Project Proposal
for
Water Resources Research Institute Program
under
Section 104, Water Resources Research Act of 1984
to the
Alabama Water Resources Research Institute

in support of the
Research Proposal

WATER POLICY AND LAW IN ALABAMA

by

Heather Elliott (PI), Associate Professor,
University of Alabama School of Law
helliott@law.ua.edu, 205-348-9965

William L. Andreen (Co-PI), Edgar L. Clarkson Professor of Law
University of Alabama School of Law
wandreen@law.ua.edu, 205-348-7091

Bennett L. Bearden (Co-PI), Director
Water Policy and Law Institute
The University of Alabama
bbearden@ua.edu, 205-247-3683

Patrick E. O’Neil (Co-PI), Director
Ecosystems Investigations Program
Geological Survey of Alabama
poneil@gsa.state.al.us, 205-247-3586
RESEARCH PROPOSAL

A. Project Number: 

B. Title: Water Policy and Law in Alabama

C. Focus Category: Law, Institutions, and Policy (LIP); Management and Planning (M&P)

D. Keywords: Water Law (268), Water Rights (278), Law (140), Policy Analysis (180), Planning (175), Resource Planning (199), Institutional Relationships (124)

E. Duration: From 03/2014 to 3/2016

F. 1. Fiscal Year 2014 Federal Funds.

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2. Fiscal Year 2015 Federal Funds

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G. Non-Federal Funds Allocated, 2014-2015

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H. Name, University and City of Principal Investigator:

  Heather Elliott (PI), Associate Professor,
  University of Alabama School of Law
  Tuscaloosa, AL

I. Congressional District of University Performing the Research:

  7th Congressional District

J. Identification and Statement of the Major Regional Water Problem:

Alabama faces a major and expanding water crisis. Population growth and economic development are putting increasing pressure on water resources already strained by recent droughts, and such droughts are likely to become more frequent and more severe in the future. Disputes with neighboring states over shared water resources threaten Alabama’s use of interstate waters to meet future needs.
Alabama’s current water-law regime, because it is primarily a judicially created common-law regime, is nowhere clearly explicated; such explication is necessary to determine its strengths and failings. We will provide a clear explication of Alabama water law and policy, covering the following topics: surface water rights, groundwater rights, irrigation, instream flows, interbasin transfers, water quality, watershed management, and drought management. We will also compare Alabama’s water-law regime to those of neighboring states (Georgia, Florida, Tennessee, and Mississippi), including the reliance in those states on water-resources permits, to illuminate our own system and to understand likely outcomes in ongoing conflicts with those states over our shared water resources.

K. Statement of the Results, Benefits and/or Information Expected to be Gained:

The major product of this research will be a definitive statement of Alabama water-resources law and policy, including comparative research on how Alabama’s water law compares to that of neighboring states. The major benefits provided by this research are the definitive statement of the law, the highlighting of the law’s strengths and failings, and the comparative analysis, all of which will enable policymakers to determine what, if any, changes need to be made to Alabama water law to meet future challenges.
L. Nature, Scope, and Objectives of the Research

1. Nature of the Research

As is generally true among the humid states east of the 100th meridian, Alabama adopted and modified the “riparian” common-law doctrine of England to regulate surface waters. Similarly, like many other American states, Alabama abandoned the English law governing groundwater and adopted the “American reasonable use rule.” Unlike many of the humid states, Alabama has never adopted a modern statute to regulate water use comprehensively. The primary water-rights statute, the Alabama Water Resources Act (AWRA), disavows any intent to change existing water rights, which are conferred by common law. Because Alabama has always relied on a common-law method, where judges determine the law on a case-by-case basis, there is no clear statement of the content of Alabama’s water law.

The need for such a statement is manifest. First, without a clear statement of existing law, it is difficult or even impossible to determine what existing water rights are. While various treatises on the law give brief summaries of Alabama water-rights law, none provides the detailed statement necessary to guide lawyers and policymakers in understanding the full content of Alabama water law. Some of these treatises even conflict with each other (compare, e.g., A. DAN TARLOCK, LAW OF WATER RIGHTS & RESOURCES § 3:56 (2013) (suggesting that Alabama may still follow the natural flow doctrine), with William L. Andreen, Alabama in, 4 WATERS & WATER RIGHTS 3-30 (Amy K. Kelley ed., 2013) (describing Alabama as an American reasonable use rule state)). A definitive statement of Alabama water law and policy is needed.

Second, we must know the current status of the law to determine what changes might be desirable: Alabama is one of the minority of eastern states that still relies almost exclusively on the common law as a source for water rights. Many other humid states have adopted at least some measure of statutory regulation of water resources to arrive at a doctrine called “regulated riparianism.” Alabama is currently considering such a move, with the Alabama Water Agencies Working Group and the Joint Legislative Committee on Water Policy taking steps to determine what the appropriate water policy should be. A definitive statement of Alabama water law and policy will permit those governmental entities to work from solid legal ground.

2. Scope of the Research

The scope of this proposal is Alabama’s water resources law and policy, including surface water and groundwater rights (including non-riparian issues such as access to water for irrigation and water supply), irrigation issues, instream flows, interbasin transfers, water quality, watershed management, and drought management. The research will also include comparison of Alabama’s regime to those of Georgia, Florida, Tennessee, and Mississippi.

3. Objectives of the Research

The main purpose of the proposed research is to produce a clear statement of Alabama’s current water law and policy, with comparisons to Georgia, Florida, Tennessee, and Mississippi law.

