1		1		1		1		1		1		1		1		1		1		1		1		1																	
16S		27E		22		1		1		1		1		03-1		04-1		1		1		1		1		1		1		1		1		1		1		1		1		1																	
16S		27E		23		1		1		1		1		03-1		04-1		1		1		1		1		1		1		1		1		1		1		1		1		1																	
16S		27E		24		1		1		1		1		03-1		04-1		1		1		1		1		1		1		1		1		1		1		1		1		1																	
16S		27E		25		1		1		1		1		03-1		04-1		1		1		1		1		1		1		1		1		1		1		1		1		1																	
16S		27E		26		1		1		1		1		03-1		04-1		1		1		1		1		1		1		1		1		1		1		1		1		1																	
16S		27E		27		1		1		1		1		03-1		04-1		1		1		1		1		1		1		1		1		1		1		1		1		1																	
16S		27E		12		1		1		1		1		03-1		04-1		1		1		1		1		1		1		1		1		1		1		1		1		1																	
16S		27E		3		1		1		1		1		03-1		04-1		1		1		1		1		1		1		1		1		1		1		1		1		1																	

No. 43-00182

OWNER CODE	NAME & ADDRESS	PRIORITY DATE	WATER USE	USE PERIOD FROM 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: DECEASED
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[illegible]

No. 43-00414

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

Water Source:	ROUND MOUNTAIN CREEK	Tributary to:	CLEAR CREEK	Stage:	DECREED
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[illegible]

No. A43-10824

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

Water Source:	Tributary to:	Stage:
ROUND MOUNTAIN CREEK	CLEAR CREEK	DECEED
ROUND MOUNTAIN SPRING	ROUND MOUNTAIN CREEK	

[illegible]

WATER RIGHT PROFILE REPORT

No. A43-02061

ADJUDICATION CLAIM PROFILE REPORT

OWNER CODE	NAME & ADDRESS	PRIORITY DATE	WATER USE	USE PERIOD FROM 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			
Point(s) of Diversion:			Stage: LICENSE			
T16S R27E S13			CASSIA County			
NE			SE			
NE NE NE NAME SENE			NE NE NE SENE			
Lt AC Lt AC Lt AC			Lt AC Lt AC Lt AC			
17			13			
16S 27E 13			TOTAL ACRES			
			30.0			

2

No. 43-02110

WATER RIGHT PROFILE REPORT

OWNER CODE NAME & ADDRESS PRIORITY DATE WATER USE USE PERIOD FROM 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 NAME SENE : NENW NWNW SWSW SWSW : NENE NWSE SUSE 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 : 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 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 NAME SENE : NENW NWNW SWSW SWSW : NENE NWSE SUSE 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 : SUM
16S 27E 13 : 16 : : 35 : 51.0
TOTAL ACRES : 51.0

County: Cassia
Stream: Spring
Amount: 8/10 sec.ft.
Use: Irrigation
Priority: 5-23-1912.

STATE OF IDAHO

Water License No. 8361

WHEREAS, On the 23rd day of May, A. D. 1912, James Mathews,

of Naf, County of Cassia, State of Idaho, duly made application (No. 12491) to me for a permit to use eight-tenths (8/10) of one cubic foot per second of the waters of Spring No. 2,

County of Cassia, State of Idaho, for irrigation and domestic purposes, and,

WHEREAS, On the 20th day of June, A. D. 1912, Permit No. 8361 was issued to said applicant for the diversion of said water and providing for the completion of the works of diversion therein described on or before the 20th day of June, A. D. 1913, and for the application to beneficial use of said water on or before the 20th day of June, A. D. 1915, and,

WHEREAS, On the 17th day of May, A. D. 1913, James Mathews,

the holder of said permit, duly made proof of the completion of adequate works for the diversion of 8/10 of 1 cubic foot per second of said waters, as evidenced by my Certificate No. 8361, dated May 24, 1913, confirming the completion of works of sufficient capacity for diverting and conveying to the place of intended use 8/10 of 1 cubic foot per second of said water, with date of priority of May 23, 1912, and

WHEREAS, On the 4th day of January, A. D. 1915, James Mathews transferred to Emma C. Olson all his right, title and interest in and to said permit, and,

WHEREAS, On the 15th day of May, A. D. 1915, Emma C. Olson,

the holder of said permit, duly made proof of the application to beneficial use of 8/10 of 1 cubic foot per second of said water:

NOW, THEREFORE, By virtue of authority vested in me by the laws of the State of Idaho, I hereby grant and confirm to

