A Report to the Subcommittee on
High Water Mark Legislation of the
Idaho Legislative Council

SUMMARY REPORT ON TITLE TO BEDS AND USE OF WATER OF NAVIGABLE STREAMS AND LAKES IN IDAHO

by Thomas R. Walenta, Professor, Law

Issued as a Cooperative Effort of the Special Research Program of the University of Idaho, the College of Law, the Water Resources Research Institute, and the Idaho Legislative Council

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TO: LEGISLATIVE COUNCIL COMMITTEE ON HIGH WATER MARK

FROM: Thomas R. Walenta, Professor of Law
Idaho Water Resources Research Institute

DATE: November 24, 1966

SUBJECT: SUMMARY REPORT ON TITLE TO THE BEDS OF NAVIGABLE WATERS IN IDAHO.

Nature and Purpose of Study

This study is concerned with the Federal and State Laws and statutes governing the ownership and control of the beds of navigable streams and lakes, together with their waters, in the State of Idaho. It was made at the request of Mr. Harold Snow, Chairman of the 1965 Sub-Committee on High Water Mark Legislation of the Idaho Legislative Council. Its purpose is to provide such materials for the Chairman and his committee members as will enable them to comply with Senate Concurrent Resolution No. 7, Idaho Session Laws (1965) at 922:

Legislative Authorization for study

"Referring to an assignment, concerning the need and desirability of legislation providing for the development, management, and regulation of lands lying below the mean high water mark of navigable streams and lakes of the State of Idaho to the Legislative Council of the State of Idaho

Be it Resolved by the Legislature of the State of Idaho:

WHEREAS, Chapter 4, Title 67, Idaho Code, provides for specific assignments by Concurrent Resolution to the Legislative Council; and

WHEREAS, the Legislature of the State of Idaho is acutely aware of the need for enactment of legislation

Legislature recognizes need for regulation of shore lands of navigable waters

providing for the development and management, and regulation of lands lying below the mean high water mark of navigable streams and lakes and a declaration of public policy relating thereto; and

WHEREAS, an agency of the State of Idaho should be empowered by such legislation to issue leases and construct public facilities for the development, management, and regulation of water-edge developments on stream and lake beds of Idaho, being mindful of the preservation of private property rights thereon; and

WHEREAS, such lands should be developed, managed, and regulated promulgating the availability of such lands for the welfare of the State of Idaho and its citizenry; and

WHEREAS, the title heretofore or hereafter acquired by this state by grant from the U. S. Government, or others, or by operation of law, to lands lying below the mean high water mark of navigable lakes and streams should be, by legislative enactment vested in the State of Idaho in trust in perpetuity for benefit of all the people of the state to allow enjoyment of travel over navigable waters, carrying commerce across such waters, and use of such waters for recreational endeavors; and
WHEREAS, it is in vital interest of the public welfare that the legislature provide for the highest use of navigable waters and prevent abuses by riparian owners and the public of their respective rights in and on such waters;

Legislative Council authorized to make study

NOW, THEREFORE, BE IT RESOLVED, that the Legislative Council be assigned to research and study for consideration of the Thirty-ninth Session of the Legislature of the State of Idaho, the problems which will confront the Legislature of the State of Idaho in drafting and proposing legislation providing for the development, management, and regulation of lands lying below the mean high water mark of navigable streams and lakes pursuant to the directive of this resolution; and

BE IT FURTHER RESOLVED, that the Legislative Council present to the Public Resources and Public Recreation Committee of the Thirty-ninth Session of the Legislature of the State of Idaho, the fruits of its research and study, and submit recommendations regarding the enactment of such legislation."

Our study must also include federal decisions, statutes, and regulations, as well as state law, because Article 6, Section 2 of the Constitution of the United States of America declares that

Study includes Federal law

"This Constitution, and the Laws of the United States, which shall be made pursuant thereof; and all treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or the laws of any state notwithstanding."

Other sources of assistance recognized

Recognition must be made of other sources of assistance which have made this study possible, George M. Bell, Dean of the College of Law, Calvin C. Warnick, Director of the University

Of Idaho Water Resources Research Institute, President Ernest Hartung and H. Walter Steffens, Vice President of Academic Affairs of the University of Idaho, have continued to furnish the writer with the time and additional finances, together with the secretarial help required, to make this study possible in the time allotted.

In lieu of our final report a Summary of the main points included in our study is submitted for your approval.

SUMMARY

Oregon Territory

(1) Oregon Territory was a part of a larger tract of land known as the Pacific Northwest.

The ownership of Oregon Territory by the United States government was initiated by discovery of Captain Grey in 1792; by purchase and exploration and occupation was recognized and made complete under international law by the Treaty of June 15, 1946 with Great Britain.

At this time the area now included in the State of Idaho was a part of Oregon Territory. For a short history of the acquisition of Oregon Territory read Shively v. Bowlby, 152 U.S. 1 (1894); 5 Thorpe, American Charters at 2985-2986 (1909).

U.S.Const. Supreme Law of Land

(2) Under our federal system of government, the Constitution of the United States, together with the laws and treaties made pursuant thereto are the supreme law of the land [U.S. Const., Art. 1, Cl. 2].

Art. IV Cl. 2., Property Clause

(3) The Property Clause of the Federal Constitution [Art. IV, §3, Cl. 2] confers on Congress the power "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."

Art. I, §8, Cl.3 Commerce Clause

(4) The Commerce Clause [Art. I, §8, Cl. 3] of the United States Constitution has also had a profound effect on the land laws of Idaho, particularly with respect to the beds of navigable streams. This clause states that Congress shall have the power to "regulate commerce with foreign nations, and among the several states and with the Indian tribes."

It is significant that (1) The Federal Constitution recognized the Indians inhabiting the United States as a political entity with the rights, powers, and privileges thereto appertaining; (2) by court decision [Gilburn v. Ogden, 9 Wheat. 1, (1824)] the Commerce Clause was extended to include navigation within the limits of every state.

Absolute power in Congress under Property Clause

(4) The power of Congress to legislate for the Territories is absolute. [National Bank v. County of Yankton, 101 U.S. 133 (1886)].

Another court has defined the power of Congress over the public domain in these words: [U.S. v. City and County of San Francisco, 310 U.S. 16, 29-30 (1940)]

> . . . "And Congress has the same power over it as any other property owned by the United States, and this power is vested in Congress without limitation, and has been considered the foundation upon which the territorial governments rest."

Congress may convey beds of navigable streams before statehood

(5) Pursuant to the constitutional powers of Congress over the public lands in all territories of the United States, Congress may convey by treaty, grant or otherwise, its public lands, including the beds of navigable streams. [Shively v. Bowlby, 152 U.S. 1, 47 (1894)]. In J. H. Seupert, 43 L.D. 267 (1914) by an Executive Order of 1872 the Colville Indian Reservation was extended to the middle of the Columbia River. See also Seufert Brothers v. U.S., 249 U.S. 194 (1919).

(U.S. v. Big Bend, Title 20, 42 F.S. 459)

This power of the federal government over the public lands was recognized in Newton v. State Board Bank, 37 Idaho 58, 69, 219 Pac. 1053 (1923).

Indian Reservations

(6) The history of Indian Reservations created in Idaho will be summarized at a later point in this study.

Washington Territory

(7) In 1853 Oregon Territory was reduced by the formation of Washington Territory and proclaimed a state on November 11, 1889. [7 Thorpe, op. cit. at 3971-3972 (1909)].

Idaho Territory created

(8) What is now the State of Idaho was successively a part of Oregon and Washington territories. It was formed into a separate territory on March 3, 1863. [Organic Act of Idaho, 12 Stats. 808 (1863), 2 Thorpe,op.cit. 913-918 (1909)].

