

Idaho Code

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Idaho, like other western states, employed a number of skillful attorneys when the time came to establish social and governmental institutions. They had a hard time. Back before 1846, when the Idaho region became part of the United States, Ontario's legal code had applied to British subjects for a quarter century. But United States citizens who ventured into that part of the country had no legal code at all. Some of them established Fort Hall in 1834 on that account: Nathaniel Wyeth had contracted to bring out supplies for a company of mountain men that summer, but they ignored their obligation which lacked legal force because no law applied to them. Unable to dispose of his goods, Wyeth built Fort Hall as a post to sell them. But if a civil code had applied to anyone aside from the Hudson's Bay Company in the land west of the continental divide and north of Mexico, he might not have had to go to the trouble. By 1840, Idaho had become about exclusively British, so the Ontario code prevailed. Then after 1846, Idaho was left with no law at all. Finally Oregon (after 1848) and Washington (after 1853) provided legal codes covering the land that emerged as Idaho. But when Congress established Idaho in 1863, no arrangement for a criminal or civil code was provided. If Idaho had come only from part of Washington territory, the established legal code would have continued to apply. But the greater (if mostly uninhabited) part of Idaho came from Dakota. Part of Nebraska had been thrown in also. With land from three different territorial jurisdictions, Idaho lapsed again into a literally lawless situation. Some legally misguided efforts were made to apply the Washington criminal code to Idaho prior to February 4, 1864, when Idaho's original criminal laws were adopted. But in 1866 the Idaho supreme court organized somewhat belatedly and reviewed that unsatisfactory procedure. In deciding an appeal of a robber who had held up a miner and made off with \$200 worth of gold dust, the supreme court turned the defendant loose because Idaho had no law against robbery (or any other crime) prior to the 1864 code. Two other convicts (the only ones still serving time for offenses committed during that lawless period) got their freedom, but otherwise the court's decision came too late to help any other criminals who had afflicted the territory during the Idaho gold rush. When the time had come for the Idaho legislature to enact the statutes that would govern the new territory, plenty of legal talent was on hand. The president and at least one other member of a seven-man Council (the upper house) were attorneys. The legal profession had equally as many representatives in the lower house. No less than four (and perhaps more) attorneys served there, including Milton Kelly (later on Idaho's territorial supreme court) and Alonzo Leland, a civic leader in Lewiston until Idaho became a state. As so often was the case, these early attorneys engaged in a variety of important enterprises. Leland also was a

newspaper editor and publisher, a miner, and a surveyor; as a Portland newspaperman, he had done more than anyone else to set off the Idaho gold rush in the first place. In Lewiston, he continued his career in journalism along with his legal practice and mining development. After his term on the supreme court, Milton Kelly took over the *Idaho Statesman* for almost two decades. As a retirement project he developed Kelly's Hot Springs, a popular summer resort near Boise. Other prominent early Idaho attorneys showed this same kind of diversity of interest that did much to develop the territory.

In some ways, members of the early Idaho bar had an easier time attending to other projects than practicing law. A second session of the legislature, which met in Lewiston late in 1864, concluded that excessive imperfections had crept into the Code which had been adopted earlier that year. So an entirely new code was enacted. A cloud upon the validity of the new 1864 code then complicated matters still further. Because of conflicting arrangements provided by the legislature at the beginning of 1864, no one could tell when the second session was supposed to assemble and transact business. After the second session also got around to the matter of choosing a location for the territorial capital (and locating the permanent seat of government in Boise, effective December 24, 1864), outraged citizens of Lewiston got their local probate judge to declare all the acts of the legislature (which included the new Code as well as the offending capital location act) illegal. Boise attorneys (including the president of the Council and speaker of the House of Representatives) remained unimpressed by the mandate of the Lewiston probate judge, whose actions finally were sustained by the local district judge (also a member of the Idaho supreme court) when he sobered up long enough to rule on the matter. But the remainder of the territorial government ignored the injunction of the Lewiston district judge, although the legality of the Idaho Code (as well as the location of the capital) depended upon the outcome of the case. No provision was made for printing the new code until after the supreme court reversed the action of the Lewiston judge on June 14, 1866. By then, everyone knew which Code was in effect. But only the original Code was printed and available. Perhaps it generally was used, at least if attorneys in those days bothered to consult the Idaho Code. Having to practice without having any copies of the laws available (except a handwritten one in the territorial secretary's office, and a few texts of statutes that got published in newspapers) proved to be a bit clumsy.

Actually, by the time the supreme court had figured out which Idaho code was in effect, the statutes had been printed. Yet they were still not available.

Early in 1866, after the third session of the legislature had adjourned, the territorial

secretary returned to San Francisco (where he had previously been a saloon keeper) to get the code and the rest of the statutes printed. On the way, he picked up all the remaining funds (\$41,062) that Congress had appropriated to operate Idaho's territorial government. Then, after concluding an arrangement with some printers, he absconded to Hong Kong (and later to Paris) with the treasury. For several years, the printers held on to the printed laws, refusing to deliver the volumes containing the Idaho Code until their printing bill was paid. When money to ransom the Code finally was available, attorneys in Idaho had a chance to obtain copies of the laws that concerned their practice. Until 1869, they had to work under awkward conditions. Yet in spite of these problems, they went ahead to make Idaho a commonwealth very similar to other western mining territories of that era.

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