ADMINISTRATIVE MEMORANDUMS INDEX

As of January 26, 2016

Please note that these Administrative Memorandums will include many memos that have become outdated due to changes in rules, statutes or current Department policy. Some memos have been amended or superseded by others, and some may no longer be applicable.

WATER DELIVERY			
No.	**Title**	**Signed**	**Amended or Superseded**
1.	**Enjoin the Use of Water Represented Only by a SRBA Claim**	**5-26-92**	
2.	**Irrigation Season**	**6-18-92**	
3.	**Partial Decrees for Wild & Scenic River Water Rights, Stipulation for Settlement of Wild & Scenic River Dispute** (also see App. Proc. No. 70)	**10-30-09**	

MEMORANDUM

To: Water Management Division

From: Norman C. Young NCY

RE: **DEPARTMENT POLICY CONCERNING ENJOINING THE USE OF WATER REPRESENTED ONLY BY A SRBA CLAIM**

Date: May 26, 1992 Water Delivery No. 1

With the 1992 irrigation season underway and another short water year occurring, it is necessary to clarify the policy the IDWR will take concerning the use of water where the only right to use the water is represented by a claim filed in the Snake River Basin Adjudication (SRBA).

IDWR is confronted with the question of whether to seek to enjoin use of water because the validity of SRBA claims has not been confirmed by the court or to allow continued use pending action of the court. Some of these claims assert expansions authorized by Section 42-1416, Idaho Code, or changes in point of diversion or place of use authorized by Section 42-1416A, Idaho Code.

Within water districts, IDWR will instruct the watermaster to continue the delivery to a permit, license or decreed right with points of diversion not in accordance with the points of diversion recorded on the permit, license or decree if:

1. A claim has been filed with IDWR in the SRBA that correctly describes the point of diversion that is claimed as being used and the claim appears to meet the requirements of section 42-1416A, Idaho Code, and

2. The water district records indicate that the requested point of diversion has been in use prior to November 19, 1987 and each year since that date.

Similarly, IDWR will instruct the watermaster to continue to deliver to permits, licenses and decrees for which the place of use has been changed from that recorded on the permit, license or decree if:

1. The change has been claimed on a SRBA claim filed with IDWR and appears to meet the requirements of Sections 42-1416, 42-1416A or 42-1416B, Idaho Code, and

2. The rate of diversion does not exceed the rate permitted, licensed or decreed.

This policy assumes the benefits provided by Sections 42-1416, 42-1416A and 42-1416B, Idaho Code, of changed or expanded use will not injure other water rights. If IDWR has information to show that the changed or expanded use will injure other water rights, IDWR will instruct the watermaster to not deliver the right to the requested point of diversion or to the changed or expanded use until either an application for change has been filed and processed, the court has issued a ruling on the right as claimed in the SRBA, or if appropriate, an administrative hearing has been held to address the issue of injury.

Within a water district, during times of scarcity, the watermaster will shut off uses based on beneficial use whether represented by a 42-243 claim, SRBA claim or both when the claim is the only evidence of the right.

Outside a water district, IDWR policy will generally be similar to that within a water district except that where a use is represented only by a 42-243 claim, SRBA claim or both, the wateruser must be able to demonstrate use of water which is consistant with the SRBA claim since November 19, 1987 if the use is questioned.

IDWR will continue to issue administrative orders to "cease and desist" the use of water if either no water right is of record with IDWR or if the only record is an unapproved application. IDWR will seek injunctions and civil fines as necessary to enforce the administrative orders.

The policy described above is intended to provide for the "property right" nature of water rights which cannot be taken or interfered with, without due process.

ADMINISTRATOR'S MEMORANDUM

To: Water Management Division

From: Norman C. Young NCY

RE: **IRRIGATION SEASON**

Date: June 18, 1992 Water Delivery No. 2

Watermasters and water users have recently asked raised questions about the authorized irrigation season for natural flow water rights and authorized periods in which water can be diverted to storage without respect to natural flow rights.

Many existing decrees do not describe seasons of authorized use for irrigation water in terms of start and end dates. If dates are provided in the decrees or licenses of water right, the dates control the authorized period of use until changed by subsequent court decree or action of the Director. When such guidance is not available, the department should generally look to the recommended irrigation seasons used by the department in connection with permits, licenses and director's reports.

With respect to the relationship between natural flow rights and storage rights on a common stream system, two court cases, copies of which are attached, provide guidance essentially describing the irrigation season as April 1 to November 1 of each year. The cases are as follows:

Twin Falls Land & Water Company v. Lind, 14 Idaho 348, 94 P. 164 (1908)

Anderson v. Dewey, 82 Idaho 173, 350 P. 2d 734 (1960)

When existing decrees have provisions allowing early or late diversion of water, the provisions should be followed.

in the district and shall be proportionate to the benefits received by such lands growing out of the maintenance and operation of the said works of said district."

This requirement of uniformity of assessment has been held applicable in irrigation districts where no federal project lands were involved. Colburn v. Wilson, 24 Idaho 94, 132 P. 579; Gedney v. Snake River Irrigation District, 61 Idaho 605, 104 P.2d 909.

I.C. § 43-701, containing the provision above quoted, was enacted some years prior to the acts of 1915 and 1917, providing for cooperation by irrigation districts with the federal government in federal reclamation projects. The later acts are now codified in various sections of chapter 18, of Title 43, Idaho Code.

[2, 3] In case of a conflict between an earlier and later act of our legislature, the later act prevails. Lloyd Corporation v. Bannock County, 53 Idaho 478, 25 P.2d 217; 82 C.J.S. Statutes, § 368. To the extent that there is any conflict in the provisions of chapter 7, of Title 43, with the provisions of chapter 18, of Title 43, the latter must prevail.

The defendant district, acting through its board of directors, has fully complied with the law in making the assessment required by the determination of the Board of Control on project lands within the district, and has fully complied with the requirements of I.C. § 43-701 in making the assessments upon Ridenbaugh lands within the district, and has no authority to change either assessment to conform to the prayer of plaintiff's complaint.

Judgment affirmed.

Costs to respondents.

SMITH, KNUDSON, McQUADE and McFADDEN, JJ., concur.

350 P.2d 734

William C. ANDERSON, Plaintiff-Appellant,

v.

E. Lee DEWEY and Ervine L. Dewey, Defendants-Respondents.

No. 8824.

Supreme Court of Idaho.

March 2, 1960.

Rehearing Denied March 29, 1960.

Action to quiet title to claimed right to exclusive use of 480 miner's inches of waters of creek between January 1st and April 1st of each year, and to enjoin interference with use thereof. The Eleventh Judicial District Court, Cassia County, ren-

dered decree in favor of plaintiff and defendants filed a motion for new trial. The successor judge, Theron W. Ward, J., made order vacating and setting aside findings of fact, conclusions of law and decree and directed entry of decree in favor of defendants and plaintiff appealed. The Supreme Court, Taylor, C. J., held that under 1892 decree providing that plaintiff's predecessors were entitled to 480 inches of water from creek from January 1 to July 1 of each year when not in use by prior appropriators, limitation of plaintiff's right to use of 480 inches of water was not confined to any irrigation season but applied to period from January 1 to April 1 as well as part of irrigation season from April 1 to July 1, but that in view of fact that one defendant had built dam constituting an invasion of plaintiff's prior right, decree would be amended to add to paragraph defining plaintiff's right "the words with date of priority of June 25, 1887."

Judgment as modified affirmed.

1. New Trial ⇐114

Where motion for new trial is heard by successor to trial judge, successor may make new findings and conclusions, and direct entry of new judgment, subject to limitation that if he is satisfied that he cannot perform those duties because he did not preside at trial, or for any other reason, he may in his discretion grant a new trial. Rules of Civil Procedure, rules 59(a), 63, 86.

2. New Trial ⇐114

If successor of trial judge is not satisfied with findings, conclusions and decree of his predecessor, and thinks such should be vacated or modified, but cannot do so because he did not see and hear the witnesses, then successor is limited to the granting of a new trial. Rules of Civil Procedure, rules 59(a), 63, 86.