Indian rights protected under Organic Act of Idaho

(9) By Section 1 of the Organic Act of Idaho the rights of persons and property of Indians in the Territory were left unimpaired so long as such rights shall remain unextinguished. Nor shall any territory of such Indians be included within the Territory of Idaho until such tribe shall signify its consent. The authority of the United States government over such Indians, their lands and property as it would be competent to make in the absence of this Act.

Section 19 of the Organic Act provided that all treaties, laws and other engagements made by the United States with the Indian tribes inhabiting Idaho Territory shall be rigidly observed.

Public Land grants

(10) Section 14 of the Idaho Organic Act provided that upon the survey of the lands within the Territory of Idaho, sections 6 and 36 in each township shall be and they are hereby reserved as school lands for said territory and states or territories hereinafter created out of such territory.

No study made prior of private land hearings

(11) We have made no study of the extent of public lands granted to private individuals during or after Idaho territorial days. It could be extensive under (1) the Homestead Act of 1862, (2) the Mining Act of 1872, (3) the Desert land Act of 1877; as well as other land statutes.

(12) The extent of a federal patent to public lands has been declared to extend to the ordinary high water line. Scott v. Lattig, 227 U.S. 229 (1912); Barney v. Keokuk, 94 U.S. 324 (1876); Hardin v. Jordan, 140 U.S. 371, 380 (1891). This is a matter of federal law. Packer v. Bird, 137 U.S. 661, 669 (1890). For a general discussion read U.S. v. Oregon, 295 U.S. 1 (1935).

State of Idaho admitted to Union on equal footing

(13) Idaho Territory was "admitted into the Union on an equal footing with the original States in all respects whatever" on July 3, 1890. [Idaho Admission Bill, 26 Stat. 215 ch. 656]. The Admission Act ratified the Idaho Constitution, provided for a variety of land grants to the State, a continuance of all territorial laws until modified or changed by this act, or by the constitution, and that the general laws of the United States shall have the same force and effect in Idaho as within the United States.

Territorial laws continued

Title to beds or lands beneath navigable streams in State of Idaho subject to federal and state constitutions

(14) As a consequence of the admission of Idaho to statehood "upon an equal footing" with the original states, it took title to the beds of all navigable waters in the federal sense existing on July 3, 1890, subject to the laws and Constitution of the United States and the State of Idaho and accordingly all Indian rights of property recognized but not extinguished by the United States continued to exist. [Shively v. Bowlby, 152 U.S.1,(1894)].

> [Idaho Constitution, Art. I, §3 - The State of Idaho is an inseparable part of the American Union, and the Constitution of the United States is the supreme law of the land. Art. 21, §19. Disclaimer of all right, title and interest to all lands owned or held by any Indian or Indian tribe and said lands shall remain under the exclusive jurisdiction of the Federal Government until such title shall have been extinguished by the United States.]

In Pollard v. Hagan, 3 Howard 212, 223 (1845) it was held that the original states had reserved title to and ownership of the beds of navigable waters and that under the principle of equality the title to the soils beneath navigable waters passed to each new state upon its admission to the Union, subject to the constitution and laws of the United States. There are many cases so holding. See Shively v. Bowlby, 152 U.S. 1, (Oregon 1894); Scott v. Lattig, 227 U.S. 229 (Idaho 1913).

Some doubt was cast upon this view of state ownership of the beds of inland navigable waters by the cases of U.S. v. Calif., 332 U.S. 19 (1947); U.S. v. Louisiana, 339 U.S. 699 (1950); and U.S. v. Texas, 339 U.S. 707 (1950).

This uncertainty was erased by the passage of the Submerged Land Act of 1953 (43 U.S.C.A. 1301-1315) when Congress confirmed title by the States to the beds of all inland navigable waters on the date of their respective admissions into the Union subject to certain reservations. This Act is appended hereto under Federal Statutes.

(15) The beds of nonnavigable waters on the public domain remained in the Federal government unless previously conveyed away. [U.S. v. Utah, 283 U.S. 64, 75 (1931). U.S. v. Oregon, 295 U.S. 1 (1930)].

(16) The States are free to do what they wish with the beds of navigable streams to which they thus received title [Scott v. Lattig, 227 U.S. 229 (1913)]. It is a matter of state law if they give it away [Hardin v. Jordan, 140 U.S. 371 (1891)].

Idaho Supreme Court rejects title in State to beds of navigable streams

(17) In 1908 the Idaho Supreme Court, in Johnson v. Johnson, 14 Idaho 561, 95 Pac. 499 (1908) rejected a state title in the bed of a navigable river (Snake) and gave it to the riparian lot owner together with an island situated on the Idaho side of the thread of the stream. The court admitted the river was navigable in fact, but declared it nonnavigable in law upon the assumption that only tidal waters were navigable at common law. The dissenting opinion pointed out that under numerous United States court decisions a stream navigable in fact was navigable in law. Citing: Barney v. Keokuk, 94 U.S. 324 (1876); Martin v. Waddell, 16 Pet. 366 (1842); Pollard v. Hagan, supra, and other cases.

Riparian takes title to beds of navigable streams

In effect the Court held that a riparian land owner took title under a federal patent to the center of all streams whether navigable or nonnavigable.

Error continued by divided court

In a series of State Supreme Court decisions from 1908 to 1915, the position assumed by the court in Johnson v. Johnson (ibid) was continued by a divided court. A.B. Moss & Bros. v Ramey, 14 Idaho 598, 95 Pac. 513 (1908). Lattig v. Scott, 17 Idaho 506, 107 Pac. 47 (1910).

Idaho Supreme Court reverses its position Title again in State of Idaho

Then in Callahan v. Price, 26 Idaho 745, 146 Pac. 732, (1915) the Supreme Court of Idaho reversed its position and held that the beds of navigable waters as of the date of statehood was in the State of Idaho. The court was aided in this decision by the Supreme Court of the United States statement of the law in Scott v. Lattig, 227 U.S. 229 (1913) which involved an island in the Snake River.

Callahan v. Price has been followed by a succession of cases including N.P. Ry. Co. v. Hirzel, 29 Idaho 438, 161 Pac. 854 (1916), Halmadge v. Village of Riggins, 78 Idaho 328, 330, 303 P. 2d 244 (1956) which have uniformly held that the State of Idaho owns the beds of navigable waters below the natural high water mark.

Effect of change in Ida.Supreme Court's position on title to submerged lands

(19) What effect did the change of position by the Idaho Supreme Court on ownership to the beds of navigable waters in Idaho have on titles acquired by private persons by patents from the federal government, both before and after statehood to lands bordering on such bodies of water?

This is a complex and difficult question to answer. The following analysis and conclusion based upon my studies to date is as follows:

Doctrine of stare decisis

Idaho was not a party

(a) Under the doctrine of stare decisis whereby judgments are given finality, only parties to the suit are affected. Here the action was to quiet title in Mr. Johnson (I.C. 6-401). The State of Idaho was not named as a party. Either the United States owned the land in controversy before patent and after statehood, or the state did. That the United States did not own it seems uncontradicted after Idaho became a state. (See cases under paragraph 14, which gave title to the State). It is also recognized law that a patent from the federal government to lands bordering on navigable waters carries title to the ordinary high water mark. (U.S. v. Oregon, 295, U.S. 1 (1935); Packer v. Bird, 132 U.S. 661 (1890, et al.)

It is also established law that the United States retains no power to convey beds of navigable waters after a territory becomes a state. Title has passed from the United States. [Pollard's Lessee v.Hagen,44 U.S. 212 (1845)].

The Court only quieted title as between the parties. [Crandall v. Gross, 30 Idaho 661, 167 Pac. 1025].