Emma C. Olson

of Strevell, County of Cassia, State of Idaho, the holder and owner of said Permit No. 8361, a perpetual right, dating from May 23, 1912, to the use of 8/10 of 1 cubic foot per second of the waters of Spring No. 2,

in the County of Cassia and State of Idaho, or so much thereof as may be necessary for the purposes hereinbelow mentioned, to be diverted at a point in the SW $\frac{1}{4}$ of SW $\frac{1}{4}$, Sec. 18, T. 16 S., R. 28 E.B.M.,

and conducted to and upon 51 acres, divided as follows: 35 acres in the NE $\frac{1}{4}$ of SE $\frac{1}{4}$, and 16 acres in the SE $\frac{1}{4}$ of NE $\frac{1}{4}$, Sec. 13, T. 16 S., R. 27 E.B.M.

for the purpose of irrigation and domestic use, subject, however, to the laws of the State of Idaho, applicable to a license for the use of the waters of the State, and subject, also, to the local or community customs, rules and regulations which have been or may be adopted from time to time by a majority of the users from a common source or supply, canal or lateral from which such water may be taken, when such rules and regulations have for their object the economical use of such water.

WITNESS, My hand and the seal of my office at Boise, Idaho, this 17th day of June, A. D. nineteen hundred and fifteen.

J. H. Smith,

(Seal)

State Engineer:

43 2110

43 2110

No. 12491

APPLICATION FOR PERMIT

To Appropriate the Public Waters of the State of Idaho

1. Name of applicant: James Mathews

Postoffice address: Naf County: Cassia State: Idaho

- I. If applicant is a corporation, give (a) Date and place of incorporation
(b) The amount of capital stock: (c) The amount paid in:
(d) Names and addresses of directors:

- II. The financial resources of the applicant are: (a) Cash on hand:
(b) Treasury stock: (c) Bonds to be issued:
(d) Other resources:

2. The quantity of water claimed is 8/10 of one cubic feet per second.

3. Source of water supply: Spring No. 2

4. Location of point of diversion: SW $\frac{1}{4}$ of SW $\frac{1}{4}$ Sec. 18, T. 16 S. R. 28 E. B. M.

County of Cassia

5. To be used for: Irrigation

- I. Irrigation and domestic use: (a) Amount of land to be irrigated: Forty (40) acres.
(b) In the following legal subdivisions: SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Sec. 13, T. 16 S. R. 27 E. B. M.

II. Mining, milling, power, manufacturing, transportation or other purposes:

[a] At what point:

[b] Amount of power to be generated:

H. P. under ft. head

[c] Is water to be returned to any stream?
return:

(d) If so, name stream and locate point of

6. Estimated cost of works: \$50.00

7. Description of works for diversion:

I. Kind of works: Dam as indicated on the map.

II. Dimensions of works: [a] Height of dam 2 $\frac{1}{2}$ feet, length of dam at top 25 feet,
length of dam at bottom 21 feet. Material used in construction: clay and earth
and stone and wood.

[b] Capacity of reservoir acre feet. [c] Size of headgate, width 1 $\frac{1}{2}$ feet,

Height 2 feet. (d) Conduit ditch width at bottom 1 $\frac{1}{2}$ feet,

width at water line 2 feet, depth of water $\frac{1}{2}$ feet; diameter of pipe

inches; average grade per mile is 6 feet. Length of conduit is $\frac{1}{2}$ miles,
and it crosses the following quarter sections: SW $\frac{1}{4}$ of SW $\frac{1}{4}$ of Sec. 18, T. 13 S. R. 28 thence
along the township line north between Sec. 13, T. 16 S. R. 27 E. and Sec. 18, T.
16 R. 28 E. and then onto the SE $\frac{1}{4}$ of NE $\frac{1}{4}$ of Sec. 13, the land to be irrigated.

8. The time required for the completion of the construction of such work is one years.

9. Time required for the complete application of the water to the proposed use is 2
additional years.

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

James Mathews..... Applicant.

By Agent.

Date of first receipt at office of State Engineer 9.00 a.m. May 23, 1912

Returned to applicant for correction May 24, 1912

Corrected application received June 6, 1912

APPROVAL OF STATE ENGINEER.

The number of this permit is 8361

Recorded in Book 27 Page 8361 Approved June 20, 1912.

This is to certify that I have examined the within application for a permit to appropriate the public waters of the State of Idaho, and hereby approve the same, subject to the following limitations and conditions:

Bond in the sum of to be filed on or before

Work to begin on or before August 19, 1912, and to continue diligently and uninterruptedly to completion, unless temporarily interrupted by circumstances over which permit holder has no control.

One-fifth of the work above specified to be completed on or before December 20, 1912.

The whole of said work to be completed on or before June 20, 1913

Beneficial use of water appropriated in accordance herewith, to be made on or before June 20, 1915.

Witness my hand this 20th day of June, 1912

A. E. Robinson,
State Engineer.

Remarks:

My plan is to increase the flow of Spring No. 2, in addition to the 4/25 sec. ft. already appropriated under Permit No. 8209, I aim to lower bottom of the spring to get another 8/10 second foot. Spring No. 2 is on Government land.

