

COOPY

**RESEARCH TECHNICAL COMPLETION REPORT
PROJECT A-010-IDA**



**A Critical Study of the
Idaho Code of Laws
Together With Various
Agencies and Their
Functions in the Field
Of Water Resources**

Project Investigator T. R. Walenta

Water Resources Research Institute
University of Idaho
January 1968

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A Critical Study of the Idaho Code of Laws
Together With Various Agencies and Their
Functions in the Field of Water Resources

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PERIOD OF INVESTIGATION - March 1965 to June 1967

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ABSTRACT

Studies of the code of laws and the legal problems associated with water resources activities in the State of Idaho has been studied through legal research of existing laws and practices. This has involved much dialogue and conferencing with state agencies personnel and representatives of interest groups such as the Idaho Reclamation Association and the Idaho Association of Soil Conservation Districts. Particular contributions have resulted in recommendations regarding PL 89-80, the Water Resources Planning Act, and national legislation on Wild Rivers as these acts might apply to Idaho. The study has contributed much to new legislation concerned with title to and use of water of navigable streams and lakes in Idaho, as well as improved legislation with regard to administration of water laws in Idaho. The legal research papers prepared by 56 law students on topics related to water law were a significant contribution to background material and served as great training contribution during the course of the study.

WALENTA, T. R.

"A Critical Study of the Idaho Code of Law Together with Various Agencies and Their Functions in the Field of Water Resources"
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KEYWORDS *Legal Aspects, Public Rights, Water Law Boundaries (property), *Legislation, Statutes, Submerged Land Act, Water Resources Planning Act, Wild Rivers Act *Water Law, Legislation, *Water Levels, Lakes, Navigable Streams

OBJECTIVES AND PURPOSES

The objectives of the study were intentionally defined in broad areas and were originally stated as follows:

1. To assist the Idaho Legislature in furnishing basic information for drafting legislation to enable the new State Water Agency (Idaho Water Resources Board) in

implementing a program that would assure optimum development of the water resources of the State of Idaho.

2. To study legal and sociological problems concerned with changing uses and transfers of water.
3. To study the Idaho Code and Constitution to determine if there are legal impediments to the implementation of a comprehensive water plan.
4. To study the various state and federal agencies interested in water resources to determine whether the statutory duties of such state agencies should be enlarged, modified, abolished or combined.
5. To study and determine the relationship of the State Water Agency with respect to the entire field of water resources and power development in Idaho and the Pacific Northwest.
6. To study legal problems with respect to acquisition of lands and the appropriation of water for power development, recreation and other purposes.
7. To study the law of navigable streams, lakes and artificial bodies of water in light of common law and federal background.
8. To study ways in which the University Water Resources Research Institute can cooperate in the legal and policy making that must develop the interplay of federal, state and local entities working for a maximum of cooperation.

PROCEDURE

This research was conducted by the principal investigator searching legal documents, state codes and by meeting with various state groups, including legislative committees, state agency personnel and interest

groups such as the Idaho Reclamation Association and the Idaho Association of Soil Conservation Districts. Some of this was done in conference and cooperation with the Institute Director, Professor C. C. Warnick, Much of the work was enhanced by research papers prepared by law students under the project leader's guidance. These were prepared in single copy and abstracted and are available as reference material at the University of Idaho.

RESULTS AND CONCLUSIONS

The results have been presented in several ways. This has included seven primary presentations:

1. A review and analysis of P.L. 89-80. Its relation to the new Idaho Water Resource Board was developed under the project investigator's leadership and with the help of the Policy and Coordinating Committees of the Institute. This presentation to the Idaho Water Resource Board was a great influence on that group's pressing for the formation of the Pacific Northwest River Basin Commission and the action has been a direct contribution to the enlivened interest of state interest in water resource activity, including much dialogue in the developing ground rules of the new commission. A copy of this analysis was transmitted to the Office of Water Resources Research and an additional single copy is appended to this report.
2. In cooperation with other members of the Institute's Policy and Coordinating Committees a study was made of the national legislation S. 1446 concerned with Wild Rivers. This resulted in testimony that was presented at the Idaho Water Resource Board hearings held in Lewiston, Idaho on October 25, 1965. This was published by the Idaho Water Resource Board and a single copy of these published hearings is appended to this report.

3. A review of legal problems revealed an inadequacy of the laws concerned with ownership and control of the use of the beds of navigable streams and lakes in Idaho. A study was made in detail of this and a report entitled "Summary Report on Title to Beds and Use of Water of Navigable Streams and Lakes in Idaho" was submitted to the Idaho Legislative Council. The project investigator believes this research resulted in or was a substantial factor in establishing the following legislation by the 1967 Idaho Legislature:

H. B. 258 amended Sec. 58-104 of the Idaho Code. The amendment extended the powers and duties of the State Land Board to include the control and disposition of public lands of the State of Idaho below the ordinary high water mark of all navigable streams and lakes.