State of Idaho retained its title to specific land involved.

Apart from the sovereign immunity of the State of Idaho to a suit; the lack of due process, if it were susceptible to suit and inability of plaintiff to establish a title by adverse possession, we find no basis for the contention that the State of Idaho lost title to the specific tract involved in the Johnson case.

The action was simply one between private parties and what the Court stated about State ownership was purely dictum.

Doctrine of stare decisis

(b) Under the doctrine of stare decisis it is generally agreed that a Court should follow its own opinion, thus giving certainty to a predictability as to property as well as other rights.

That courts follow the rule of stare decisis is commendable. However, a court is free to change its mind if it notes an error in its line of decision without infringing the due process clause of the Federal Constitution. [G.N. Ry. v Sunburst Oil & Ref. 287 U.S. 359 (1932).

Court may change opinion of the common law

Court may make decisions retroactive

In other words, a Court can make its decision retroactive or only prospective in its effect. That the Idaho Court made its decision retroactive in the Callahan Case is apparent, for the patent to the land in controversy was issued by the Federal Government before the Johnson case was decided in 1908. Thus our own Court recognized that stare decisis is not an inflexible rule, even where property rights are involved.

Under this doctrine, even if applicable on its facts to state lands, it would not establish title in other riparian land owners under patents issued prior to the Callahan decision.

State lands may only be granted by legislature

(c) There is another reason for holding that the State of Idaho has not lost title to the beds of navigable waters in this state that is worthy of consideration. It is a legislative, not a judicial function to convey title to state property. North.Pac. v. Hirzel, 29 Idaho 438, 161 Pac. 854 (1916). Under the Constitution, the State Land Board is authorized to manage and convey state public lands. If as asserted by the Court in the Hirzel case, beds of navigable streams are not public lands, then the Constitution should be amended to put such lands specifically under the jurisdiction of the legislature - a matter which actually would be there with or without the amendment. The amendment would simply clarify the matter.

Navigability as Federal question

(20) Whether a body of water is navigable or not for the purposes of determining title to lands beneath such waters is a federal question. U.S. v Holt State Bank, 270 U.S. 49, 56 (1926). A state may not by statute declare a body of water navigable which is not navigable in the federal sense and thus deprive the United States of its title. U.S. v. Oregon, 295 U.S. 1 (1935).

Federal test of Navigability

(21) Ever since the case of The Daniel Ball, 10 Wall. 557, 563 (1870) the United States Supreme Court has repeatedly declared that navigability in law is a navigability in fact. The actual use of a stream need not be continuous (U.S. v. Utah, 283, U.S. 64, 87 (1931)], as

A Federal Question

past as well as present uses are factors in determining navigability. [Arizona v. California, 283 U.S. 423, 453 (1931)]. A watercourse once found to be navigable remains so. [U.S. v. Appalachian Elec. Power Co.,311 U.S. 377, 408 (1940)]. Any kind of vessel that can float on the water may be cited for the purpose of proving navigability [The Montello-, 20 Wall. 430, 432 (1874)].

Federal tests of Navigability

The fact that certain rivers and lakes are used in rafting and to float logs to market is in legal contemplation indistinguishable from transportation by boats. [The Montello (ibid); St. Anthony Falls Water Pwr.Co. v. St. Paul Water Comm., 168 U.S. 345, 359 (1897)]. The use need not be commercially important [U.S. v. Utah, 283 U.S. 64, 82 (1931)]. It is enough if it forms a useful channel for trade or if it forms a useful channel for trade or travel in the immediate vicinity. [U.S. v. Holt State Bank, 270 U.S. 49, 56 (1926)]. It has also been established that use of the waterway by private boats used by trappers or Indians in trade or travel is evidence of navigability in fact. [U.S. v. Oregon, 295 U.S. 1 (1935); U.S. v. Ladley 4 F. Supp. 580 (D.Ct. of Idaho 1933)]. Nor does occasional difficulty in travel, such as sand bars, render a stream not navigable. U.S. v Holt (ibid), U.S. v. Utah (ibid). Finally we find Judge Taylor declaring the Moyie River a navigable stream in Idaho and holding that the title to the bed thereof was in the State of Idaho, citing U.S. v. Appalachian Elec. Power Co., 311 U.S. 377 (1940).

Navigable bodies of waters in Idaho

(22) Based upon the above cases and others of like import we find a title in the State of Idaho to all bodies of water which were on July 3, 1890 used or capable of being used in their natural state for transportation of logs to market, such as the Palouse, Clearwater, the North Fork of the Clearwater. There are other rivers that might be mentioned, as the Spokane, St. Joe and the Moyie. Such lakes as the Payette, Pend d'Oreille, Priest, Coeur d'Alene and possibly Gray's Lake, would constitute navigable bodies of water in the federal sense; subject in all instances to unextinguished Indian claims or prior grants by the United States. The grants in 1891 by the United States to Frederick Post of what is now Post Falls, 26 Stat. 1026 (1893) confirming an Indian grant to Post in 1871 is a case in point.

Physical limits of State Ownership of submerged lands under navigable bodies of water

What then are the physical limits of state ownership to lands beneath navigable bodies of water? Generally it is said to be the ordinary high water mark of such watercourse.

Herein of the Ordinary High Water Mark

Because the determination of these areas of land which constitute the land beneath or beds of navigable waters is a federal question [U.S. v Oregon, 295 U.S. 1 (1950)] we have confined our search for a suitable definition of the ordinary high water mark to federal decisions and law. In many cases the demarcation between state and federal ownership with respect to the lands below the ordinary high water mark has been referred to as the water line [Packer v. Bird, 137 U.S. 661 (1890)]. Other courts have referred to it as the high water mark. [Shively v Bowlby, 152 U.S. 1 (1894); Scott v. Lattig, 227 U.S. 574 (1922)]. In substance all the courts are stating that the ordinary high water mark constitutes the line of demarcation. This is borne out by the following cases:

In Alabama v. Georgia, 23 Howard, 505, 515 (1859) the Supreme Court of the United States in determining the extent of state ownership of the bed of a certain stream declared:

> . . . "and that the bed of the river is that portion of its soil which is alternately covered and left bare, as there may be an increase or diminution in the supply of water, and which is adequate to contain it at its average and mean stage during the entire year, without reference to the extraordinary freshets of the winter or spring, or the extreme droughts of the summer or autumn."

This method of ascertaining the extent of state ownership by reference to the ordinary high water mark was followed in U.S. v. Chicago M.St.P.&P. Ry.Co., 312 U.S. 592, 297 (1940).

That lands beneath navigable waters is limited by the ordinary high water line is demonstrated by this quotation from the Submerged Land Act of 1953, 43 U.S.C.A. 1301(a):

> "(1) all lands within the boundaries of each of the respective states which are covered by nontidal

> waters that were navigable under the laws of the United States at the time such State became a member of the Union, or acquired sovereignty over such lands and waters thereafter, up to the ordinary high water mark as heretofore or hereafter modified by accretion, erosion, and reliction;"

By adopting the federal definition of ordinary high water mark found in Alabama v. Georgia (ibid) we are on safe ground. It describes the line in terms of physical characteristics as well as by engineering and skill by reference to "its average and mean stage". It is not an easy line to define or locate on the land. It is a question of fact to be determined by the Court.

That the ordinary high water mark is not a fixed boundary but may be varied by accretion, erosion, and reliction is pointed out in the Submerged Land Act of 1953 at Section 1301(a) of 43 United States Code Annotated.

Artificial raising of water level

(22) Another major problem presented for study is to determine the effect on title to riparian lands adjacent to a lake, the water of which has been raised artificially by means of a dam on its outlet. In conjunction with the title problem is that of the public to use the waters of such lake as extended and maintained by such artificial means.