Affidavit of holder and fee for proof of completion of works received May 17, 1913.

Certificate of completion of works issued May 24, 1913.

PERMIT NO. 8361.

CERTIFICATE OF COMPLETION OF WORKS.

To All Whom It May Concern:

This is to certify that James Mathews, of Naf, County of Cassia, and State of Idaho, the holder of Permit No. 8361, issued upon Application No. 12491 bearing date of priority of May 23, 1912, authorizing the diversion of 8/10 of 1 second foot of the waters of Spring No. 2, County of Cassia, State of Idaho, for irrigation and domestic purposes, has fully complied with the provisions of the laws of the State of Idaho relating to the proof of completion of the works of diversion set out and described in said Permit; that said works are adequate for diverting and conveying to the place of intended use 8/10 of 1 second foot of the waters of Spring No. 2; that the point of diversion of said waters is in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ Sec. 18, T. 16 S., R. 28 E. B. M.; that the lands proposed to be irrigated by the use of said water are described as follows, to-wit: SE $\frac{1}{4}$ NE $\frac{1}{4}$ Sec. 13, T. 16 S., R. 27 E. B. M., containing 40 acres.

Witness my hand this 24th day of May, A.D. 1913.

F.P. King,

State Engineer of the State of Idaho.

(See assignment to Emma C. Olson recorded under Permit No. 5691.)

License issued for 8/10 second feet

Page 1814

Recorded by CP

Checked by 213

APPLICATION FOR AMENDMENT TO PERMIT TO APPROPRIATE THE PUBLIC WATERS OF THE STATE OF IDAHO

No. 8361

Comes now Emma C. Olson and represents to the State Engineer of the State of Idaho,

That she is the owner and holder of Permit to appropriate the Public Waters of the State of Idaho, No. 8361, and requests that the list of lands to be irrigated as described in said permit be changed to read as follows:

NE $\frac{1}{4}$ of the SE $\frac{1}{4}$ of Section 13 T. 16 S. R. 27 E. B. M. and SE $\frac{1}{4}$ of the NE $\frac{1}{4}$ of Section 13, T. 16 S. R. 27 E. B. M., making a total of eighty (80) acres.

That an additional amount of water is not asked for, and that the rights of others will not be adversely affected by such change.

Signed at Salt Lake City, Utah this 14th day of June, 1915.

Emma C. Olson

Date of receipt at Office of State Engineer, June 17, 1915.

APPROVAL OF STATE ENGINEER.

I, J. H. Smith, State Engineer of the State of Idaho, hereby approve the above and foregoing application for amendment to Permit to appropriate the Public Waters of the State of Idaho, No. 8361. This approval constitutes a new permit and is issued as an amendment to the original permit, to which it refers and of which it becomes a part, and said application is approved only insofar as the rights of others will not be adversely affected thereby.

Witness my hand this 17th day of June, 1915.

J. H. SMITH,
State Engineer.

A S S I G N M E N T.

For and in consideration of the sum of One (\$1.00) Dollar, I hereby sell, assign and transfer unto L. N. Reese of Strevell, Idaho, all my right, title and interest in and to Permit No. 8361 for the appropriation of the public waters of the State of Idaho. Also License No. 5691.

Witness our hands and seals this 30th day of October, 191__.

Emma C. Olson.

Witness:

Lilly D. Underwood.
L.B. Underwood.

State of Idaho,)
County of Cassia) ss.

On the 30th day of October, A.D., 1918, personally appeared before me Emma C. Olson, signers of the above instrument, who duly acknowledged to me that they executed the same.

(SEAL)

L.B. Underwood.
Notary Public.

Received and filed for record in the office
of the State Engineer, at Boise, Idaho, at
9:00 A.M. February 25, 1919.

Fred A. Wilkie,
State Engineer.

**THIS
RIGHT HAS BEEN
DECREED IN THE
SRBA**

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

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.

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

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

PETITION FOR RECONSIDERATION

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

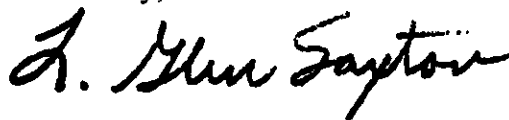
APPEAL OF FINAL ORDER TO DISTRICT COURT

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

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

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

Sincerely,



L. GLEN SAXTON, Chief
Water Allocation Bureau

Enclosure

c: Inter-Office Distrubution

PIORM —

**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

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.

SRBA Case No. 92-00014

ORDER FOR DIRECTOR'S REPORT

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

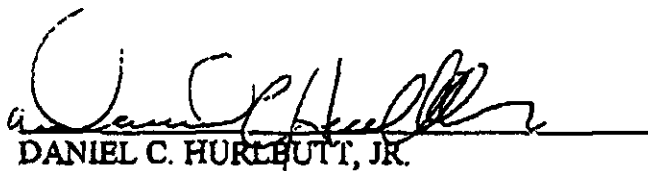
of the several water rights at issue is likely to result in duplicative litigation when the Clear Creek Stream System is reported in a Director's Report as part of the SRBA.