3. Constitutional Law ⇐314

New Trial ⇐114

In cases tried without a jury, a party litigant is entitled to decision of facts by judge who heard and saw witnesses, and deprivation of that right is a denial of due process, but, in case where successor judge, in resolving issues raised by motion for new trial, is not required to weigh conflicting evidence or pass upon credibility of witnesses, but can resolve such issues upon questions of law, or upon evidence which is not materially in conflict, he may exercise the same authority as could judge who tried the case. Rules of Civil Procedure, rules 59(a), 63, 86.

4. Waters and Water Courses ⇐152(11)

Where statutes were enacted subsequent to decree with respect to rights to water of stream, statutes and decision based thereon could not be considered as controlling in construing decree, but decree would be construed in light of facts in case and law as it existed when the decree

was entered. I.C. §§ 42-907, 42-908, 42-1201, 42-1202.

5. Waters and Water Courses ⇐152(11)

Under 1892 decree providing that plaintiff's predecessors were entitled to 480 inches from creek from January 1 to July 1 of each year when not in use by prior appropriators, limitation of plaintiff's right to use of 480 inches of water was not confined to any irrigation season but applied to period from January 1 to April 1 as well as part of irrigation season from April 1 to July 1.

6. New Trial ⇐114

Where successor to trial judge on motions for new trial was not required to weigh conflicting evidence or determine credibility of witnesses, he did not exceed his authority nor abuse his discretion in setting aside the findings, conclusions and decree of trial judge without a new trial. Rules of Civil Procedure, rules 59(a), 63, 86.

On Petition for Rehearing.

7. Waters and Water Courses ⇐152(11)

Where neither plaintiff nor his predecessor who had been granted water rights under 1892 decree were parties to 1910 action, no water rights conflicting with plaintiff's prior rights could be asserted by defendants based on 1910 decree.

8. Waters and Water Courses ⇐152(2)

Diversion and storage of water by defendant by dam he had built at time when plaintiff's prior right to early runoff or flood water was unfilled and needed by plaintiff constituted an invasion of plaintiff's prior right.

9. Waters and Water Courses ⇐152(12)

Where defendant had built a dam or reservoir in which he stored water in high or flood water season for use at later date and claimed the right to do so under 1910 decree, and such diversion and storage at time when plaintiff's prior right to 480 inches of early runoff or flood water was unfilled and needed by plaintiff who was downstream constituted an invasion of plaintiff's prior right, decree defining plaintiff's rights to water would be modified to include date of priority of June 25, 1887.

Merrill & Merrill, Pocatello, for appellant.

A party litigant is entitled to a decision upon the facts of his case from the Judge who hears the evidence, where the matter is tried without a jury. DeMund v. Superior Court, 213 Cal. 502, 2 P.2d 985; McAllen v. Souza, 24 Cal.App.2d 247, 74 P.2d 853; In re Williams, 52 Cal.App. 566, 199 P. 347.

The reversal of a judge of co-ordinate jurisdiction who heard the evidence and

saw the witnesses and entered a decree to the contrary by a judge who had not heard the evidence nor seen the witnesses would be unconstitutional and a violation of the Fourteenth Amendment of the United States Constitution and Article I, Section 13 of the Constitution of Idaho, because it would deprive the contending party of property without due process of law. U.S.C.A. Const. Amend. 14; Article I, Section 13, Constitution of State of Idaho; Smith v. Dental Products Co., etc., 7 Cir., 168 F.2d 516; Mills v. Ehler, 407 Ill. 602, 95 N.E.2d 848; Federal Deposit Insurance Corp. v. Siraco, 2 Cir., 174 F.2d 360; People ex rel. Reiter v. Lupe, 405 Ill. 66, 89 N.E.2d 824.

It is the law of Idaho that an irrigation season is between April 1st and November 1st. Twin Falls Land & Water Co. v. Lind, 14 Idaho 348, 94 P. 164; Sections 42–907, 42–908, Idaho Code.

S. T. Lowe & Kales E. Lowe, Dean Kloepfer, Burley, Parry, Robertson & Daly and Bert Larson, Twin Falls, for respondents.

The validity of a judgment is to be determined by the laws in force at the time of its rendition and is not affected by subsequent changes therein. Pacific Power Co. v. State, 1917, 32 Cal.App. 175, 162 P. 643; Lake v. Bonynge, 1911, 161 Cal. 120, 118 P. 535; Secs. 42–907, 42–908, I.C.; McGinness v. Stanfield, 6 Idaho 372, 55 P. 1020.

A judge succeeding a retired judge has the same authority as his predecessor and authority to set aside his predecessor's findings of fact, conclusions of law, judgment and decree, and enter new ones adverse to the old. Rules 59, 63, Idaho Rules of Civil Procedure; Ryans v. Blevins, D.C.Del.1958, 159 F.Supp. 234, affirmed by the U. S. Court of Appeals, 3rd Circuit, 258 F.2d 945; Phelan v. Middle States Oil Corp., 7 Cir., 1954, 210 F.2d 360; United States v. Standard Oil Company, D.C.Cal.1948, 78 F.Supp. 850; Kelly v. Sparling Water Company, 1959, 52 Cal.2d 628, 343 P.2d 257; Freese v. Bassett Furniture Industries, 1954, 78 Ariz. 70, 275 P.2d 758; Krug v. Porter, 1957, 83 Ariz. 108, 317 P.2d 543.

The appellant has not been denied due process under the Fourteenth Amendment to the United States Constitution or under Article I, Section 13 of the Idaho Constitution. Eagleson v. Rubin, 16 Idaho 92, at page 101, 100 P. 765; Connelly v. United States, 8 Cir., 1957, 249 F.2d 576; United States v. Twin City Power Company of Georgia, 5 Cir., 1958, 253 F.2d 197.

TAYLOR, Chief Justice.

Plaintiff (appellant) brought this action to quiet title to his claimed right to the exclusive use of 480 miner's inches of the waters of Marsh creek between the dates of January 1st and April 1st of each year, and to enjoin the defendants (respondents) from interfering with his use thereof. The cause was tried to the court without jury. Findings, conclusions and decree were entered in favor of the plaintiff and against the defendants.

Thereafter, after the judge before whom the cause was tried had retired from office and his successor had been elected and qualified, the defendants filed a motion for a new trial. After hearing the motion, in lieu of granting a new trial, the successor judge made an order vacating and setting aside the findings of fact, conclusions of law and decree, and directed the entry of, and thereupon entered findings, conclusions and decree in favor of defendants. Plaintiff appealed from the order vacating the findings, conclusions and decree of the trial judge, and from the decree entered by the successor judge.

Marsh creek rises approximately fifteen miles above plaintiff's lands, in Cassia county, and runs northerly and westerly through the lands of the defendants and others before reaching the property of the plaintiff. The rights to the use of the waters of Marsh creek were adjudicated by decree made by District Judge C. O. Stockslager under date of March 21, 1892, and entered April 11, 1892. Plaintiff is successor in interest of J. W. Lamoreaux, whose rights were set out in the decree as follows:

"5 J. W. Lamoreaux Sixty inches from Marsh creek April 16th 1881.
J. W. Lamoreaux Sixty inches from Marsh creek July 21st 1884.
J. W. Lamoreaux Four hundred and eighty (480) inches from Marsh creek from January 1st to July of each year when not in use by prior appropriators."

The decree fixes no date of priority for the 480 inches of water decreed to Lamoreaux. However, in the conclusions of law the 480 inch water right is set out as follows:

"* * * and to 480 inches of the waters of said Creek for like purpose to date from June 25th 1887 said last mentioned water to be used only from January 1 to July 1 of each year."

The trial judge found that as to the 480 inches plaintiff was entitled to a priority date of June 25, 1887, as determined in the conclusions of law entered by Judge Stockslager. This finding was not altered by the successor judge.

The defendants are the successors in interest of S. R. Gwin, Minnie Gwin, R. L. Wood and Mary R. Norton. The rights of the defendants' predecessors are set out in the Stockslager decree as follows:

"7 S. R. Gwin, fifty inches from Marsh creek, June 5th, 1875.
S. R. Gwin, one hundred and thirty-three and one-third inches from Marsh creek, May 30th, 1879.
S. R. Gwin, five hundred (500) inches from Marsh creek, April 20th, 1881.