The author has not as of this time arrived at a definite answer. The title problem may be restated in this manner: Is the State of Idaho entitled to those lands lying above the average high water mark of the lake in its natural state to the extent that they are submerged by the artificial raisings of the water level?

In Burris v. Edward Rutledge Timber Co., 34 Idaho 606, 202 Pac. 1067 (1921) the language of the Court is confusing on this issue. The gist of the Court's decision is that the waters of navigable lakes do not lose their nature as waters of navigable lakes because the water level has been raised and that the rights of the public to use such waters in their artificial state is recognized. To this we agree.

However, in arriving at this conclusion, our Supreme Court quoted from two Wisconsin decisions wherein the Wisconsin Court held in effect that the raising of the level of a lake by artificial means extended the title of the public or State to the additional submerged lands.

It should be noted that the Idaho Supreme Court immediately prior to citing the Wisconsin cases quoted from Northern Pac. Ry. Co. v. Hirzel, 29 Idaho 438, 161 Pac. 854, that: "The state holds title to the beds of the navigable streams below the natural or average high water mark, for the use and benefit of the people."

Does "natural" in this context refer to a stream or lake in its natural state? If so, the Court would appear to disclaim a title in the State of Idaho to the beds of a navigable stream to the extent that it is extended by the artificial raising of the water.

It would appear doubtful that this case would sustain a holding that the State of Idaho could acquire title under the Constitution of Idaho by the acts of a third person acting under a federal license in building a dam.

On the other hand, it does not solve the problems inherent in declaring such waters navigable and open to public use, to find that the State of Idaho did not acquire title to these submerged lands.

It should be pointed out also that the flowage rights may be acquired by license, purchase of flowage easements, grant, prescription as between individuals. But to say that the state should acquire title short of eminent domain proceedings seems quite unlikely.

Legislation Suggested:

(23) The legislature should give thought to enacting legislation that would disclaim title in such lands rather than force each individual land owner to contest such an assertion of title, if any, in the state.

Comparable areas of land lie along the creek bottoms adjacent to Lake Coeur d'Alene which were overflowed by the dam on Lake Coeur d'Alene. A flowage easement has in most instances been secured. That the title to such lands remains in the landholder seems evident. No prescriptive right could be obtained in view of the permission granted to overflow this land. It could scarcely be treated as a dedication to the public.

Here also legislation is demanded to adjust the rights of the parties and public.

Legislative Precedent: There is precedent for such legislation in the Idaho Session Laws of 1957, Ch. 211. Here there was a bona fide dispute between the landowners who occupied the bed of a lake denominated in the legislation as non-navigable water. This lake had been drained by the landowners, used as farm lands and taxed to them. The legislature authorized the State Land Board to release and convey all right, title and interest, if any, of the State of Idaho to the land owners in consideration of a nominal fee of ten dollars.

(24) Another problem of a comparable nature arises when lands below the ordinary high water mark of a navigable body of water are reclaimed by filling in of soil and rock by the adjacent riparian landowner. In an Idaho case, Halmadge v. City of Riggins, 78 Idaho 328, 303 P.2d 244 (1956) the Supreme Court held that the City as licensee of the State had the right to dump refuse on the bed of the Salmon River, a navigable stream, on the theory that the State owned the beds of such stream below the natural high water mark. This case is not strictly speaking pertinent to the discussion, but does reaffirm title in the State below the ordinary or natural high water mark.

Lands created by unauthorized filling of shore lands Speaking generally, a littoral or riparian landowner cannot by his own acts dump fill in a navigable body of water in such a manner as to extend his shoreline into the stream or lake and thus acquire title to such reclaimed lands as against the State. See State v Sause, 217 Ore. 52, 342 P.2d 803 (1959); People v. Broedell, 365 Mich. 201, 112 NW 2d 517 (1961); Royer v. Miner, 172 Cal. 448, 156 Pac. 1023 (1916); and Beach v Eagen, 39 Cal.App.2d 23, 102 P.2d 438 (1940). Barney v. Keokuk, 94 U.S. 324 (1876).

This is not to deny the riparian landowner his right of access to a navigable body of water by way of docks or wharfage. Title is still in the State.
Carli v. Stillwater St.R. & Trans. Co., 28 Minn. 373, 10 NW 205 (1881); United States v Turner, 175 F.2d 644 Cert. denied 338 U.S. 851. It is all a matter of state law.

Legislative Relief Suggested This entire problem should be reviewed and legislation designed to give equitable relief to the riparian landowners. Steps should be taken to clarify the title to such lands and define the rights of the public therein. The State's inactivity, taxation of the property, and general improvement of lakeshore should be factors in arriving at a final decision.

Indian rights to beds of Navigable Streams in Idaho

This study has also included a search of the federal statutes, treaties, executive orders and cases pertaining to Indian claims and rights of property to the beds of navigable waters in the State of Idaho. Based upon these studies to date and the materials herein referred to, we conclude:

Indian title extinguished to lands north of Spokane River and Lake Coeur d'Alene

(1) That the Indian claim, right or title to the northern portion of Idaho above Coeur d'Alene and the Spokane River has been ceded or extinguished by the United States;

(a) The Treaty of July 16, 1855 at Hell's Gate, Montana (12 Stat. 925) (Flatheads, Kootenay and Upper Pend d'Oreille).

(b) Agreement and Cession of March 18, 1887 ratified July 13, 1892 (27 Stat. 120) (Upper and Middle Spokanes)

(c) Agreement and Cession of March 27, 1887, ratified March 3, 1891, 26 Stat. 1026.

Coeur d'Alene Indians ceded all right, title and interest to lands outside the boundaries of their reservation as established by Executive Order of 1867.

Title to beds of non-navigable water subject to private ownership

The beds of all non-navigable waters which were opened to homestead entry passed into private ownership to the extent that they were homesteaded and patents issued. Johnson v. Johnson (ibid); Shively v. Bowlby (ibid).

Title to beds of navigable waters in State of Idaho

Title to the beds of all navigable waters covered by the respective cessions passed to the State of Idaho upon its admission to statehood, subject to the rights of the Coeur d'Alenes, whose cession was not ratified until March 3, 1891, and the Spokanes, whose cession was ratified on July 13, 1892.

Title in State to bed of Pend d'Oreille, Priest Lakes, Kootenai & Moyie Rivers

It would seem that all Indian claims so far as the title of the State of Idaho was concerned were extinguished on the dates of ratification. Pend d'Oreille and Priest Lakes would seem to be navigable waters as well as the Kootenai and Moyie Rivers. We express no opinion as to Spirit Lake, Hayden Lake, Twin Lakes or Blue, Kelso, or comparable lakes. Facts existing at the time of statehood would be controlling.

Coeur d'Alene Reservation

(2) With respect to the Coeur d'Alene Reservation as created by the Executive Order of June 14, 1867, and enlarged by the Executive Order of November 8, 1873, Indian title to the northern portion of the reservation was ceded by the Agreement of 1889 and ratified by Congress on March 3, 1891. [26 Stat. 1026]. The agreements and cessions of 1887 and 1889 appear to be an express recognition of the right and title of the Coeur d'Alenes.

Post Falls area -Title to bed in Frederick Post

(a) This cession specifically excluded the lands granted to Frederick Post in 1871 by Chief Andrew Seltice. A patent to this area, consisting of 156 acres of land and 593 acres of water, was issued to Mr. Post. This deed appears to include the bed and we conclude that was the intention of the parties.