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

1993 MAY 15 PM 4: 56

DISTRICT COURT SREA
TWIN FALLS, 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.

ORDER PROVIDING FOR PRELIMINARY INJUNCTIVE RELIEF - 1

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.

ORDER PROVIDING FOR PRELIMINARY INJUNCTIVE RELIEF - 2

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.

ORDER PROVIDING FOR PRELIMINARY INJUNCTIVE RELIEF - 3

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

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 ¹⁸⁸² ~~1881~~ to 85" of water, with priority of June 1, ~~1992~~ ¹⁹⁹², 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.

ORDER PROVIDING FOR PRELIMINARY INJUNCTIVE RELIEF - 5

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 ^{*David Sessions*} ~~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 ^{*Laverne Kempton*} ~~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

ORDER PROVIDING FOR PRELIMINARY INJUNCTIVE RELIEF - 6

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

ORDER PROVIDING FOR PRELIMINARY INJUNCTIVE RELIEF - 7

CLEAR CREEK WATER RIGHTS

Ray

Jeff

PRIORITY	ID	HOLM	STEW	JONES	SES	ARIMO	HOS	TOTAL CK
08/01/1881	43-00033	2.40						
08/01/1881	43-00034	5.4	3.00					
08/01/1881	43-00035	8.4	3.00					
08/01/1881	43-00036	10.6	2.20					
08/01/1881	43-00039	11.1	0.50					11.10
08/01/1881	43-00037			1.40				12.50
01/02/1882	43-00116		2.00					14.50
08/01/1882	43-00045				1.70			16.20
01/31/1884	43-00117		4.0	2.00				18.20
08/05/1886	43-00206					2.00		20.20
08/15/1886	43-00038	12.8	1.70					21.80
08/15/1886	43-00042	15.0	2.20					24.10
08/01/1887	43-00040	17.2	2.20					26.30
08/01/1887	43-00041	19.9	2.70					29.00
08/01/1887	43-00044	24.3	4.40					33.40
08/11/1897	43-00116		6.8	2.80				36.20
05/01/1908	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
08/14/1911	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	BY HURLE				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

Post-it® Fax Note

7671

To	From
Co./Dept.	Co.
Phone #	Phone #
Fax #	Fax #



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

December 31, 1996

PHILIP E. BATT
GOVERNOR

KARL J. DREHER
DIRECTOR

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

Dear Interested Party:

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

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

PETITION FOR RECONSIDERATION

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

EXCEPTIONS AND BRIEFS

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

ORAL ARGUMENT

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

CERTIFICATE OF SERVICE

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

FINAL ORDER

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

APPEAL OF FINAL ORDER TO DISTRICT COURT

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

Sincerely,

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

L. GLEN SAXTON
Chief, Water Allocation Bureau

Enclosure

C: IDWR - Region

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE
STATE OF IDAHO

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

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

ANALYSIS

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

Recent Adjudication Decisions

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

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

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

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

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

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

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

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

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

Review of the Evidence

The hearing officer listened to portions of the record, particularly the testimony of Merle Jones, Jeff Sessions, and Dave Sundberg. Merle Jones testified several times that lands located in the NWNE and the NENW of Section 13, T16S, R27E were only irrigated during very high water. When asked specifically what water was applied to these lands, he stated that they were irrigated with Clear Creek water or Clear Creek waste water from upstream water users. Upon being questioned further, he testified that the lands east of the Round Mountain Creek channel were irrigated with commingled water.

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

The testimony of Dave Sundberg established that his father, the former watermaster, recognized portions of right no. 43-00286 owned at one time by W. Aythart 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 NWE of Section 13 (35 acres total) will only be recognized as a place of use for water right no. 43-00286B. Thirty-five acres of the 40 acres proposed as a place of use in the NENW, Section 13, T16S, R27E, may be irrigated only with Clear Creek water until the watermaster begins regulating junior priority water rights to satisfy senior priority water rights. The 35 acres may be irrigated with commingled water from the reservoir if Clear Creek water is simultaneously delivered to the reservoir and the rights of Clear Creek are unregulated as described above.

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

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

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

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

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

FINDINGS OF FACTS

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

DESCRIPTION	ACRES
T16S, R27E, Section 13, NENW	6
T16S, R27E, Section 13, SENE	17
T16S, R27E, Section 13, NESW	40
T16S, R27E, Section 13, NESE	35
T16S, R27E, Section 13, NWSE	33
T16S, R27E, Section 13, SWSE	40
T16S, R27E, Section 13, SESE	40
T16S, R27E, Section 24, NENE	40
T16S, R28E, Section 19, NWNW	15
TOTAL ACRES	266

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

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

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

5. The applicant proposes to change the place of use from 23 acres in the NWNE and from 17 acres in the NENW, Section 13, T16S, R27E, to 40 acres in the NESW, Section 13, T16S, R27E. The application for transfer also proposes changes in the period of use and nature of use of the rights.