"8 Minnie Gwin, five hundred (500) inches from Marsh creek, April 20th, 1881.

"18 * * * R. L. Wood, 160 inches of the waters of Marsh creek from the 30th of April, 1873, and 45 inches of the waters of Marsh creek, from the 31st day of March, 1878.

"19 Mary R. Norton, one hundred (100) inches of the waters of Marsh creek, from the 30th day of April, 1874."

Thus, the Stockslager decree fixes the priority dates of all of defendants' water rights at times prior to the right given to plaintiff's predecessor for the use of the 480 inches in issue.

Defendants assert their right to the use of the water as against the plaintiff on two grounds: first, by the terms of the Stockslager decree, their right to the use of the 480 inches of water in question is prior and superior to plaintiff's right; second, since January, 1915, they have acquired the right to the use of the water adversely to plaintiff by prescription.

As to defendants' first contention, the trial court construed the Stockslager decree as giving plaintiff an exclusive right to the use of the 480 inches of water from January 1st to April 1st of each year. This conclusion was based upon the trial court's finding that the irrigation season in Idaho begins on April 1st and continues to November 1st. From this finding the court concluded that defendants' prior rights under the Stockslager decree were effective only during the irrigation season and for that reason did not take precedence over plaintiff's preseason or winter right between January 1st and April 1st.

The trial court found the evidence insufficient to sustain defendants' claim of right to the use of the water by prescription.

Upon consideration of the motion for a new trial, the successor judge concluded that the irrigation season for the use of waters from Marsh creek was not limited to the period "between April 1st and November 1st, or any other time," and that the limitation of plaintiff's right to the use of the 480 inches of water set out in the Stockslager decree, to wit, "when not in use by prior appropriators", is not confined to any irrigation season, but applies to the period from January 1st to April 1st as well as from April 1st to July 1st.

The successor judge made no finding or ruling on the issue of defendants' claim of prescriptive right to the use of the water in issue, but based the judgment for defendants exclusively upon his interpretation of the Stockslager decree.

Plaintiff contends that the successor judge had no power or authority to order the vacation of the findings, conclusions and decree of his predecessor, and to make and enter findings, conclusions and decree in favor of the losing party, without a new trial; that he had no authority to do so for the particular reason that he had not pre-

sided at the trial and had not seen or heard the witnesses; and that the action of the successor judge had deprived the plaintiff of property without due process of law.

The authority of the successor judge in the premises is governed by the following rules of civil procedure:

"A new trial may be granted to all or any of the parties and on all or part of the issues for any of the reasons provided by the statutes of this state. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment." Idaho Rules of Civil Procedure Rule 59(a).

"If by reason of death, sickness, or other disability, a judge before whom an action has been tried is unable to perform the duties to be performed by the court under these rules after a verdict is returned or findings of fact and conclusions of law are filed, then any other judge regularly sitting in or assigned to the court in which the action was tried may perform those duties; but if such other judge is satisfied that he cannot perform those duties because he did not preside at the trial for any other reason, he may in his discretion grant a new trial." I.R.C.P. Rule 63.

Idaho Code, § 10-606, the former statutory rule governing the authority of the trial judge in ruling upon issues raised on motion for new trial, has been superseded and abrogated by Rule 59(a), supra. For that reason we consider only the two rules above set out in disposing of the present issue. See I.R.C.P. Rule 86.

[1,2] Under Rule 59(a) a judge upon motion for a new trial is authorized to "make new findings and conclusions, and direct the entry of a new judgment." Freese v. Bassett Furniture Industries, 78 Ariz. 70, 275 P.2d 758; Krug v. Porter, 83 Ariz. 108, 317 P.2d 543; Phelan v. Middle States Oil Corp., 2 Cir., 210 F.2d 360; United States v. Standard Oil Co., D.C.Cal., 78 F.Supp. 850. Where the motion is heard by a successor to the trial judge, such successor may make new findings and conclusions and direct the entry of a new judgment under authority of Rule 63, subject, however, to the limitation therein contained; that is, if he "is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may in his discretion grant a new trial." If the successor is not satisfied with the findings, conclusions and decree of his predecessor, and thinks such should be vacated or modified, but cannot do so because he did not see and hear the witnesses, then he is limited to the granting of a new trial.

[3] In cases tried without a jury, the general rule is that a party litigant is entitled to a decision on the facts by a judge who heard and saw the witnesses, and that a deprivation of that right is a denial of due process. Eagleson v. Rubin, 16 Idaho 92, at page 101, 100 P. 765; DeMund v. Superior Court, 213 Cal. 502, 2 P.2d 985; City of Long Beach v. Wright, 134 Cal.App. 366, 25 P.2d 541; Bartholomae Oil Corp. v. Superior Court, 18 Cal.2d 726, 117 P.2d 674; David v. Goodman, 114 Cal.App.2d 571, 250 P.2d 704; Kelly v. Sparkling Water Co., Cal., 343 P.2d 257; People ex rel. Reiter v. Lupe, 405 Ill. 66, 89 N.E.2d 824; Mills v. Ehler, 407 Ill. 602, 95 N.E.2d 848; Smith v. Dental Products Co., 7 Cir., 168 F.2d 516; Federal Deposit Ins. Corp. v. Siraco, 2 Cir., 174 F.2d 360.

However, in a case where the successor judge, in resolving the issues raised by a motion for a new trial, is not required to weigh conflicting evidence or pass upon the credibility of witnesses, but can resolve such issues upon questio of law, or upon evidence which is not materially in conflict, he may exercise the same authority as could the judge who tried the case. People ex rel. Hambel v. McConnell, 155 Ill. 192, 40 N.E. 608; Meldrum v. United States, 9 Cir., 151 F. 177; Connelly v. United States, 8 Cir., 249 F.2d 576; Ryans v. Blevins, D.C.Del. 1958, 159 F.Supp. 234, affirmed 3 Cir., 258 F.2d 945; Miller v. Pennsylvania R. Co., D.C.D.C., 161 F.Supp. 633.

In this case the evidence is without substantial conflict that for years it had been the practice of water users along Marsh creek to irrigate their lands during the winter months in order to store the water in the soil for the nourishment of the crops to be planted in the spring. This fact is admitted by plaintiff. Plaintiff has been protesting this practice on the part of the upstream water users for a number of years, contending that whenever in the winter months it reduced his flow below 480 inches, it was done in violation of his right under the Stockslager decree.

Plaintiff's principal contention is that under the Stockslager decree the defendants' priority rights were limited to the irrigation season. He calls attention to the finding of the trial judge that the irrigation season along Marsh creek was from April 1st to November 1st, and contends that it was error for the successor judge to set aside that finding and enter a finding that there was no irrigation season affecting the parties. In support of his contention plaintiff cites I.C. §§ 42-907, 42-908, 42-1201, 42-1202. The first two of these sections have application where two or more parties take water from the same ditch, canal or reservoir, at the same point, through the same lateral, and require such parties, on or before April 1st of each year, to select some person to have charge of the distribution of water from the lateral during the succeeding season. The second two of the foregoing sections have

application where a person, company or corporation, owns or controls a ditch, canal or conduit for the purpose of irrigation, and require such owner to keep the same in good repair and, from April 1st to November 1st each year, to keep a flow of water therein sufficient for the requirements of persons entitled to the use of water therefrom. Plaintiff also cites Twin Falls Land & Water Co. v. Lind, 14 Idaho 348, 94 P. 164. In that case the court, on authority of I.C. § 42-1201, above cited, said:

> "* * * There is but one irrigating season during each year. That season is defined by law as extending from April 1st to November 1st." 14 Idaho at pages 351-352, 94 P. at page 165.

[4] All of the foregoing sections were enacted subsequent to the Stockslager decree. For that reason such statutes and the decision based thereon cannot be considered as controlling in construing that decree; rather the decree is to be construed in the light of the facts in the case, and the law as it existed when the decree was entered. Lake v. Bonynge, 161 Cal. 120, 118 P. 535; Pacific Power Co. v. State, 32 Cal.App. 175, 162 P. 643; 49 C.J.S. Judgments § 14, p. 41.