(b) The land included in the cession of 1889 is described in 26 Stat. 1026 as follows:

> "Beginning at the northeast corner of the said reservation, thence running along the north boundary line 67 degrees, 29 minutes west to the head of the Spokane River thence down the Spokane River to the northwest boundary corner of the said reservation; thence south along the Washington Territory line 12 miles; thence due east to the west shore of the Coeur d'Alene Lake; thence southerly along the west shore of the said lake to a point due west of the mouth of the Coeur d'Alene River where it empties into said lake; thence in a due east line until it intersects with the eastern boundary line of the said reservation; thence northerly along the east boundary line to the place of beginning."

Cataldo Mission point of beginning survey

The place of beginning we interpret to be Cataldo Mission. Indian title to this area we believe to have been extinguished as of the date of ratification by Congress on March 3, 1891. There are no cases to my knowledge on this specific point.

Title to balance of reservation not extinguished by Cession of 1889

Indian title to the balance of the reservation does not seem to have been extinguished. This reasoning is based upon the fact that there has been no specific cession. Further, although the Reservation was opened to homestead entry and lands patented, such patents would not convey title beyond the ordinary high water line. [See prior discussion.

Title to beds of navigable waters not extinguished

This would leave the title to the beds in the United States on trust for the Coeur d'Alenes. The lands left in the reservation that were either unalloted or not homesteaded were restored to tribal ownership by an Act of Congress in 1958.

Hayden Park

Hayden Park was conveyed to the State of Idaho in 1908 by a description following the United States survey. This would not necessarily convey title to the bed of navigable waters, if any, within the conveyance. [35 Stat. 50].

"West Shore" line in doubt

We are not now prepared to say where a line would be run to fit the description "southerly along the west shore of Lake Coeur d'Alene".

The case of Montana Power Co. v. Rochester, 127 F. 2d 189 [9th Cir. 1942], is helpful in concluding that the area excluded from the cession of 1889 and lying beneath the waters of Lake Coeur d'Alene and St. Joe River within the Reservation has not been extinguished. Other details are reserved for further discussion.

(3) We are not prepared to make a statement as to the extinguishment of Indian title in the area of Nez Perce or Fort Hall Reservations and Gray's Lake in southeastern Idaho. This does not seem to be important at the Gray's Lake Areas as it is now a Federal Game Refuge under a ninety-nine year agreement with the parties concerned.

Thomas R. Walenta
Professor of Law
November 24, 1966

Summary Report, continued:

PROPOSED LEGISLATIVE CHANGES AND RECOMMENDATIONS

I. "Ownership of land beneath navigable waters - State of Idaho

The State of Idaho hereby declares its title to and ownership of the lands beneath navigable waters within the boundaries of the State of Idaho and the natural resources within such lands and waters; and the right and power to manage, administer, lease, develop and use the said lands and natural resources, all in accordance with applicable State and Federal laws, subject to the following exceptions;" (Submerged Land Act of 1953, 43 U.S.C.A. 1133a.)

Comments:
This declaration of state ownership of the beds of navigable streams is derived from Section 2 of the Submerged Land Act of 1953. This act is taken as our model for the reason that the determination of navigability and title to the beds of navigable bodies of water are federal questions and must be determined by federal law. U. S. v. Holt State Bank, 270 U.S. 49 (1926); U.S. v. Utah, 283 U.S. 64 (1931); U.S. v. Oregon, 295 U.S. 1 (1935).

It is also believed that Congress in enacting this Act intended only to declare that the title to the beds of navigable water already vested in the States shall be confirmed and established subject to the paramount powers of the United States under the Constitution. People v. Hecker, 4 Cal. Rptr. 334 (1960); Village of Kake v. Egan, 174 F. Supp. 500 (Alaska 1959). See 43 U.S.C.A. 1314 of retained powers of United States.

Note that the word "sell" is not used in this definition on the assumption that we have adopted a limited trust theory of ownership by the State. N.P. Ry. Co. v. Hirzel, 29 Idaho 438, 161 Pac. 854 (1916). As this is a matter of State law, the legislature may do as it chooses with respect to the disposition of state lands.

It ascertains both the land in question in streams of its outer margin to the ordinary high water line. The definition of the ordinary high water line is built into the lands it encompasses, which is what it does in reality. By referring to the "average or mean stage of the water" it permits both a visual and an engineering determination of the ordinary high water line. This is good, for the vegetation test alone is not sufficient. It corresponds to the designation of "normal or average high water mark" as stated in the Idaho cases. Halmadge v. City of Riggins, 78 Idaho 328, 303 P. 2d 244 (1956).

"II. Lands beneath navigable waters - bed - defined; ascertained. -

(A) Defined:

All lands covered by navigable waters under the laws of the United States within the boundaries of the State of Idaho on the date that it was admitted to statehood or thereafter acquired sovereignty over such lands and waters up to the ordinary high water mark as heretofore or hereafter modified by accretion, erosion and reliction; and all filled-in, made or reclaimed lands which were lands beneath navigable waters on July 3, 1890." [43 U.S.C.A. 1301(a) (3)].

Comments:
All filled-in, made, or reclaimed lands which were formerly lands beneath navigable waters on the date the State of Idaho was admitted into the Union, are specifically added to the definition of lands beneath navigable water. This is taken from the Submerged Land Act, 43 U.S.C.A. 1301(a)(3). This is in conformity with the discussion in the Summary Report. The word "navigable" has been substituted for "nontidal".

"(B) Ascertainment:

The land below ordinary high water mark or bed of a river is that portion of its soil which is alternately covered and left bare, as there may be an increase or diminution in the supply of water, and which is adequate to contain it at its average and mean stage, during the entire year, without reference to the extraordinary freshets of the winter or spring, or the extreme droughts of the summer or autumn." U.S. v. Chicago M. & St. P. Ry. Co., 312 U.S. 592 (1941). Alabama v. Georgia, 23 How. 505, 515 (1859).

Comments:
This definition of beds of lands beneath navigable waters is taken from the United States Supreme Court decisions. See Sec. 22 in Summary.

"III. Exception to State Ownership - Federal and Indian Interests.

There is excepted from the operation of Section I of this title:

(a) All tracts or parcels of land together with all accretions thereto, resources therein, or improvements thereon, title to which has been lawfully and expressly acquired by the United States from the State of Idaho or from any person in whom title had vested under the law of the State of Idaho or of the United States, and all lands which the United States lawfully holds under the law of the State; all lands expressly retained by or ceded to the United States

when the State entered the Union; all lands acquired by the United States by eminent domain proceedings, purchase, cession, gift, or otherwise in a proprietary capacity; all lands filled in, built up, or otherwise reclaimed by the United States for its own use; and any rights the United States has in lands presently and actually occupied by the United States under claim of right;

(b) such lands beneath navigable waters held or any interest in which is held by the United States for the benefit of any tribe, band or group of Indians or for individual Indians;

(c) all structures and improvements constructed by the United States in the exercise of its navigational servitude."

Comment:
This section is taken from 43 U.S.C.A. 1313. It reserves federal ownership to all property acquired by the United States from the State of Idaho or private citizens "and all lands filled-in, built-up or reclaimed by the United States for its own use."
Note also the reservation from State ownership of all lands beneath navigable waters held by the United States for the benefit of any tribe,band or group of Indians or for individual Indians.

"IV. Rights acquired under laws of the United States and State of Idaho unaffected

Nothing contained in this chapter shall affect such rights, if any, as may have been acquired under any law of the United States or the State of Idaho, by any person in lands subject to this chapter and such rights, if any,shall be governed by the law in effect at the time they may have been acquired: Provided, however, That nothing contained in this chapter is intended or shall be construed as a finding, interpretation or construction by the Congress that the law under which such rights may be claimed in fact or in law applies to the lands subject to this chapter, or authorizes or compels the granting of such rights in such lands, and that the determination of the applicability or effect of such law shall be unaffected by anything contained in this chapter."