The Bill also provided a new definition of the ordinary high water mark, which it defined as follows: "The term 'natural or ordinary high water mark' as herein used shall be defined to be the line which the water impresses on the soil by covering it for sufficient periods to deprive the soil of its vegetation and destroy its value for agricultural purposes."

Copies of the report have been widely distributed and a single copy is appended to this report.

4. Additional study of state statutes provided bases for legislative changes and close collaboration with the Idaho Reclamation Engineer resulted in the following significant changes in state law.

- (a) H.B. 290 amended Sec. 42-225 of the Idaho Code authorizing the Department of Reclamation to conduct, supervise and compile information concerning the uses of water within the various river basin areas of the state. The act applies also to groundwater areas.

- (b) H.B. 290 also added Sec. 42-225A of the Idaho Code, which requires those persons who have heretofore acquired water rights under the constitutional method to file an affidavit of claim to such waters. The claim must be filed with the Department of Reclamation, which will cause a notice of the claim to be published in a local newspaper for two weeks, under Sec. 42-225B.
- (c) H.B. 293 provides for the revision of the Water Permit System and includes both ground and surface waters.
- (d) H.B. 279 amended Sec. 42-233A of the Idaho Code to provide a new definition of a critical ground water area, which reads as follows:
"Any ground water basin or designated part thereof not having sufficient ground water to provide a reasonably safe supply for irrigation of cultivated lands, or other uses in the basin system at the then current rates of withdrawal or rates of withdrawal projected by consideration of valid and outstanding applications and permits as may be determined and designated from time to time by the State Reclamation Engineer."
- (e) H.B. 291 repeals and re-enacts Sec. 42-233 of the Idaho Code with respect to the licensing of well drillers.

5. Research proposed future desirable revisions in state water law and recommendation were submitted to the State Reclamation Engineer for action. These are summarized as follows:

Revision of Sections 42-101 through 42-117 as proposed:
Sec. 42-101 - Nature of Property in Water. Redefining the control and supervision of all public waters by the State of Idaho.

Sec. 42-103- - Mandatory Permit System Established - subject to all existing vested water rights, all future water rights must be acquired under the permit system.

Sec. 42-104 - Appropriation must be for beneficial purposes - such beneficial uses or purposes include but are not limited to "irrigation, domestic, municipal,

mining, recharging, manufacturing, transportation, power, industrial, stock watering, fish culture, wildlife, scenic, health, and recreational purposes."

Sec. 42-106 - Priorities. As between appropriators "the first in time is the first in right", however, a reasonable exercise of this doctrine shall not block the full economic development of the ground or surface waters of this state.

Sec. 42-107 - Amended to recapture waste, seepage and spring waters. Such waters are subject to appropriation by persons other than the first appropriator or user only after the latter has abandoned his right to use or recapture.

Sec. 42-108 - Involving change in point of diversion and place of use was amended by adding the following paragraph:

"In addition, such persons seeking to make such change in the point of diversion, use and place of use, must also secure a permit to do so from the State Reclamation Engineer, as provided for in Sec. 42-218."

Sec. 42-111 (New) - Use of water for watering livestock acquired by appropriation. This follows substantially the law in Nevada.

Sec. 42-113 (New) - Inventory of Water Resources - Statement of Claim. This section was adopted as Sec. 42-223 of the Idaho Code. However, it was believed to be advisable to include it in this section of the Water Code.

Sec. 42-114 (New) - Vested Water Rights not impaired This is a new section and was made to allay any fears as to the loss of water rights heretofore acquired.

Sec. 42-115 (New) - Appropriation by the United States and the Idaho Water Resource Board. This section provides for appropriation under the permit system by the United States Government and the Idaho Water Resource Board for future beneficial uses not ordinarily permitted to private appropriators.

Sec. 42-116 (New) - Permit required to appropriate surface waters for recharging ground water reservoirs. It was believed that recharging ground water reservoirs should be under the supervision of the State Reclamation Engineer; permits being required for both recharging and withdrawal in order to protect the public.

Sec. 42-117 - Definitions.

It was recommended that "domestic use" as heretofore defined by the Code be made more liberal as to amount.

"Persons" was defined to include the agencies and departments of the United States and the State of Idaho, together with all local subdivisions of the state.

Appropriation for beneficial uses may now be made with or without a diversion of water.