McGinness v. Stanfield, 6 Idaho 372, 55 P. 1020, involved water rights antedating the statutes referred to. The judgment below was given by Judge Stockslager March 15, 1898. After referring to the practice of irrigators from Cold Springs creek to use water on their lands from the thawing of the land in spring until its freezing in the fall, the court announced the rule, applicable here, that:

> "* * * so long as the appropriator of water applies the same to a beneficial or useful purpose, he is the judge, within the limits of his appropriation, of the times when and the place where the same shall be used." 6 Idaho at page 375, 55 P. at page 1021.

[5] It is to be noted that the term of plaintiff's right to the 480 inches "from January 1st to July of each year" is not in harmony with the irrigation season, purported to have been established subsequently by the statutes relied upon. Judge Stockslager could not have had in mind the irrigation season now contended for by plaintiff. Also, the fact that the 480 inches was decreed to plaintiff for irrigation from January 1st to July indicates that the judge was aware of the necessity or desirability of the use of water for irrigation of lands along Marsh creek in the late winter months. The term "irrigation season" is not defined in the Stockslager decree; nor are any of the rights of prior appropriators, therein limited as to season. As plaintiff points out, the grant to the plaintiff of 480 inches from January 1st to July is the only right in the decree for which a season of use is fixed. It is quite conclusive of the question here that the right is specifically limited by the phrase

"when not in use by prior appropriators," not from April 1st to July, but from January 1st to July.

The decision of the successor judge, in setting aside the finding as to the existence of an irrigation season and entering a finding to the contrary, was based upon the construction of the Stockslager decree in the light of the law and the facts as they existed at the time the decree was entered. Insofar as it may be said to depend upon facts appearing in the present record, such facts are without substantial conflict.

The issue, as to which the evidence is conflicting, is that involving defendants' claim of adverse possession and use of the water in dispute. The findings, conclusions and judgment made and entered by the successor judge do not depend upon a determination of that issue. Such issue is immaterial to the judgment entered.

[6] In disposing of the motion for a new trial the successor judge was not required to weigh conflicting evidence or determine the credibility of witnesses; hence, he did not exceed his authority nor abuse his discretion in setting aside the findings, conclusions and decree of the trial judge without a new trial.

The judgment appealed from correctly construes and applies the Stockslager decree, and is affirmed.

Costs to respondents.

SMITH, KNUDSON, McQUADE and McFADDEN, JJ., concur.

On Petition for Rehearing.

TAYLOR, Chief Justice.

In his petition for rehearing, plaintiff calls attention to the fact that the decree entered by the successor judge herein confirms in defendants certain water rights as decreed to them by the decree made by Judge Edward A. Walters, dated March 17, 1910, and filed April 6, 1910, in Cassia county, in an action brought by John A. Bridger, at al., v. Hyrum Tremayne, et al. Plaintiff complains of these entries because neither he nor his predecessor were parties to the Bridger v. Tremayne action.

[7] The present decree merely reiterates or confirms what is contained in the earlier decree. The present decree also recites and confirms the water rights of the parties hereto as they appear in, and were adjudicated by, the Stockslager decree. The rights given to defendants by the Walters decree of 1910 bear priority dates of 1892 and 1893. Since neither the plaintiff nor his predecessor was a party to the 1910 action, the plaintiff is not bound by that decree. Also, the water rights therein granted to defendants being subsequent in time to plaintiff's rights under the Stockslager decree, no rights can be asserted by defendants based on the 1910 decree, which would in any way conflict with plaintiff's prior rights.

[8, 9] However, in the petition for rehearing, plaintiff further calls attention to testimony by defendant E. Lee Dewey to the effect that he has built a dam or reservoir in which he stores water in the high or flood water season for use at a later date, which he claims the right to do under the 1910 decree. Such diversion and storage of water, at a time when plaintiff's prior right to 480 inches of early runoff or flood water is unfilled and needed by plaintiff, constitutes an invasion of plaintiff's prior right. It, therefore, appears necessary to fix definitely the date of priority attaching to the plaintiff's 480 inch right.

As pointed out in the foregoing opinion, Judge Stockslager concluded that the right dated from June 25, 1887. The trial judge herein found that plaintiff was entitled to that priority date. The successor judge, however, did not determine this priority date.

The cause is remanded to the district court with directions to amend the decree by adding to the paragraph defining plaintiff's right to 480 inches from January 1st to July 1st of each year, the words, "with date of priority of June 25, 1887." As thus modified, the judgment is affirmed.

Costs to respondents.

Rehearing denied.

SMITH, KNUDSON, McQUADE and McFADDEN, JJ., concur.

350 P.2d 743

BOARD OF TRUSTEES OF JOINT CLASS A SCHOOL DISTRICT NO. 151 IN CASSIA AND TWIN FALLS COUNTIES and Hermon E. King, Reed G. Starley, Herschel Bedke, Blaine Wight and Joe Gillette, Constituting the Members of the Said Board of Trustees, Plaintiffs-Appellants,

v.

BOARD OF COUNTY COMMISSIONERS OF CASSIA COUNTY, Idaho, and Horace O. Hall, R. J. Harper and John A. Clark, Constituting the Members of the Said Board of County Commissioners of Cassia County, Idaho, Defendants-Respondents.

No. 8764.

Supreme Court of Idaho.

March 30, 1960.

Action by board of trustees of school district for writ of mandate to compel board of county commissioners to levy upon taxable property of county a tax sufficient to raise sum determined by board to be necessary for operation of school. The Eleventh Judicial District Court, Cassia County, Hugh A. Baker, J., entered order denying petition, and school board appealed. The Supreme Court, McQuade, J., held that where school district encompassed all but two small areas of particular county as well as a small portion of adjoining county and an election was held within first county seeking approval of transfer of all powers and duties of county board of education to the board of trustees of school district, election was not author-

remanded for further proceedings in accordance with the views herein expressed. Costs are awarded to appellant.

Ailshie, C. J., and Stewart, J., concur.

(February 20, 1908.)

TWIN FALLS LAND & WATER COMPANY, Appellant, v. NELS LIND, Respondent.

[94 Pac. 164.]

CONSTRUCTION OF CONTRACT—IRRIGATING SEASON—FREE USE OF WATER.

1. Under a contract entered into between an irrigation company and a water consumer providing that the consumer shall pay certain water rents per acre annually for the use of water to irrigate his land, and containing a clause that "water shall be delivered free of all charges during the first irrigating season that water is delivered to said purchaser," *held*, that the words "irrigating season" signify and are equivalent to the entire irrigating period embraced in one year's time, and that it was the intention of the contracting parties to thereby exempt the consumer from payment of water rents for the period of one year, and that the settler is entitled to receive the free use of the water during the irrigating period for one year from the date on which water was delivered to him, and that at the expiration of one year his pay period will begin.

2. Under a contract providing that the water consumer shall be exempt from payment of water rents for the "first irrigating season that water is delivered to him," *held*, that it was the intention of the contracting parties to provide for the free use of water for a definite period of time rather than for any particular crop or crops.

(Syllabus by the court.)

APPEAL from the District Court of the Fourth Judicial District for the County of Lincoln. Hon. Lyttleton Price, Judge.

Action by the plaintiff to recover on a contract for water rents. Judgment for the defendant and plaintiff appeals. *Reversed.*

S. H. Hays, for Appellant.

Sweeley & Sweeley, for Respondent.

Counsel cite no authorities on points decided.

AILSHIE, C. J.—This action was commenced by the appellant corporation to recover from the respondent water rents for the year 1906. Judgment was entered for the defendant and plaintiff appealed. The appeal involves the construction of two separate contracts. On January 2, 1903, the appellant corporation entered into a contract with the state of Idaho whereby it agreed to construct a system of irrigating canals for the irrigation and reclamation of arid lands under the Carey act, and in that contract there is contained the following paragraph:

"It is hereby agreed that every purchaser of shares in said canal, or holder of stock in said Twin Falls Canal Company, Limited, shall be entitled to have delivered for the irrigation of his land his full amount of water as herein provided, and it is hereby stipulated and agreed that while it retains possession and control of said canal system the party of the second part may make a charge for the delivery of said water for irrigation, to the purchaser of said shares, on the following basis and in the following manner: All of the water dedicated to his land shall be delivered free of all charges during the first irrigating season that water is delivered to said purchaser, and thereafter an annual charge not to exceed eighty cents per acre may be made for each and every acre irrigated."