Comment:
This section is necessary to preserve the constitutionality of Section 1, as a taking of private property without just compensation under the 5th and 14th Amendments of the United States Constitution.

"V. Natural Resources Defined:

The term "natural resources" includes, without limiting the generality thereof, oil, gas and all other minerals and fish, and other marine animal and plant life, but does not include water power or the use of water for the production of power."

Comment:
Natural resources as defined confirms the prevailing view in Idaho that minerals in the soil beneath navigable waters, as well as the fish and marine life in the waters, are the property of the State. The statement that water power or the use of water for power was not included in State ownership is both blunt and somewhat startling. It was forseeable in Chandler-Dunbar v. U.S., 229 U.S. 53 (1913) where the Court stressed that in such matters there can be no divided empire.

The Following Matters Are Suggested for Further Study by The Legislature:

VI. Legislation that would clarify the ownership of riparians to a navigable body of water which has been raised by artifical means, with relationship to the rights of the public and the State of Idaho.

VII. Legislation should be enacted that would provide security to those land owners whose lands have been overflowed by the raising of the water level artifically, who wish to reclaim this land. The ownership of such lands in both 6 and 7 has been discussed in Paragraphs 22, 23 and 24 of the Summary and found to be in the riparian owner.

VIII Legislation should be enacted to amicably adjust the rights to the use of reclaimed or filled in lands upon the shore of navigable waters. Although it would seem that the title to such lands is in the State, there are many mitigating circumstances which would merit remedial legislation that would not infringe upon the rights of the public to the use of such lands and the adjacent navigable waters.

IX. Serious thought should be given to the enactment of a comprehensive water code governing the rights of the public and riparian land owners to the use of our navigable waters and the adjacent shores. In this connection the purchase by the State of suitable shore-line property is advisable. The needs of the people for recreation, wilderness areas, fishing, boating and swimming, has been demonstrated.

X. It is suggested that the control and supervision of navigable streams and lake shore areas should be centralized in some definite agency.

XI. That a Natural Resources Board be created with over-all authority to work the development of our navigable streams and lakes into a comprehensive plan to develop all our natural resources.

XII. In this connection there is attached to this report a copy of a talk prepared by us for delivery to the Idaho Soil Conservation Association on November 17, 1966, at Caldwell, Idaho. This paper states the minimum requirements, in our opinion, for a legal basis to a natural resources program. It complements the suggestion made above.

XIII. Steps should be taken by the Legislature in conjunction with the Federal Government and the Indian Tribes involved to ascertain the extent and nature of the Indian claims to the beds of navigable waters in this state.
A map is enclosed to clarify the extent of the Coeur d'Alene Reservation.

It is my sincere hope that this summary report and recommencation has answered some questions for you. But most of all, I trust it has fortified your desire to do something constructive about the development of the navigable streams and lakes of this State in the common interest of all.

Sincerely,

Thomas R. Walenta
Professor of Law
November 25, 1966

THE LEGISLATIVE ROLE IN THE DEVELOPMENT OF THE WATER RESOURCES OF IDAHO

Prepared by Thomas R. Walenta, Professor of Law, for delivery at the 24th Annual Convention of the Idaho Association of Soil Conservation Districts
Caldwell, Idaho - November 17, 1966

First of all, let me say that both Dean George M. Bell of the College of Law, and Calvin C. Warnick, Director of the Water Resources Research Institute at the University of Idaho, have asked me to convey to you their best wishes for the success of this conference.

Personally, I am honored to have been invited to participate on this panel concerned with Water. I appreciate the opportunity to exchange ideas and views on our natural resources, because I value your opinions and judgment with respect to the use of the water and other related resources of this area. For years your group, collectively and individually, has been vitally concerned with the proper use and development of our water resources, so that you and your children may enjoy its use now and in the future.

All of us will agree that the orderly development of the natural resources of Idaho, in the common interest of all of its people and the Nation, is the foremost challenge of our time.

During the past several decades the need to conserve, develop, and utilize our water and related land resources has become a matter of increasing concern to both the federal and state governments. An unprecedented growth in population here and throughout the Southwest and California has accentuated the problems of control and distribution of our natural resources. This has been reflected by recent legislation and activity at the state and federal levels.

Federal Resources Legislation

One of the most forward looking pieces of legislation to provide for joint planning by the State and Federal governments, was secured through the passage of the Water Resources Planning Act of 1965 (42 USCA 1962 et al). Other federal acts included legislation (1) to control the pollution of our streams (Water Quality Act of 1965, 33 USCA §§466(a-g); (2) create a National Wilderness System (16 USCA §§1131 et al [1960]); (3) provide recreational areas at Federal Multi-Purpose Projects (16 USCA §460L [1964]); (4) set apart National Parks (Nez Perce), (16 USCA §281 [1965]); (5) enhance sport (16 USCA §757a) and commercial fisheries (16 USCA §§799 et al); (6) encourage creation of state parks and recreational facilities (Land and Water Conservation Act (16 USCA §§460-L4 et al); (7) as well as providing for flood control (33 USCA 70(a)

et al [1944]); 708 (1944) as amended to 1965); (8) reclamation (43 USCA §361 et al [1902]); and (9) soil conservation (16 USCA §590(a) (q)1 [1935 as amended through 1965]).

There are many other pieces of federal legislation that have been passed or are contemplated to improve our economy, upgrade our communities and provide recreation and transportation for our people. In this area, the Southwest Idaho Irrigation Project is an apt illustration.

Idaho Water Resources Agency

Idaho has also moved forward in water resources development. A Water Resources Agency was provided for by Constitutional amendment in 1963, and a Water Resources Board was subsequently created by the legislature under this authorization. [I.C. §42-1732 (1965)].

State Park Board

A State Park Board was created by the legislature in 1965 as an independent agency [I.C. §67-4218]. The rights, duties, and obligations of the state board of land commissioners created by chapter 5, title 58 and chapter 42, title 67 of the Idaho Code, relating to parks, were transferred to the Park Board of the Department of Parks by the same act.

Board of Health

The State Board of Health was authorized in 1907 and empowered to cooperate with other states and the federal agencies in the abatement of water pollution. An independent Air Pollution Control Commission was established in 1947 and reactivated in 1965.

Fish and Game Commission

Our Fish and Game Commission has been both active and efficient in protecting our fishery resources and providing sportsmen with good fishing.

Flood Control

Flood Control [I.C. §42-3101 - 42-3124]; Soil Conservation Reclamation [I.C. §43-101 et al]; Watershed Improvement [I.C. §42-3701, 3717 (1956)]; and other acts have been passed by our legislature to keep abreast of development in the field of land and water conservation. All in all, the people of Idaho, speaking through their legislature, have made commendable progress in this area of development of our natural resources.

Water Transportation

The building of a series of federal power dams on the Snake and Lower Columbia rivers, with their slack water reservoirs, has stimulated visions of sea-going transportation for our wheat, timber and other products. In anticipation of this commerce, a Port District has been created at Lewiston.

Studies are now being made of other uses for this slack water on the Snake River, including fishing, boating and all forms of water sports and recreation.

Lakeshore Development for Recreation

Notwithstanding these beginnings in the use of our water for irrigation, navigation and recreation, there are other rivers, lakes and reservoirs of sufficient size and volume to serve many useful purposes. Along their timbered shorelines are excellent sites for homes, summer resorts, parks and marinas. The opportunities offered by these areas has generated great interest in their development by private and state interests. This activity is reflected by the development of Hayden Park on Lake Coeur d'Alene, the purchase of a BoyScout Camp at Farragut, as well as the establishment of a game refuge at Gray's Lake in South Idaho.