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

**WATER RIGHTS
43-00045**

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

43-00286

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

43-00182 & 43-00414

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

**ADJUDICATION CLAIMS
A43-00045**

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

A43-00286B

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

A43-10824

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

43-02061

- Authorizes irrigation of 30 acres from springs.

A43-02061

- Claims irrigation of 30 acres from springs.

43-02110

- Authorizes irrigation of 51 acres from a spring.

A43-02110

- Claims irrigation of 51 acres from Round Mountain Spring.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

22. Jeff Sessions is the principal owner of Round Mountain Ranch. Sessions acquired the ranch in December of 1992. After the acquisition of Round Mountain Ranch, Sessions

evaluated the property to determine better ways to irrigate the ranch. He extended the upstream end of the pipeline, capturing Round Mountain Spring water at its present location.

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

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

25. Sessions determined that he could better manage his irrigation water by building a dam and pond near the location of the old dam and by abandoning the storage tank. Sessions built a dam and reservoir of 20 to 30 acre-feet capacity in late 1993. The reservoir location is depicted on applicant's exhibit no. 6. The reservoir captures discharge from Round Mountain Spring and also from the tile drain.

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

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

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

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

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

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

32. The protestants proved that there are no written watermaster records showing delivery of Clear Creek water to Round Mountain Ranch pursuant to water right no. 43-00286 or assessments for delivery of water right no. 43-00286. Dave Sundberg, son of a longtime watermaster who recently died, testified that his father's records recognized some portions of water right no. 43-00286, but did not show ownership of any of water right no. 43-00286 by the applicant or its predecessor. The written documents produced by Dave Sundberg (protestants exhibit no. K) did not prove non-delivery of the right, however. At best, the documents showed two people named W. Ayhart 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 L. YARBROUGH
Senior Secretary

[illegible]

ADJUDICATION CLAIM PROFILE REPORT											
OWNER CODE	NAME & ADDRESS	PRIORITY DATE	WATER USE	USE PERIOD FROM TO	DIVERSION RATE	DIVERSION VOLUME					
C	MERLE JONES	06/01/1982	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							
		NW		SE							
NENE	NWNE	SUNE	SENE	NENW	NWNW	SWNW	SENW	: NENE	NUSE	SUSE	SESE
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	: 06	23	17	:	:	:	:	: 35	33	40	40
16S 27E 24	: 40	:	:	:	:	:	:	:	:	:	:
16S 28E 19	:	:	:	:	:	:	:	:	:	:	:
TOTAL ACRES											
266.0											

No. 43-00286

WATER RIGHT PROFILE REPORT

OWNER
CODE NAME & ADDRESS
C SETTLERS LAND & WATER CO.

PRIORITY
DATE 11/23/1911

WATER USE
IRRIGATION

USE PERIOD
FROM 00/00 TO 00/00

DIVERSION
RATE 60.000 CFS

DIVERSION
VOLUME

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

T	R	S	NE			NW			SW			SE			SUM		
			NAME	NAME	NAME	NAME	NAME	NAME	NAME	NAME	NAME	NAME	NAME	NAME			
Lt	Ac	Lt	Ac	Lt	Ac	Lt	Ac	Lt	Ac	Lt	Ac	Lt	Ac	Lt	Ac	Lt	Ac
16S 27E 2	01-1	02-1	1	1	03-1	04-1	04-1	1	1	1	1	1	1	1	1	1	1
16S 27E 4	01-1	02-1	1	1	03-1	04-1	04-1	1	1	1	1	1	1	1	1	1	1
16S 27E 5	01-1	02-1	1	1	03-1	04-1	04-1	1	1	1	1	1	1	1	1	1	1
16S 27E 8	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
16S 27E 9	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
16S 27E 10	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
16S 27E 11	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
16S 27E 13	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
16S 27E 14	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
16S 27E 15	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
16S 27E 16	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
16S 27E 17	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
16S 27E 21	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
16S 27E 22	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
16S 27E 23	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
16S 27E 24	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
16S 27E 25	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
16S 27E 26	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
16S 27E 27	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
16S 27E 12	1	1	1	1	03-1	04-1	04-1	1	1	1	1	1	1	1	1	1	1
16S 27E 3																	