This was necessary in order to make scenic values, use of water for swimming, fishing, and other forms of outdoor recreation, subject to appropriation.

"Diffuse surface water" was defined to include surface and other waters while on private lands.

6. The project investigator through encouragement by Professor Warnick prepared a specific review of ground water legal problems for the Symposium on Ground Water of the American Water Resources Association in San Francisco. This was finished after the project investigator retired from the University of Idaho and resulted in delay of finalizing this completion report. A copy of the paper as it was submitted is appended to this report.

7. The various research papers prepared by law students under the supervision of the project investigator served two prime purposes: (1) provided background material for the aforementioned results, and (2) provided excellent training for students who will become involved in legal problems concerned with water resources. The following is a listing of titles and students involved in the period of the project study. Single copies are available as references at the University of Idaho. No doubt several of these will result in articles to law journals in later years.

LISTING OF STUDENT PAPERS:

<u>STUDENT</u>	<u>TOPIC</u>
1. Anderson, William E.	How Does a Municipality Acquire a Water System?
2. Ashbaugh, David L.	Columbia Interstate Compact - Its Present, Future and Ramifications
3. Church, John A.	The Water Resources Planning Act and Its Relation to Idaho With Respect to the Proposed Columbia River Basin Commission
4. Clarke, Kenneth	Land and Water Conservation Act of 1964 Its Effect Upon Government Agencies and People in Idaho - Recreation a Beneficial Use
5. Dial, Thomas	Air Pollution - A Basic Study
6. Fancher, Frederic G.	The Indian and The Salmon
7. Felsted, Harold	Accretion, Reliction and Avulsion
8. Grimes, Larry B.	Bear Lake - Rights of Riparian to Bed of Artificial Lake
9. Hargis, James R.	Recommendations for Revising Water and Irrigation Provisions of Idaho Constitution
10. Manning, James	Artificial Lakes and Storage
11. Martsch, James L.	What is a Navigable Stream in Idaho?
12. McAdams, Ronald K.	Tribal Rights to Navigable Beds
13. Merrick, Gale L.	Public Waters in Idaho
14. Moorer, Winifred B.	Stare Decisis - Effect of Overruling a Rule of Real Property Law

15. Morgan, Gary L. Watershed Protection & Flood Prevention Act
16. Nelson, Timothy L. Concept of Navigability in Idaho for Determining Ownership of Submerged Lands
17. Peck, Frank D. A Basin Accounting System for the Pacific Northwest - Southwest Idaho Development Project
18. Redford, Mac A. Southwest Idaho Water Development Project
19. Ritteman, Peter M. Delaware River Basin Compact of 1961
20. Schlender, Erwin L. Ground Water Code: An Analysis and Criticism
21. Smith, Robert L. Water Pollution
22. Sullivan, Willis E. Wild Rivers Bill and Its Effect in Idaho
23. Swenson, Severt, Jr. Handbook of Government Agencies Concerned With Natural Resources
24. Ward, John C. Title to the Beds of Navigable Streams in Idaho
25. Warren, Maureen Bonneville Power Administration and the Wheeling of Power into Southern Idaho
26. Wheeler, Dennis E. Construction of Grants of Riparian Lands Abutting Navigable Waters
27. Wilson, Alan D. Federal Water Project Recreation Act
28. Bithell, Walter H. Outline of Proposed Water Pamphlet (no abstract)
29. Brock, Norman May a Municipality Appropriate?
30. Derbidge, Warren S. Legal Problems Involved in the Exploration of Outer Space
31. Eliason, Lyle Dean Boundaries on Navigable Water Courses
32. Graves, Ronald N. Rights to Beds and Waters of Deer Flat Reservoir
33. Greener, Richard H. Accretion, Reliction and Avulsion in Washington and Idaho
34. Hodgson, Frank Pollution and Fish Survival (Special Research)
35. Jauregi, Paul L. Dworshak Dam and Reservoir
36. Kiel, Duane D. Acquisition of Lands for Purposes of Flood Control and Jurisdiction over Land and Waters Impounded