Notwithstanding all these commendable accomplishments, we are not satisfied. There is still something missing. All of us sense a sort of futility in our efforts to achieve our goals in water resource development.

We look to our neighboring states of Oregon, Utah, Washington, and California, and note that their progress in developing their water and other natural resources far exceeds the results achieved in this state.

Natural Resource Planning

I am not alone in believing that we need a comprehensive plan for the development of our water and related land resources. A plan which we can call our very own - a plan which we fashion to meet our needs - one which takes into account the relationships which exist between water, agriculture, grazing lands, timber, minerals, domestic and municipal needs, as well as water for power, transportation, fishing, boating and other forms of recreation for the people of this state and nation.

Need for Planning

Such a plan is a bare necessity if our representatives are to partake on a plane of equality with the other states of the Pacific Northwest as is contemplated by the creation of the Columbia River Basin Commission under the provisions of the Water Resources Planning Act of 1965 [Pub.L.89-80] Unless Idaho acts soon, the opportunity for meaningful

and cooperative participation in the planning for the development of our resources will be gone forever. Once federal planning begins, our representatives must be present on a continuing basis, armed with facts as to our available water supplies, lands capable of irrigation, together with estimates of the future needs of our towns and cities for power, industry and recreation. We must have a voice in what is said and done.

The first step in securing a coordinated water resources plan is the need to create a Natural Resources Board, charged with the duty of formulating a comprehensive plan for the development of all our natural resources, and the ability to execute it financially and otherwise.

What then keeps us from accomplishing these worthwhile objectives? To my way of thinking, after taking into account that there is a certain amount of inertia and fear of change, the difficulty lies primarily in our antiquated Constitution and Statutes.

Art.9 §2 State Land Board

Our Constitution provides that the State Land Board shall administer the public lands of this state under the direction of the Legislature. [Art. 9 §2, State Land Board]. Notwithstanding this admonition, the Legislature created a State Park Board independent,in its powers and functions, of the State Land Board.

Art. 15 §7 State Water Agency

Then, in 1965, we separated the public waters of this state and created another constitutional agency and called it a State Water Board. The Board was charged with many admirable powers and worthwhile duties, the chief of which was to formulate a comprehensive state-wide water plan for the maximum development of our water resources.

Conflicting jurisdiction

Now we have two constitutional agencies, each charged with administering each of our two most important natural resources. These two resources are in fact opposite sides of a shield, inseparable in the over-all plan. Other conflicts appear with respect to the use of water for recreation (Park Board); Pollution (Health Board); Power and Mining.

Who can say whether the State Land Board, the Department of Reclamation, the Park Board, Fish and Game Department, or the Water Board, is property equipped and

adapted to perform such an over-all function.

It would seem to me that it is the function of the State Legislature to study this problem and to declare and provide for such a Board.

Constitutional changes proposed

The Constitution as it now stands forbids such planning. It should be altered by abolishing the provisions for a State Land Board and Water Resources Agency, and in their stead provide:

> That all state-owned property, including public lands and the beds of navigable streams are state property and subject to the jurisdiction of the state legislature.
>
> That all the waters of this state, both ground and surface, are public waters and subject to the control and management of the state legislature.

This would then give the state legislature full authority to create such boards and change their authority and duties as circumstances demand.

Natural Resources Board

This would permit it to create a Natural Resources Board, charged with the over-all responsibilities to develop a comprehensive and unified plan for the development of all of our natural resources.

It would not mean that the State Water Board or the Land Board would not continue to exist as legislative bodies.

Composition of Natural Resources Board

Each of the state agencies concerned with our natural resources should be represented on such Board - each would have its voice. This could afford the flexibility as well as unity of planning so essential to effective development. Each agency need not be abolished. It would thus eliminate the legal problems associated with jurisdiction of a constitutional agency.

There are other needs for change:

Mandatory Permit system

Any agency or board charged with the formulation, development and execution of water resources planning must have authority. In this connection, I refer to the need for a mandatory permit system. A system that

would require that in the future no water, ground or surface, could be appropriated without first obtaining a permit. This is essential to effective planning, for without a knowledge of the water appropriated, no check is available on the amounts of water available for appropriation. Our ground waters are becoming subject to overdraft or "mining". In many instances surface waters are now being over-appropriated. The result is an open invitation to law suits.

Issuance of permits should not be automatic

The Board charged with the responsibility of issuing permits should be authorized to refuse or prefer one application over another, if needs be, to meet the needs of a plan. Without this authority to implement a plan in the public interest, such planning becomes wasted effort. If certain waters are required to supply municipal needs, then a permit to use it for some other purpose should be refused, if found to be in the public interest.

Reservation of water from appropriation

Certain waters should be reserved for recreation, domestic and municipal needs, if found to be in the sommon interest. Oregon does this by statute.

Constitution as interpreted by Courts prevents adaptation to needs

What keeps us from doing these things? Article 15, §3 of the Idaho Constitution declares that the right to appropriate the unappropriated waters of this state shall never be denied. Unfortunately, our Supreme Court on repeated occasions has held that this clause forbids the state from requiring an individual to secure a permit before initiating a water right by appropriation. In addition, it has been held that the State itself cannot appropriate the unappropriated waters of this state.

Sections 1, 2, 3 and 7 of the Constitution should be stricken and in their stead substituted one section which should read as pointed out above:

> "That all the waters of this state, both ground and surface waters, are the property of the State and subject to the regulation and control of the State Legislature."

Amendments would give flexibility

Such an amendment would permit the legislature to determine how and under what conditions the public waters of this state should be used in all public interest. It would allow the legislature to determine the public policy of the State to meet changing needs and circumstances.

Beneficial Uses of Water Defined

There is another point that needs clarification. Just what is a beneficial use of water under §42-104 of the Idaho Code?

This statute declares that the public waters of this state may be appropriated for a beneficial use. It should be amended so as to declare what are the beneficial uses for which one may appropriate the unappropriated waters of this state. This is particularly important now when the use of water for recreation, fishing, scenic beauty, appropriation or reservation of water for recreation and wilderness areas are pressing needs. Under our proposed changes in the Constitution and Statutes of this State these needs would be recognized. The fact remains that now the Federal Government is recognizing these uses of water in all its projects, with or without our consent.

Priorities in use of water defined

There is a need also for a statute declaring priorities or preferences in the use of water, if planning for its use is to become effective and meaningful. This is doubly true if we strike §3 of Article 15, wherein a preference to the use of water was established, provided compensation was paid for its taking.

Arizona Statutes as an example

For the purposes of an example, only, Arizona has provided [§45-147] that the relative value of uses of water are:

A - "As between two or more pending conflicting applications for the use of water from a given water supply, when the capacity of the supply is not sufficient for all applications, preference shall be given by the department according to the relative values to the public of the proposed use."

B - "The relative values to the public for the purposes of this section shall be:

1. Domestic and municipal uses. Domestic use shall include gardens not exceeding one-half acre to each family.
2. Irrigation and stock watering.
3. Power and mining uses.
4. Recreation and wildlife, including fish."

[As amended, Ariz. Laws of 1962, ch. 113 §3]

State Agencies may not appropriate water

The case of State Water Conservation Board v. Enking, 56 Idaho 722, 58 P.2d 779 (1938) prohibits the State or any of its agencies or instrumentalities from appropriating the public waters of this state for the reason that to do so would deprive the individual under Art. 15, §3, from appropriating such water; a right would be denied if the State appropriated the water for a public use. How this differs in substance from the appropriation of the same water by another individual eludes me.

Water Resources Agency an Exception

It was for this reason that the Constitutional Amendment [Art. 15 §7] provided that the State Water Agency could appropriate water as a trustee for Agency projects. This power would be restored to the State and its agencies under statute, should the proposed amendment be adopted.