After the appellant company had entered upon the construction of the canals and ditches and the lands had been opened to entry and settlement, the respondent herein, in contemplation of entering and filing upon a tract of land under the canal system, entered into a contract with the land and water company, which contract, among other things, contains the following paragraph:

"The company agrees that so long as it retains possession of said canal system it will keep and maintain the dams, main laterals and canals in good order and condition, and in case of accident to same will repair any injury thereto as soon as practicable and expedient.

"For the purpose of defraying the expense of delivery of water for irrigation and expense of maintaining and keeping in repair the canal system, the Company have the right to levy against the purchaser an assessment or annual charge sufficient to raise equally and ratably from all users and takers of water a sufficient sum therefor, provided, however, that no such charge or assessment shall be levied or assessed against the purchaser during the first irrigating season after water is delivered under this contract, and thereafter an annual charge or assessment not exceeding eighty cents per acre may be made for such purpose for each and every acre irrigated."

The respondent settled on his land under the appellant's canal in March, 1905, and notice was thereafter given him that water would be ready for delivery to him on or about June 26, 1905. He actually received the water on July 6, 1905. He used the water during the balance of the season and cultivated about twenty-two acres of alfalfa, though made no crop, and by reason of having water on the land, made final proof during the fall of that year, and thereby became entitled to his patent to the land. He declined to pay water rent for the following year 1906, on the ground that the latter year was the "first irrigating season" that he had received the water and that under the contract he was entitled to have the water free for that season. He contended that since he did not receive the water during the whole of the irrigating season of 1905, he could not be charged anything for that year, and that he was entitled to one full irrigating season free of charge. The trial court agreed with his contention and declined to give the canal company judgment for any sum whatever for the use of water during the year 1906. Although the respondent settled on the land in March, 1905, he was under no obligation to do so until water was

ready to be delivered on the land. It was not obligatory on the defendant to make settlement on the land at the time he did, nor was he obliged to receive the water during the year 1905. In other words, he was under no obligation to accept and use water for a portion only of the irrigating season. He might have declined to accept it for that year on the ground that if he did so he could only raise a partial crop and that he could not get the benefit of a whole year's irrigation. On the contrary, however, he did accept and use the water, and as we view the contract under consideration, he was liable to be charged with his free period of use from the date he received the water, and that at the expiration of one year from that date his liability to pay water rents would attach. The respondent calls our attention to section 15 of the act of February 25, 1899 (Sess. Laws 1899, p. 382), which provides that canal companies owning and controlling ditches and canals for the purpose of irrigation, shall keep a flow of water in such canals sufficient for the requirements of all persons entitled to use water therefrom at all times from April 1st to November 1st of each year. Counsel insists that under the provisions of this statute, where the term "irrigation season" is used in the contract, it is intended to mean the period from April 1st to November 1st, and that during such time the farmer irrigates all the crops that he raises during that season, and that it takes the full period of the irrigation season to raise the crops he may desire to grow for one year. He also urges that such period cannot be divided up. In other words, that the crop cannot be started in July and grown up to November and then be hibernated until the next spring and completed. That contention is both theoretically and practically correct in this country where the crops would undoubtedly become somewhat chilled during the interval. We do not think, however, that the contracting parties had specially in mind so much the raising of any particular crop or crops or of a particular irrigating season, but rather a definite period of time. There is but one irrigating season during each year. That season is defined by law as extending from April 1st to

November 1st. If the settler gets the free use of the water for the full period of one year, he necessarily gets the same benefit and he is saved the same rental that he would get and would be saved if he had received the water the first day of the irrigating season and had been able to use it every day during the season. The contracting parties in this case clearly had in mind the exemption of the settler from payment of water rents for the period that water is used during a twelve-month. When entering into the contract no one could tell when the works would be so advanced that water could be delivered to any settler. It was provided, however, that the settler should have the first irrigating season free. If the settler only intended to raise one crop, he would necessarily want the water continuously during one season, but where he is going to continue the use of water, as he must necessarily do in farming, he would need it from year to year. He saw fit to receive and accept the use of the water from July 6th to the end of the season. He found a beneficial use to which he could apply the water, and he should be properly charged with that period. As we construe this contract, he was entitled to have the free use of water from July 6, 1905, the date on which the company delivered it to him, until July 6, 1906, at which time he would become liable for water rents for the succeeding year. It is contended that it would be difficult to apportion the year's water rent between the different months of the irrigating season,—that no one can tell whether the water is of more value to the user during the early part of the season or the latter part of the season. That may be true, but it can make no difference to the consumer if he gets the water free for one entire year. The purpose of the contracting parties was not to fix a rental charge by the month nor for any shorter period than one year or one irrigating season. If the settler pays his water rents each time for the period of one year, he will be entitled to water from the date in July on which he first received water to the corresponding date the next year, and will thereby have a fixed and definite period of time covered by the payment of his water rentals. On the contrary, there can be no injustice

or inequity done either party by allowing judgment against the defendant for an amount equal to that proportion of the annual rentals which the period from July 6th, when water was received, bears to the entire irrigating season. The judgment in this case is reversed, and the cause remanded, with direction to the trial court to make findings and enter judgment in favor of the plaintiff for such proportion of the year's water rentals as the period from July 6th to the close of the irrigating season bears to the entire irrigating season, or, at the option of the defendant, enter judgment against him for the full year's water rentals, the period to end on the 6th day of July the following year. Costs awarded in favor of appellant.

Sullivan, J., concurs.

Stewart, J., concurs except as to the alternative part of the judgment and dissents as to that part of the judgment.

(February 26, 1908.)

I. A. WEST & CO. et al., Plaintiffs, vs. THE BOARD OF COMMISSIONERS OF THE COUNTY OF LATAH, STATE OF IDAHO, a Municipal Corporation, Defendant.

[94 Pac. 445.]

LIQUOR LICENSE—AUTHORITY TO ISSUE—DISCRETIONARY POWER OF THE BOARD OF COUNTY COMMISSIONERS—AMENDMENT OF STATUTES.

1. Sec. 2 of the act of March 4, 1901 (Laws of 1901, p. 13), having been added to and made a part of the act of February 6, 1891, as amended February 2, 1899, becomes a part of said act, and in the absence of authority to be found in said added section to issue such license, the law of 1891 as amended February 2, 1899, vesting such authority in the board of county commissioners, will govern.

2. Where the power to issue a license for the sale of intoxicating liquors, not to be drank in, on or about the premises where sold, is

ADMINISTRATOR'S MEMORANDUM

To: Regional Offices and Water Allocation Bureau
From: Jeff Peppersack
Date: October 30, 2009

RE: PARTIAL DECREES FOR WILD & SCENIC RIVER WATER RIGHTS, STIPULATION FOR SETTLEMENT OF WILD AND SCENIC RIVER DISPUTE

Table of Contents

I. Introduction

During the summer of 2004, the State of Idaho, the United States of America, and other interested parties (referred to hereafter as "the parties") signed a stipulation for settlement of objections to instream federal reserved water rights claimed pursuant to the Wild and Scenic Rivers Act. The stipulated agreement is referred to herein as the "Wild & Scenic Agreement." Under the Wild & Scenic Agreement, the parties agreed to recognize federal reserved instream water rights on the Main Salmon, Middle Fork Salmon, Rapid, Selway,

Lochsa, and Middle Fork Clearwater Wild & Scenic Rivers. These water rights will be referred to hereafter as the "Wild & Scenic Water Rights." The parties developed recommendations to the Snake River Basin Adjudication (SRBA) Court for those water rights and attached them to the agreement as Attachments 1 through 6.

The Wild & Scenic Agreement resolves the objections through both the objectors and claimants accepting the following:

- That the Wild & Scenic Water Rights are subordinate to certain existing and future water uses.
- That existing and future uses are subject to detailed administration to ensure water use conforms to all elements of the water rights.

The parties to the Wild & Scenic Agreement stipulated that the Wild & Scenic Water Rights would be subordinate to existing appropriations of water and some future appropriations of water and anticipated that IDWR would perform detailed administration of existing and new water rights following execution of the agreement and issuance of the recommended partial decrees by the SRBA Court.