No. 43-002868

ADJUDICATION CLAIM PROFILE REPORT

OWNER
CODE NAME & ADDRESS
C MERLE JONES

PRIORITY
DATE 11/23/1911

WATER USE
IRRIGATION

USE PERIOD
FROM 04-01 TO 11-01

DIVERSION
RATE 4.30 CFS

DIVERSION
VOLUME

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

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

T	R	S	NE			NW			SW			SE			SUM			
			NAME	NAME	NAME	NAME	NAME	NAME	NAME	NAME	NAME	NAME	NAME					
Lt	Ac	Lt	Ac	Lt	Ac	Lt	Ac	Lt	Ac	Lt	Ac	Lt	Ac	Lt	Ac	Lt	Ac	
16S 27E 13	06	23	17	17														
16S 27E 24	40																	
16S 28E 19																		
														35	33	40	40	211.0
																		40.0
																		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 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	CASSIA County			
		S24	NESESE	CASSIA County			
T	R	S	NE	NESE	SESE	SUM	
16S	27E	13	06	23	17	40	
16S	27E	24	17	35	33	40	
16S	28E	19	01-15			15.0	
TOTAL ACRES						266.0	

WATER RIGHT PROFILE REPORT

[illegible]

WATER RIGHT PROFILE REPORT

[illegible]

ADJUDICATION CLAIM PROFILE REPORT

Water Source:	ROUND MOUNTAIN CREEK ROUND MOUNTAIN SPRING	Tributary to:	CLEAR CREEK ROUND MOUNTAIN CREEK	Stage:	DECREED
Point(s) of Diversion:	T16S R27E S13 R28E S18 Lot04(SWSWSV)	SENESE	WESESE	CASSIA County CASSIA County	

				NE				NW				SW				SE																	
		NENE		NNWE		SUNE		NENW		NNNW		SUNW		SENW		NWSW		SUSW		SESW		NENE		NWSE		SUSE							
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	SUM				
16S	27E	13	06	23			17																										
16S	27E	24	40																														
16S	28E	19																															
																35																	
																	33																
																		40															
																			211.0													211.0	
																																40.0	
																																	15.0
																																	266.0
																TOTAL ACRES																	

WATER RIGHT PROFILE REPORT

No. A43-02061

ADJUDICATION CLAIM PROFILE REPORT

1

WATER RIGHT PROFILE REPORT

OWNER CODE	NAME & ADDRESS	PRIORITY DATE	WATER USE	USE PERIOD FROM 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					
WENE	NWNE	SWNE	SENE	WENW	NWNW	SWNW	SENW	WESW	NWSW	SWSW	SESW	WESSE	NWSE		
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 :				16 :				16 :				35 :			
												TOTAL ACRES			
												51.0			
												51.0			

No. A43-02110

ADJUDICATION CLAIM PROFILE REPORT

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

[illegible]



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.

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

Chief, Water Allocation Bureau

Enclosure

cc: IDWR - Region

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

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

Protests were filed with the Idaho Department of Water Resources (department) contesting application for permit to appropriate water no. 43-07321 and application for transfer no. 4640. The department conducted a hearing on February 21 and 22, 1996. The hearing officer recommends the following findings of fact, conclusions of law and order:

FINDINGS OF FACT

1. On May 24, 1995, Round Mountain Ranch (applicant) filed application for permit no. 43-07321 with the department, proposing the storage of 26 acre feet of water to be diverted from Round Mountain Creek, drain water, and surface runoff water at points of diversion located within the NWNESE¹ and NENWSE, Section 13, T16S, R27E, B M.² The applicant proposes diversion to storage of 1.0 cubic feet per second (cfs) for year-round storage and for irrigation and stock water for 400 head of cattle. The application for permit proposes irrigation of the following place of use:

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

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

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

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

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

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

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

5. The applicant proposes to change the place of use from 23 acres in the NWNE and from 17 acres in the NENW, Section 13, T16S, R27E, to 40 acres in the NESW, Section 13, T16S, R27E. The application for transfer also proposes changes in the period of use and nature of use of the rights.

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

WATER RIGHTS

43-00045

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

43-00286

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

43-00182 & 43-00414

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

43-02061

- Authorizes irrigation of 30 acres from springs.

43-02110

- Authorizes irrigation of 51 acres from a spring.

ADJUDICATION CLAIMS

A43-00045

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

A43-00286B

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

A43-10824

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

A43-02061

- Claims irrigation of 30 acres from springs.

A43-02110

- Claims irrigation of 51 acres from Round Mountain Spring.

7. The department published notice of the applications which were subsequently protested by Harold Jones and Ray Jones (protestants). The protestants own lands irrigated by water flowing in the channel of Round Mountain Creek.

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

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

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

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

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

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

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

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

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

16. The boggy area was difficult to farm. During the mid-1960's, Merle Jones constructed an east-west tile drain which collects the subsurface waters in the shallow water table. The subsurface waters collect in the tile drain and discharge into a north-south pipeline. The pipeline delivers water for irrigation.

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

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

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

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

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

22. Jeff Sessions is the principal owner of Round Mountain Ranch. Sessions acquired the ranch in December of 1992. After the acquisition of Round Mountain Ranch, Sessions evaluated the property to determine better ways to irrigate the ranch. He extended the upstream end of the pipeline, capturing Round Mountain Spring water at its present location.

