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