The partial decrees for the Wild & Scenic Water Rights were decreed by the SRBA Court on November 16, 2004. The decreed water rights are numbered as shown in the table below.

Table 1. Decreed Water Right Numbers for the Wild & Scenic Water Rights

Wild & Scenic River	Decreed Water Right Numbers
Main Salmon River	75-13316 & 77-11941
Middle Fork Salmon River	77-13844
Rapid River	78-11961
Selway River	81-10472
Lochsa River	81-10513
Middle Fork Clearwater River	81-10625

This memorandum interprets language within the Wild & Scenic Agreement and the partial decrees for the Wild & Scenic Water Rights for purposes of recording, tracking, and administering water rights in the watersheds of the Wild & Scenic Water Rights.

II. Definitions/Global Concepts

a. Effective Date

The text of the Wild & Scenic Agreement establishes September 1, 2003, as the effective date of the agreement.

b. Hydraulic Connection

IDWR interprets the term "hydraulically connected sources" to mean all sources of water (including ground water) within the surface water drainages of the Wild & Scenic Rivers. Additionally, IDWR assumes that all such "hydraulically connected" sources of water remain connected to the Wild & Scenic River at all times. All surface water rights and ground water rights diverted from sources hydraulically connected to the Wild and Scenic River reaches upstream from the ending points will be recorded, tracked and administered as anticipated under the provisions of the Wild & Scenic Agreement.

IDWR has created GIS shape files depicting the areas where diversions of water will be recorded, tracked and administered as anticipated under the provisions of the agreement. The shape files have been posted on IDWR's Internet site and made available to staff members in IDWR's internal GIS database.

c. Conjunctive Management

IDWR will conjunctively manage the ground water and surface water in the Wild and Scenic River Basins. At a minimum, ground water users must account for their diversion of water. Ground water rights that do not enjoy the benefits of subordination will be curtailed in times of shortage.

Appropriations from all sources of water hydraulically connected to the Wild and Scenic River reaches, including ground water appropriations, must be included in the cumulative totals of water rights enjoying the benefits of subordination (see part III below).

III. Subordination Provisions of the Partial Decrees

Each partial decree for the Wild & Scenic Water Rights bears a provision stating that the water right is subordinate to certain existing and future water rights and uses. This means that, although the Wild & Scenic Water Right may be senior in priority, some junior water rights will not be regulated to provide water to satisfy the Wild & Scenic Water Right.

a. Subordination to Certain Junior Water Rights and Uses

All of the Wild & Scenic Water Rights are subordinate to eight classes of junior water rights and uses with points of diversion or impoundment and places of use within the Wild & Scenic basin upstream of the ending point of the Wild & Scenic instream water right. The eight classes are as follows:

1. All water right claims filed in the SRBA as of September 1, 2003, if ultimately decreed in the SRBA.
2. All water right licenses, permits, and applications bearing priority dates earlier than September 1, 2003, for which proof of beneficial use was due after November 19, 1987.
3. Domestic use as defined by Idaho Code § 42-111(1)(a) and (b) and consistent with Idaho Code § 42-111(2) and (3). Multiple ownership subdivisions do not enjoy the benefits of subordination as domestic uses unless the use meets the diversion rate and volume limitations set forth in Idaho Code § 42-111(1)(b).
4. De minimis stockwater uses as defined by Idaho Code § 42-111 and Idaho Code § 42-1401A(11).
5. Nonconsumptive water rights.
6. Water rights of the United States.
7. Instream flows.
8. Replacement water rights as defined in the partial decrees.

The Wild & Scenic Water Rights for the Main Salmon River are subordinate to the eight classes of water rights listed in section (a) above, and also to the following:

1. Municipal water rights bearing a priority date later than September 1, 2003. Hookups with a capacity less than 2 cfs will enjoy the benefits of subordination. However, any hookups with a capacity equal to or greater than 2 cfs (except if for fire protection) will enjoy subordination under the finite future use limit to the extent that the limit has not been met at the time the hookup is developed. Municipal is defined more narrowly than the statutory definition.

The other Wild & Scenic Water Rights are not subordinate to municipal uses. This is probably because there is so much federal land in those basins that there is not, and probably will never be, any municipal use within or upstream from the other Wild & Scenic River reaches.

b. Subordination to Finite Future Uses

Section 10.b.(6) of the partial decree for the Main Salmon River and 10.b.(5) of the remainder of the Wild & Scenic partial decrees provides that the federal reserved water rights in each Wild & Scenic basin will be subordinate to a limited amount of future development that would not otherwise enjoy the benefits of subordination under other provisions of the partial decrees. Each watershed within and upstream of the Wild and Scenic River reach was evaluated to determine limitations of uses and these limitations were incorporated into the development limitations. The amount of future development in each basin that will enjoy the benefits of subordination is summarized in Table 2 and is limited to a total combined diversion rate, only a portion of which is to be for purposes of irrigation.

Table 2. Future Use Amounts to which the Wild & Scenic Water Rights will be Subordinate

Partial Decrees	Flow Rate (cfs)	Irrigation Limit (acres at 0.02 cfs/acre)	Other
Main Salmon River	150	5,000	Subordinated to an additional 225 cfs/10,000 acres (at <= 0.02 cfs/acre) when the mean daily flow at the Shoup Gage is >1,280 cfs.
Middle Fork Salmon River	60	2,000	Subordinated to an additional 5 cfs of diversion from specific areas for commercial or industrial use or storage for such uses, where storage capacity is <= 100 acre-feet.
Rapid River	10	300	None
Selway River	40	500	None
Lochsa River	40	500	None
Middle Fork Clearwater River	40	500	None

The partial decree for the Main Salmon federal reserved water rights states that "if a portion of the acreage permitted within" the "150 cfs is to be idled for a year or more, an equal number of acres permitted for irrigation within the 225 cfs . . . can be substituted to take advantage of the subordination when the river is less than 1,280 cfs for the period of years the original acres are idled." Although the flow rate quantities authorized by the water rights in each group determine whether the rights will be within the first 150 cfs block of water rights or the second 225 cfs block of water rights, for purposes of administration, portions of water rights within the first 150 cfs block not used during an entire calendar year will be temporarily removed from the 150 cfs subordination block of water rights. The earliest priority water rights in the second 225 cfs block of water rights will become a part of the 150 cfs block up to 150 cfs total diversion rate authorized by the first block of water rights.

The language in the partial decrees for the Wild & Scenic Water Rights is not entirely clear as to how much future irrigation use the federal reserved rights will be

subordinate to. Each partial decree bears language similar to that of the Main Salmon partial decree, which provides that the federal reserved rights will be subordinate to future appropriations with "... a total combined diversion of 150 cfs (including not more than 5,000 acres of irrigation with a maximum diversion rate of 0.02 cfs/acre."

Conservation of water resources within Idaho requires water users to be reasonably efficient. Modern irrigation methods typically do not require more than 0.02 cfs per acre of irrigation. Approving new irrigation water rights for more than 0.02 cfs in the areas tributary to the Wild & Scenic Rivers could be contrary to the subordination provisions of the partial decrees, and it could further limit the number of irrigated acres that can benefit from the subordination provisions of the Wild & Scenic water rights. Therefore, recognizing that each federal reserved water right has its own limits, but using the Main Salmon as the example, IDWR interprets the future appropriation statements of the partial decrees to mean the following:

1. The federal reserved water rights will be subordinate to a combined total of 150 cfs of new appropriations that do not already enjoy the benefits of subordination under other provisions of the partial decree.
2. Not more than 100 cfs (5,000 acres at 0.02 cfs/acre) of new irrigation appropriations will enjoy the benefits of subordination.
3. The federal reserved water rights will be subordinate to a new appropriation listing irrigation as a beneficial use only if the total diversion under all existing rights appurtenant to the place of use for that appropriation is less than or equal to 0.02 cfs/acre.