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

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

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

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

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

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

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

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

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

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

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

33. Jeff Sessions testified that during filling of the reservoir in the fall, water from Round Mountain Spring would discharge into an artificial ditch along the east side of the reservoir and

would completely percolate into the ground. Sherl Chapman, an expert witness for Sessions, also testified that he had observed the water from Round Mountain Spring sinking into the ground at approximately the location of Jeff Sessions' house.

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

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

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

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

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

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

40. The expert witnesses disagreed about the source of shallow ground water located below Round Mountain Ranch, and also disagreed where Round Mountain Spring derives its water. Sherl Chapman, expert witness for the applicant, testified that Round Mountain Ranch is underlaid by an impervious clay layer which extends to approximately the north end of the property boundary of Round Mountain Ranch. He testified that water is perched on top of the impervious clay layer, and does not originate as ground water underflow in the Clear Creek drainage. He testified that the

confining clay layer disappears just north of Round Mountain Ranch, and it is his opinion that Round Mountain Creek loses water as it flows north.

41. In contrast, Charles Brockway, expert witness for the protestants, testified that ground water underlying Round Mountain Ranch is probably a combination of precipitation, percolating irrigation water applied to Round Mountain Ranch and deeper underflow from the south. He further testified that Kelso Springs, or more generally, the springs which arise in the channel of Round Mountain Creek north of Round Mountain Ranch, but upstream of Kelso Springs Ranch, are an expression of ground water underflow

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

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

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

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

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

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

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

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

50. On April 30, 1993, the department issued a moratorium order prohibiting the further appropriation of ground water or surface water for consumptive purposes which affects appropriations of water in the Raft River Valley. An exception in the order states that the department will review applications for permit on a case-by-case basis to determine whether approval would injure other water users.

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

CONCLUSIONS OF LAW

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

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

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

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

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

The department of water resources is hereby prohibited from issuing or granting permits to divert or appropriate the waters of any lake not exceeding five (5) acres in surface area at high water mark, pond, pool or stream in this state, which is located or situated wholly or entirely upon the lands of a person or corporation owning said land, or with his or its written permission, executed and acknowledged as required for the conveyance of real estate

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

5. Idaho Code § 42-212 prevents the intrusion or trespass of prospective water users on the land of another to divert surface water wholly contained on the landowner's property. The section does not describe those waters, however, as being solely owned by the landowner on whose lands they are found. It also does not exempt the landowner from the requirement that the water must be appropriated by obtaining permits and licenses from the department.

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

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

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

... a moratorium is established on the processing and approval of presently pending and new applications for permits to appropriate water from all surface and ground water sources within the Eastern Snake River Plain Area. The following provisions apply to the administration of the moratorium:

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

- a) Protection and furtherance of the public interest as determined by the Director, requires consideration and approval of the application irrespective of the general drought related moratorium; or
- b) The Director determines that the development and use of the water pursuant to an application will have no effect on prior surface and ground water rights because of its location, insignificant consumption of water or mitigation provided by the applicant to offset injury to other rights.

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

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

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

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

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

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

14. Idaho Code § 42-222 (2) states:

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

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

16. The applicant's adjudication claims were filed pursuant to Idaho Code § 42-1416 and § 42-1416A, which allowed water users to claim additional acreage as a place of use than was described by the water right. These laws, known as the presumption statutes, were held to be unconstitutional by the Idaho Supreme Court. The statutes were repealed and Idaho Code § 42-1425 and § 42-1426, known as the amnesty statutes, were enacted to replace the presumption statutes. The amnesty statutes were also challenged, and the district court ruled that the statutes are constitutional. The Idaho Supreme Court recently affirmed that the amnesty statutes are constitutional.

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

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

ORDER

IT IS HEREBY ORDERED that storage during the nonirrigation season proposed by application for permit no. 43-07321 is APPROVED. All other portions of application for permit no. 43-07321 are REJECTED. Because of difficulty in separating natural flow from storage water, 35 acres of the proposed place of use, located in the NESW, Section 13, T16S, R27E, cannot be irrigated with storage water, but can only be irrigated during the period of time when Clear Creek water is deliverable pursuant to water right no. 43-00286B. Irrigation of the 35 acres must cease when delivery to junior water rights in Clear Creek must be curtailed to satisfy senior water rights.

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

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

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

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

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

IT IS FURTHER ORDERED that application for transfer no. 4640 is PARTIALLY APPROVED to allow storage during the nonirrigation season and the retention of summer flows diverted pursuant to existing water rights for water management purposes.

IT IS FURTHER ORDERED that 35 acres located in the NESW, Section 13, T16S, R27E, can only be irrigated with a portion of water right no. 43-00286. Irrigation of the 35 acres is not permitted when diversion from Clear Creek to junior water rights must be curtailed to satisfy senior water rights.