May a Municipal Corporation Appropriate water?

In this connection, the Enking Case has cast doubt over the ability of a City or County to appropriate water for its municipal needs. In the Beus Case, interpreting §49-1130 of the Idaho Code Annotated (1932) our Supreme Court spoke favorably as to the power of a city to appropriate water for its present and future needs. In Durand v. Cline, 63 Idaho 304 (1941), the Supreme Court held that the City of Moscow could issue bonds to dig wells to secure a "more adequate water supply". This is in its nature an appropriation. Section 49-1130 I.C.A. (1932) was repealed in 1951. Section 4 of Art. 12 of the Constitution provides that a municipal corporation may contract debts for "water" purposes. An Irrigation District has been defined as a municipal corporation in this connection. Pioneer Irr. Dist. v. Walker, 20 Idaho 605. In Section 50-2802, a municipality may acquire "a water supply" by purchase "or otherwise". And in §50-1301, a city may acquire ground or surface, public or private water, by appropriation, through an irrigation system by "appropriation or otherwise". A city may engage in flood control activities [Sec. 50-139] and create a "planning commission" [Sec. 50-2701].

Provide for Municipal Needs

Whether the fears are justified as to legal right of a municipality to acquire water for its needs by appropriation is not here an issue. The state legislature, under the proposed changes would be able to clearly define the municipalities rights to appropriate water for all its needs, including domestic use, recreation and industry.

Revenue Bonds Authorized

Finally, we should amend Sections 2 and 3 of Article 12 by adding to each of these sections a clause which would state that the issuance of revenue bonds by any agency of the State would not be in violation of such sections.

Conclusion:

The above suggestions for changes in our Constitution and Statutes are believed to be in the best interests of the people of this State and Nation. Times have changed. We are on the threshold of a new era in the Pacific Northwest. We should lead, not follow, our sister states in the development of our natural resources.

What we do will depend on your sense of personal responsibility.

Thomas R. Walenta
Professor of Law
November 17, 1966

THE LEGISLATIVE ROLE IN THE DEVELOPMENT OF THE WATER RESOURCES OF IDAHO

Part 2

The following suggested changes in the Constitution and Statutes of the State of Idaho are offered in the belief that they provide a substantial base upon which to formulate, develop and administer a comprehensive plan for the conservation, development, and use of the water and related land resources of the State of Idaho.

(1) Eliminate the State Board of Land Commissioners (Art. 9 §7) and the State Water Resources Agency (Art. 15 §7) as constitutional boards, and retain each of them as legislative boards. (I.C. §58-101, State Board of Land Commissioners, and I.C. §42-1731 et al, Water Resources Board).

This would remove the almost exclusive powers which each of these boards are given over our land and water resources respectively. It would permit the legislature to blend the use of these two resources as our needs require; thus assuring flexibility and adaptibility to our changing needs.

(1a) That provision in Art. 15, §7, granting to the State Water Resources Agency power to issue revenue bonds to construct water projects,could be preserved by amending Article 8, §2, concerning the use of state credit to so provide.

(2) Amend §8, Art. 1, of the State Constitution to provide that all state lands, including the beds of navigable waters, are the property of the State, and subject to the power of the state legislature to make all needful rules and regulations concerning their use and disposition.

This would eliminate the need for a State Land Board as a constitutional agency. This would permit the legislature to create Park Boards, or other agencies, charged with such responsibilities over our land and water resources as it deemed in the public interest.

(3) Strike Sections 1, 2 and 3 of Article 15 (Water Rights) and substitute one section which in effect would read:

> "All ground and surface waters of this State are the property of the State and the use thereof may be acquired by appropriation, subject to the regulations and control of the legislature."

This amendment would restore to the legislature its jurisdiction and control over the water resources of this state. No longer would the legislature be subject to the individual appropriator, nor would it need act through a single agency.

That portion of §3 referring to preferences in the use of water should be rewritten by the legislature and placed in the Code.

By eliminating that portion of §3 declaring that "the right to appropriate the unappropriated waters of any natural stream to beneficial uses shall never be denied" we have restored to the legislature the right to control and regulate the use of water in this state.

(4) Provide by statute for the creation of a Natural Resource Board charged with the duty to formulate and administer a comprehensive plan for the use and development of all the natural resources of this state in the common interest.

Such a board would be composed of representatives from the state boards charged with the use and management of our natural resources, plus members representing the public generally. This board should have the final authority in formulating a plan for the approval of the legislature. Such an arrangement would eliminate friction between various boards, provide a forum for public discussion, and center responsibility for comprehensive planning and its administration.

(5) A mandatory permit system should be established by statute for the appropriation and use of both ground and surface water.

No comprehensive plan for the development of our water resources can succeed if the appropriation and use of such waters may be acquired without the knowledge or consent of the state. A Continuing inventory of water resources is impossible. In passing, all western states, with the possible exception of Colorado and Idaho, have a mandatory permit system.
(Idaho and perhaps Colorado, are the only two of the Western States which do not have a mandatory permit system.)

(6) The Agency charged with the issuance of permits to appropriate water should have the authority to reject, issue on conditions, or prefer one permit over another, in the public interest.

Alaska, California, Oregon, Utah and Wyoming provide for issuance of permits under such conditions. Without such authority, the implementation of a state water policy would be impossible.

(7) Beneficial uses of water should be clarified and defined so as to include the uses of water for fishing, boating, swimming, scenic values and other forms of recreation, as well as for transportation and use of municipalities.

Section 42-104 of the Idaho Code declares that water may be appropriated for beneficial uses, but does not define such uses. This should be clarified.

(8) Oregon has declared that water may be reserved and withdrawn from appropriation for public recreational needs [§§538.110 et al], scenic areas [§§538.200 et al] and for future needs of municipalities [§§538.410 et al].

This method of procedure should be studied further and adapted to our needs where it is found to be in the public interest.

Idaho has in effect done the same thing in appropriating the waters of Big Payette Lake [I.C. §§67-4301 et al] and Pend d'Oreille and Lake Coeur d'Alene [I.C. §§67-304 et al]. Two difficulties with this appropriation under our present laws lies in the inability of the State of Idaho to appropriate water and (2) whether an appropriation for such uses is authorized as a beneficial use of the public waters of this state.

(9) Preferences in the use of water should be established by the state legislature.

This is a necessity in guiding the Natural Resources Board in its planning and the Board charged with the issuance of water permits. It also provides security and recognition of the needs of the people.

Practically all the western states have such statutes.

By way of suggestion, Arizona [§45-147 (1962)] has a statute listing beneficial uses in this order.

1. Domestic and municipal uses
2. Irrigation and stock watering
3. Power and mining uses
4. Recreation and wildlife, including fish.

(10) The state,municipalities and other political bodies should be granted specific authority by statute to appropriate water both for their present and future needs.

By Court decision this right to appropriate water by state agencies was denied. A statute which could be fairly construed to grant this authority to municipalities was repealed. Repeal of Art. 15, §3, should remove any constitutional doubt. It is true that Art. 15, §7, did give the Water Resources Agency the power to appropriate water for its water projects. This authority should be extended to all state and municipal agencies. The proposed changes will do this.

(11) The matter of water pollution is a matter of pressing concern to all of us. The work of the Idaho Health Department has been commendable. Its activities should be coordinated through the Natural Resources Board.

CONCLUSION:

The foregoing changes are offered to you for your consideration. They are, in my judgment, the minimum upon which a solid legal foundation may be established for the comprehensive development of our natural resources.

Thomas R. Walenta
Professor of Law
November 17, 1966.

COEUR D'ALENE INDIAN RESERVATION