The above interpretation implies that some new appropriations will not enjoy the benefits of subordination even though the future use limits may not have been reached. This is discussed in more detail in the section of this document entitled *Permitting and Licensing Guidelines.*

Storage water rights are specifically excluded from the future use subordination provisions of the partial decrees for the Wild & Scenic Water Rights. Because water rights for storage volumes cannot be easily converted to a flow rate that can be counted against the flow rates to which the Wild & Scenic water rights are subordinate, IDWR will treat on-stream storage rights in the same way that instream flow water rights and nonconsumptive water rights are treated in the partial decrees; they will not be deducted from the flow rate limitations to which the Wild & Scenic water rights will be subordinate.

If a water right that enjoys the benefits of subordination is forfeited or abandoned, the future use subordination amount available is increased by the amount of the water right that was forfeited or abandoned. If a water right (other than for domestic, stockwater, or municipal uses) that is senior to the federal reserved water rights is forfeited or abandoned, the State of Idaho may petition the SRBA court for an increase in the future use amounts equal to that of the forfeited or abandoned senior rights.

c. Accounting of Subordination to Finite Future Uses

To ensure adherence to subordination limitations for the Wild & Scenic Water Rights, diversion rates and irrigated acres must be totaled for all applications proposing appropriations from the "future use subordination" provisions in each Wild & Scenic partial decree. These summaries will change from time to time because of additional

appropriations, reduced development, lapsing or licensing of permits, or abandonment, voiding or forfeiture of water rights to which the Wild & Scenic water rights are subordinate.

The Wild & Scenic Agreement states that water rights enjoying the benefits of subordination shall be recorded, tracked, and made available via modern electronic means. The Water Rights Section shall diligently pursue computer programming assistance to create capability within the Enterprise database and access to the database information through queries available on IDWR's Internet site. As an interim measure, a spreadsheet has been created and is maintained as a temporary method for recording and tracking the water right records enjoying the benefits of subordination. IDWR staff in the regions and the state office will share responsibility for updating the spreadsheet as part of their regular data entry functions for new applications, permits, and licenses. IDWR shall post the spreadsheet to the IDWR Internet site at least once a month.

IV. Other Provisions of the Partial Decrees

a. Publicly Available Information

As anticipated under the Wild & Scenic Agreement, IDWR will maintain "publicly available" information in its databases about water rights "above the ending point of each Wild and Scenic federal reserved water right." All water rights (decreed, licensed, or permitted) enjoying the benefits of subordination must be separately identified.

b. Out of Basin Transfers Prohibited

Each partial decree contains language prohibiting new appropriations or transfers of any water right that would result in the transfer of water from within the watershed of the Wild & Scenic River (upstream of the ending point of the instream reach) to points outside of the of the watershed of the Wild & Scenic River. The partial decrees do not prohibit transfers of points of diversion from above the ending point to below the ending point of the same instream reach. The language does not prohibit approval of new water rights or water right transfers proposing use of water within the Wild & Scenic Watersheds. Although the partial decrees each use the phrase, "This water right precludes any diversion of water out of the watershed ..." the partial decrees are not meant to prohibit the use of rights already authorized to divert water from within the basin to lands outside the basin.

V. Permitting and Licensing in Wild & Scenic Watersheds

a. Permitting and Licensing Guidelines

- Published notices of water right applications must contain information about subordination of the Wild & Scenic Water Rights.

  If the application is for single domestic use, de minimis stock water use, or instream flow; or if it is a United States right, a nonconsumptive use, or a replacement right, language similar to the following text should be included in each published notice:

> This application proposes the diversion and use of water from <ground water tributary to/a tributary of> the _____ Wild & Scenic River. The decreed minimum stream flow rights for the federal Wild & Scenic Rivers are subordinate to certain categories of water use and to specific amounts of water use established after the minimum stream flow. The water use proposed in this application will benefit from the subordination provision because it is for _____ purposes.

If the use is NOT a single domestic, a de minimis stockwater use, a nonconsumptive use, a United States right, a replacement right, or an instream flow, language similar to the following text should be included in each published notice:

> This application proposes the diversion and use of water from <ground water tributary to/a tributary of> the _____ Wild & Scenic River. The decreed minimum stream flow rights for the federal Wild & Scenic Rivers are subordinate to certain categories of water use and to specific amounts of water use established after the minimum stream flow. The water use proposed in this application will benefit from the subordination provision because the diversion rate <<and acres>> will be applied to the subordination amounts specified in the decree for the Wild & Scenic River listed above.

- Permits for irrigation of more than 5 acres of new development will be issued with a diversion rate of no more than 0.02 cfs/acre – this diversion amount and acreage will be deducted from the future use amounts.
- Permits for irrigation of 5 acres or less of new development will be issued at a diversion rate of no more than 0.03 cfs/acre – this diversion amount and acreage will be deducted from the future use amounts.
- Permits for irrigation of existing irrigated acres that result in an overall diversion rate of more than 0.02 cfs/acre will not enjoy the benefits of subordination and will not be deducted from the future use subordination amounts. This applies even if the new license authorizes 0.02 cfs/acre or less, as long as the total diversion rate (including existing rights) for the irrigated acres exceeds 0.02 cfs/acre.
- Permits for municipal uses within the Main Salmon River drainage (basins 71 through 75) to which the Main Salmon Wild & Scenic Water Right will be subordinate based on paragraph 10.b.(5) of the partial decree must be conditioned to require the right holder to report when diversions commence and to submit to IDWR by January 31 of each year thereafter, a report listing the size, capacity, and location of all new connections greater than 4 inches in diameter.
- When a new application for appropriation is filed, a permit or license is issued, or, by order or operation of law, is voided, forfeited, abandoned, or lapsed, IDWR's action should be posted to the "subordination accounting database." Until that database is developed, this information should be posted to the tracking spreadsheet described in section III.c of this document.
- The Wild & Scenic Agreement anticipates that all permits or licenses issued for non-de minimis uses from sources of water in a Wild & Scenic River basin after September 1, 2003 will be conditioned to require a lockable controlling works, a measuring device, and a data logger or other suitable

device to record diversion rates at each point of diversion. The term "de minimis" is not defined in the agreement. IDWR coordinated with the federal government (U.S. Forest Service) to determine de minimis uses and the timing of requirements based on anticipated administration of rights through a water district. Please refer to the flow chart *"Measuring Device, Lockable Controlling Works, and Water District Conditions for Applications for Permit"* for specific information on these conditions. The flow chart is subject to revision, but the current version is available from the Water Rights Permits Section.

b. Current Moratoriums

The order establishing a moratorium on the appropriation of surface water in the Salmon River and Clearwater River basins dated April 30, 1993, and the order establishing a moratorium on the appropriation of surface and ground water in areas within and tributary to wilderness areas, dated October 26, 1999, were rescinded by order executed on November 9, 2005.

For additional guidance, see the information sheet *"Applying for a Permit to Appropriate Water in the Salmon and Clearwater River Basins"*, and the flow chart *"Water Right Application Review Process for the Salmon and Clearwater River Basins."* These documents are subject to revision, and the most current versions are available from the Water Rights Permits Section.

VI. Administration and Regulation

In the portion of the Wild & Scenic Agreement titled "Administration of Water Rights" subparagraph 2.a., titled "Enforcement," states:

> The State, through the Idaho Department of Water Resources ("IDWR") and local water districts created and supervised by IDWR pursuant to Idaho Code §§ 42-604 et seq., shall distribute water to the federal reserved water rights set forth in this Stipulation and the Partial Decrees and all other hydraulically connected water rights, regardless of sub-basin location, above the ending point of the respective federal reserved water rights . . . . [A]ll new water rights that are hydraulically connected with the Wild and Scenic Rivers federal reserved water right will be administered as a single source.

The following IDWR tasks are anticipated or implied under the agreement:

1. Insure the accuracy of the decreed water rights in basins 71, 72, 73, 74, and 75. Create user lists of water users for the purpose of notifying the water users of the need to create a water district.
2. Create the Upper Salmon Water District. Help water users find a watermaster suitable for election and appointment, determine place of work, determine number of deputy watermasters, and establish a budget and appropriate assessments for the water users. Determine interaction of the larger district with existing water districts.
3. Conduct a systematic inventory of diversions for watermaster oversight.
4. Measure existing diversions with a current meter and require adherence to water right limitations. Require installation of lockable controlling works, measuring devices, and data loggers where necessary.
5. Require installation of lockable controlling works, measuring devices, and data loggers for all new non-de minimis water permits and licenses issued after September 1, 2003 regardless of priority. See Section V.a for details regarding implementation of this task.