37. Lyons, Jim Incorporeal Interests in Scenic Easements
(Special Research)
38. McAdams, Ron American Indian and His Tribal Property
Rights (Special Research)
39. McDermott, Peter D. Saga of American Falls Dam
40. Moore, Winfred Stare Decisis as Applied to Beds in
Navigable Streams (Special Research)
41. Morton, Wm. R. Comparative Study of Idaho and
California Appropriation Systems
42. Nelson, Tim Public Land Law Review--1964-1968
(Special Research)
43. Peck, Frank The Basin Account - 1966 (Special Research)
44. Priest, Wm. George Lower Colorado River Basin Project --
A Threat to Idaho Water?
45. Risch, James E. Land and Water Conservation Fund Act,
Federal Water Project Recreation Act-
Effect on Each Other and the State of
Idaho
46. Sellman, John R. Idaho Public Land
47. Shurtliff, Marvin K. Recreation and New Department of Parks
in Idaho
48. Smith, Denison E. Structures and Fills on Submerged Lands
49. Smith, Jay C. Water Diversion from Pacific Northwest
to Pacific Southwest (Special Research)
50. Staihar, Nick J. Mining Rights on State Lands in Idaho
51. Taylor, Gordon K. Comparative Study of Western Ground
Water Codes
52. Trabert, Robert L. Compensation for Taking of Property
under Navigation and Property Clause
of United States Constitution
53. Ward, John L. Adjudication of Water Rights (Special
Research)
54. Warnick, C. C. Legal Considerations in Groundwater
Recharge Water
55. Westberg, Paul L. Salvaged by Improving the Irrigation
Ditch
56. Williamson, Michael H. Water Pollution - A Problem Caused By
The Mining Industry

The project investigator believes the major objectives of this study were achieved and that results in the form of improved legislation will continue to accrue. The activities of the investigator as Emeritus Professor of Law opens a new opportunity in which service will be extended to such organizations as his new employer, the Bovay Engineers, through its work with Puget Sound Task Force, a Type II Water Resources Planning effort now in progress.

LIST OF PUBLICATIONS

1. WALENTA, T. R., WARNICK, C. C., COREY, G. L. and FOLZ, W.E.:
Sept. 1965 Analysis of the Water Resources Planning Act, P.L. 89-80, Report of Policy and Coordinating Committee, Water Resources Research Institute, University of Idaho, Moscow, Idaho.
2. WALENTA, T. R.
Oct. 1965 Statement of Idaho
Water Resources Research Institute
Transcript of Idaho Water Resource Board Hearings on the Wild Rivers Bill (S.1446) at Lewiston, Idaho, October 25, 1965.
3. WALENTA, T. R.
Dec. 1966 "Summary Report on Title to Beds and Use of Water of Navigable Streams and Lakes in Idaho" A Report to the Idaho Legislative Council, Water Resources Research Institute, University of Idaho.
4. WALENTA, T. R.
In Press "Legal Problems Concerned With Ground Water" Proceedings of Ground Water Symposium of the American Water Resources Association, San Francisco, November 6, 1967.

FINAL TIME AND COST REPORT - ANNUAL ALLOTMENT (SEC. 100) PROJECT

Project No. A-010-IDA State: Idaho Date: January 20, 1968

Project Title: A Critical Study of the Idaho Code of Laws Together With Various Agencies and Their Functions in the Field of Water Resources

Principal Investigator: Dr. T. R. Walenta

Project Began (Mo.-Yr.): March 1965 Project Ended (Mo.-Yr.): June 1967

Indicate below, by cost categories, how Federal Sec. 100 annual allotment funds were applied in support of project accomplishment.

<u>Cost Category Items</u>	<u>Funds Expended All Years</u>
<u>A. Salaries and Wages:</u>	
Principal Investigator(s)-----No. <u>1</u> - Man-yrs. <u>1</u> -- \$	<u>11,667.00</u>
Other Professional Staff-----No. _____ - Man-yrs. _____ -- \$	<u> </u>
Student Research Assistants-----No. _____ - Man-yrs. _____ -- \$	<u> </u>
Others (Clerks,Technicians,etc.)-----No. <u>1</u> - Man-yrs. <u>1</u> -- \$	<u>1,469.91</u>
<u>Sub-total (A)-----</u>	<u>(13,136.91)</u>
<u>B. Non-Expendable Equipment Items:-----</u>	<u>Sub-total (B)----- (825.02)</u>
<u>C. Expendable Materials & Supplies:-----</u>	<u>Sub-total (C)----- (572.05)</u>
<u>D. Other Costs: (Specify-such as travel, printing, contractual services, equipment rental, etc.)</u>	
Travel	309.94
<u>Sub-total (D)-----</u>	<u>(309.94)</u>
<u>TOTAL ANNUAL ALLOTMENT (SEC. 100) FUNDS APPLIED TO PROJECT-----</u>	<u>\$14,843.92</u>

Non-Federal funds expended on this project during the period of the project's operation is estimated to have totaled \$7,845.60. This includes employee fringe benefits and indirect costs borne by state funds of the University.

In addition, the student papers that were prepared under Dr. Walenta's direction represent from the 56 papers no less than 1700 man hours of effort.