IT IS FURTHER ORDERED that the remaining five acres of the 40 acres located in the NESW, Section 13, T16S, R27E, will be described as a place of use for water right nos. 43-00045, 43-00286, 43-000182, 43-00414 (the last two combined into A43-10824), and will also be described as a place of use in the water right representation of adjudication claim no. A43-10116.

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

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

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

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

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

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

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

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

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

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

The total instantaneous diversion of water from all points of diversion under transfer no. 4640 shall not exceed 28 10 cfs, nor total combined annual volume of 1064.0 acre feet.

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

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

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

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

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

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

ATTACHMENT A

No. 43-00045

WATER RIGHT PROFILE REPORT

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

Water Source: CLEAR CREEK

Tributary to: RAFT RIVER

Stage: DECREED

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

No. A63-00045

ADJUDICATION CLAIM PROFILE REPORT

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

Water Source: CLEAR CREEK

Tributary to: RAFT RIVER

Stage: DECREED

Point(s) of Diversion:

T16S R27E S27

SESEME

CASSIA County

OWNER CODE	NAME & ADDRESS	PRIORITY DATE	WATER USE	USE PERIOD FROM TO	DIVERSION RATE	DIVERSION VOLUME
T	R S : Lt Ac Lt Ac Lt Ac Lt Ac					SUM
16S 27E 13 :						
16S 27E 24 :						
16S 28E 19 :						
TOTAL ACRES						266.0

WATER RIGHT PROFILE REPORT

DIVISION RATE

60.000 CFS

Stage: DECREED

ADJUDICATION CLAIM PROFILE REPORT

DIVERSION RATE
 4.30 CFS

Stage: DECREED

CASSIA County

T	R	S	NE			NW			SW			SE			SUM
			NENE	NWNE	SENE	NENW	NWNW	SENW	NESW	NWSW	SESW	NESE	NWSE	SUSE	
165	27E	13	06	23	17	17									211.0
165	27E	24	40												40.0
165	28E	19				01-15									15.0
TOTAL ACRES															266.0

PAGE: 1

[illegible]

WATER RIGHT BENEFIT REPORT

**DIVERSION
VOLUME**

1.500 CFS

Stage: DECREED

NE				NW				SW				SE			
NAME	NAME	SNAME	SENE	NAME	NAME	SNAME	SENE	NAME	NAME	SNAME	SENE	NAME	NAME	SNAME	SENE
1	R	S	:	1	R	S	:	1	R	S	:	1	R	S	:
16S	27E	12	:	16S	27E	13	:	16S	27E	13	:	16S	27E	13	:

WATER RIGHT PROFILE REPORT

DIVERSION VOLUME

0.600 CFS

Stage: DECREED

[illegible]

ADJUDICATION CLAIM PROFILE REPORT

DIVERSION
VOLUME

0.04 CFS

2.10 CFS

Stage: DECREED

CASSIA County
CASSIA County

[illegible]

TOTAL ACRES	266.0
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WATER RIGHT PROFILE REPORT

Stage: LICENSE

CASSIA County

30.0

ADJUDICATION CLAIM PROFILE REPORT

Stage: 1 LICENSE

CASSIA County

0-0

30.0

WATER RIGHT PROFILE REPORT

USE PERIOD	DIVERSION	DIVERSION
FROM	TO	RATE
		VOLUME
00/00	00/00	0.800 CFS

Stage: LICENSE

CASSIA County

TOTAL ACRES

ADJUDICATION CLAIM PROFILE REPORT

USE PERIOD	DIVERSION	DIVERSION
FROM	RATE	VOLUME
04-01 11-01	0.80 CFS	

Stage: LICENSE

CASSIA County

TOTAL ACRES

Signed this 15th day of October, 1996.


GARY SPACKMAN

CERTIFICATE OF MAILING

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

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

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

Harold & Ray Jones
HC 72
Malta, ID 83342

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


JULIE L. YARBROUGH
Senior Secretary

REPORT OF ENGINEER

1. State name of applicant and number of permit: Anna S. Olson
James Mathews no 8361
2. State source of water supply: Spring no 2
3. Location of point of diversion: S.W. 1/4 of S.W. 1/4 - sec. 18 - T. 16 S. R. 28 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: 1 1/2 ft
 - (b) Width at water line: 2 ft
 - (c) Depth of water: 1/2 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:
all 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. 1/4 of S.E. 1/4 of Sec 13. T. 16. S. R. 27 E. B. M.
16 acres S.E. 1/4 of N.E. 1/4 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, deposes and 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 May 1915

My Commission Expires Jan. 20th 1917

L. B. Underwood
Notary Public.

8361

[illegible]

SCALE: 2 INCHES=1 MILE DRAW PLAN IN INK.