6. Collect and report diversion data quarterly. Collect and report diversion data daily in times of shortage "as necessary to properly administer water rights."

7. Conduct periodic coordination meetings with the watermaster, the federal government and other water users for the purposes listed below:
   - to agree upon management goals;
   - to identify and prioritize stream reaches or other locations needing improved management;
   - to identify sources of funding for regulation, equipment and facilities;
   - to identify needs for creation of additional sub-districts;
   - to share data and other information and assess progress in meeting management needs.

   The requirement for periodic meetings will continue to be met through meetings of the WD170 Advisory Committee, to be attended by the watermaster and representatives of IDWR.

a. Regulation of the Main Salmon River

The partial decree for the Salmon River Wild & Scenic water rights states that water rights within the watershed of the Salmon River Basin upstream of Long Tom Bar will be administered to ensure the satisfaction of the Wild & Scenic water right through out the Wild & Scenic reach. The instream flows established by the Wild & Scenic Water Rights can be diminished by diversions of water under the water rights enjoying the benefits of subordination, but junior water rights that do not enjoy the benefits of subordination will be regulated when the Wild & Scenic Water Rights are not being satisfied. The mean daily flow of the Salmon River at the Shoup Gage is used to determine whether the Salmon River Wild & Scenic water right is considered satisfied. The water rights have both a high flow and a normal flow component.

- **High Flow Component.** Section 3.b of the partial decree for the Salmon Wild & Scenic water rights provides that the United States is entitled to all flows up to 28,400 cfs at times when the flow at the Shoup gage is greater than 13,600 cfs, or would be greater than 13,600 cfs if not for junior upstream depletions. In other words, the total of depletions to the flow at Shoup due to junior water rights must be added to the flow at Shoup to determine whether the flow at Shoup is 13,600 cfs or more. Because the actual depletion is unknown, we must use an estimate. Although the depletion to the flow is not necessarily equivalent to the diversions from the system, the diversion amounts provide a conservative estimate of the depletions in the sense that it is less likely that the estimate will under-represent the depletions. As many of the junior diversions are not routinely measured, an upper limit of the diversions can be estimated based on the water rights.

  The IDWR database currently shows approximately 21,434 cfs of water rights junior to 7/23/1980. This includes water rights enjoying the benefits of subordination. All but approximately 740 cfs are minimum stream flow water rights, and approximately 290 cfs is non-consumptive (fish propagation and power), leaving approximately 450 cfs of junior water rights that may deplete flows to the Shoup gage. However, not all of these water rights are diverted at a given time, and the actual depletion is likely less than 100% of the diversion. Nevertheless, without having a well-founded estimate of how much of the 450 cfs is diverted at a given time, the assumption that it is all diverted and results in a depletion equal to 450 cfs at the Shoup gage will result in a conservative estimate of the depletions. As such, the 13,600 trigger occurs when the mean

daily flow at the Shoup Gage is 13,150 cfs. This value should be adjusted periodically as additional water is appropriated and as additional depletion information becomes available.

- **Normal Flow Component.** If the mean daily flow on a given date at the Shoup gage is less than 13,600 cfs, but equal to or greater than the amount shown in Table 3 for that date, then the water right is considered satisfied. Table 3 summarizes the regulatory action required to satisfy the federal reserved water rights.

Table 3. Quantity of Salmon Wild & Scenic Water Right when Flow at Shoup is Less than 13,600 cfs

Period of Use	Flow Rate at Shoup (cfs)	Regulatory Action
All Dates	> 13,150 and <= 28,400	All junior rights not enjoying the benefits of subordination will be regulated*
All Dates	> 28,400	No regulation necessary to satisfy W&S rights.
January 1-15	< 1440	Junior rights not enjoying the benefits of subordination will be regulated on a priority basis to supply the flow shown for the corresponding date* *See Section III for a description of rights enjoying the benefits of subordination. When the flow at Shoup is > 1280 cfs, the 225 cfs block of future uses enjoy the benefits of subordination and will not be regulated.
January 16-31	< 1450	
February 1-15	< 1500	
February 16-28(29)	< 1550	
March 1-15	< 1510	
March 16-31	< 1540	
April 1-15	< 1590	
April 16-30	< 2470	
May 1-15	< 3920	
May 16-31	< 7310	
June 1-15	< 9450	
June 16-30	< 7790	
July 1-15	< 4730	
July 16-31	< 2700	
August 1-15	< 1390	
August 16-31	< 1240	
September 1-15	< 1200	
September 16-30	< 1400	
October 1-15	< 1570	
October 16-31	< 1700	
November 1-15	< 1820	
November 16-30	< 1730	
December 1-15	< 1600	
December 16-31	< 1510	

b. Upper Salmon Water District

The Wild & Scenic Agreement states that "[w]ithin six months of issuance of the Partial Decrees confirming the Wild and Scenic Rivers federal reserved water rights, the parties will file a joint petition with the SRBA Court . . . for an order for interim administration of basins 71 and 72 and IDWR will establish a water district for the Upper Salmon River Basin." The petition for interim administration in basins 71 and 72 was filed on May 16, 2005 and was granted on September 29, 2005. On March 6,

2006, the Director issued Final Order Creating Water District No. 170. That order was amended in response to an objection by Thompson Creek Mining Company and reissued on April 6, 2006 as Amended Final Order Creating Water District No. 170. Thompson Creek Mining Company appealed the order and a decision was issued by the Idaho Supreme Court on October 27, 2009 upholding the Director's creation of the water district. The water district IDWR created will be referred to herein as "WD170" or the "Upper Salmon Water District."

Ultimately, the Upper Salmon Water District will be enlarged to include basins 73, 74, and 75. The director has recommended rights for the SRBA in basins 73, 74 and 75. A petition for interim administration of basin 74 has been submitted to the SRBA Court and was granted by the court on May 1, 2006. The Wild & Scenic Agreement states that additional petitions for orders of interim administration would be filed with the SRBA Court within six months of the filing of the SRBA recommendations for each basin. However, discussions with the SRBA Court and the United Sates have resulted in the decision not to petition for interim administration for basins 73 and 75 pending resolution of objections and/or issuance of the bulk of the partial decrees for water rights in those basins. As this occurs, these basins will be brought into WD170.

The Upper Salmon Water District envelopes existing water districts within its boundaries. The existing water districts have become sub-districts within the larger Upper Salmon Water District but retain much of the control over deputy watermaster selection, budgets and administration of water rights in the sub-districts as contemplated by the Wild & Scenic Agreement. As the district is expanded to encompass the remaining basins, preexisting water districts in those basins may be revised to become sub-districts of WD170.[1] For purposes of efficient administration, the Director may designate additional sub-districts within WD170.

Although not expressly written in the Wild & Scenic Agreement, the agreement contemplates a steady ramp up rather than full immediate operation of water district activities within the Upper Salmon Water District.

c. Regulation and Administration of Remaining W&S Rivers

The Wild & Scenic Agreement does not contemplate that a water district will be formed to administer any of the remaining Wild & Scenic Water Rights. However, section 2.b.(1) of the agreement states the following:

> IDWR will establish water districts as necessary to assist IDWR in the administration of water rights. The parties agree that, regardless of whether a water district has been established for an area, IDWR will: A) collect and record diversion data; B) enforce the water rights in priority; and C) curtail unauthorized or excessive diversions as necessary.

This anticipates that IDWR will perform some level of measurement and control in the other Wild & Scenic River basins. Presently, as these areas are not under watermaster control, measurement and control are accomplished on an as-needed basis in response to user complaints and/or whenever IDWR is aware that illegal use of water is occurring.

[1] Water District Nos. 72-B and 72-C were merged to form Water District No. 72-A, a sub-district within WD170, by order of the Director on February 16, 2007. A sub-district was created to administer rights in basin 71 by order of the Director on December 11, 2008.

Although the current and near future anticipated level of permitted rights that enjoy subordination in these basins does not warrant a need for water districts, section 2.b.(3) of the Wild & Scenic Agreement acknowledges that any party may file a petition for administration and IDWR will evaluate the need for water districts in these areas at that time.