Specific objectives of the proposed research are to identify existing law regarding:

- Water supply issues
- Surface water rights
- Groundwater rights
- Non-riparian issues (access to water for irrigation and water supply)
- Interbasin transfers
- Irrigation issues
- Instream flows
- Water quality
- Drought management
- Watershed protection
M. Methods, Procedures, and Facilities.

1. Methods and Procedures

The development of this comprehensive statement of Alabama water law and policy will occur in five phases: gathering existing case law and statutory materials governing Alabama water resources law and policy; formulating a definitive statement of the Alabama law; gathering existing case law and statutory materials on Georgia, Florida, Tennessee, and Mississippi water resources law and policy; comparing Alabama law to its neighbors’ law; and compiling the information and analysis into a document to distribute to policymakers and stakeholders. A final report from this two-year study will be published jointly through the University of Alabama School of Law and the Water Policy and Law Institute at The University of Alabama.

2. Facilities

The research will be done primarily at the University of Alabama School of Law, using its library and computing resources, and at the Water Policy and Law Institute at The University of Alabama.
N. Related research. Show by literature review and communication citations the similarities and differences of the proposed project to completed or on-going research on the same topic.


O. Progress Review. (Required only if you had a prior year project)

N/A
P. Investigator's Qualifications. Include resumes of all participating investigators. No resume shall exceed three pages or list more than 15 pertinent publications.

Heather Elliott, J.D., M.A. (P.I.)

Heather Elliott is an associate professor at the University of Alabama School of Law. She has over ten years of experience teaching water law and related topics, as well as supervising J.D. student research in water law and environmental law topics more generally. She received her J.D., Order of the Coif, from the University of California, Berkeley School of Law (Boalt Hall), with environmental law certificate. After clerking for Justice Ruth Bader Ginsburg at the United States Supreme Court and for Judge Merrick B. Garland at the United States Court of Appeals for the District of Columbia Circuit, Elliott practiced appellate litigation in the D.C. office of WilmerHale. She is admitted to the Bar in Washington, D.C., and California.

William L. Andreen, J.D. (Co-P.I.)

William L. Andreen is the Edgar L. Clarkson Professor of Law at the University of Alabama School of Law, where he teaches environmental law, international environmental law, and administrative law. He holds a J.D. degree from Columbia University School of Law. Prior to joining the law school, he served as Assistant Regional Counsel of the U. S. Environmental Protection Agency, Region 4. He is a past Chair of the Environmental Law Section of the American Association of Law Schools, and currently serves on the Environmental Law Commission of the World Conservation Union and in many similar capacities. Professor Andreen publishes widely on water pollution law and water management, as well as on other environmental and administrative law topics.

Bennett L. Bearden, J.D., LL.M., J.S.D. (Co-P.I.)

Bennett Bearden’s legal, political and negotiating experiences have placed him squarely in the center of one of Alabama's most important natural resources issues: water policy. He is Director of the Water Policy and Law Institute at the University of Alabama. In April 2012, Governor Robert Bentley appointed Bearden chair of the Alabama Water Agencies Working Group, the task force charged with developing policy options for a comprehensive water management plan for the State. As chair, he has provided the AWAWG with constructive resolution of emerging challenges at the intersection of water policy and law, emphasizing strategic counseling, crisis management, creative dispute resolution and enhanced relations with stakeholders and community groups. He currently serves as Special Counsel on Water Law and Policy for the Office of the Governor of the State of Alabama. He is a former Special Counsel on Water Law and Policy for the Office of the State Geologist and General Counsel for the Geological Survey of Alabama.

Bearden received B.S. in Geology and M.S. (geology) degrees from the University of Alabama. He received his Juris Doctor (J.D.) degree from Birmingham School of Law (ranked no. one academically in his class) and his Master of Laws (LL.M.) degree in Commercial and Corporate Law (with honors) from the University of London. Bearden also has a post-graduate Certificate in Watershed Management from the University of British Columbia. He earned his doctorate...
(J.S.D. degree, legal education’s counterpart to the Ph.D.) in water law and policy at McGeorge
School of Law, University of the Pacific, in Sacramento, California, where he was the recipient
of the 2008 Slater International Water Law Award.

Bearden is a member of the Alabama State Bar, the Washington DC Bar and is admitted to the
Roll of Solicitors in England and Wales. He is a member of the American Bar Association
(ABA) Section of Environment, Energy, and Resources (SEER) Water Resources Committee,
the Executive Committee of the Environmental Section of the Alabama State Bar, the Alabama
Section of the American Water Resources Association (AWRA), the Organizing Committee of
the Alabama Water Resources Conference and the International Water Association (IWA).

Bearden was an Adjunct Professor at Birmingham School of Law where he taught water law,
environmental law, contracts, equity, and trial advocacy. He also taught water resources
management, law and policy at the University of Alabama. His work has been published in
Water Policy, the official journal of the World Water Council.

Patrick E. O’Neil, Ph.D. (Co-P.I.)

Patrick E. O'Neil is Director of the Ecosystems Investigation Program of the Geological Survey
of Alabama where he directs research activities related to the aquatic biological resources of
Alabama and monitoring the condition of the state's rivers, streams, and reservoirs. He holds a
Ph.D. degree in Civil Engineering and Masters Degrees in Environmental Engineering and
Biology from the University of Alabama. He currently serves as Reporting Subcommittee Co-
Chair for the Alabama Water Agencies Working Group and sits on the Board of Directors of the
Alabama Clean Water Partnership. Current research activities include developing fisheries-based
instream biological monitoring methodologies, surveys of aquatic resources in Alabama, and
implementing watershed-based projects to restore and recover habitat, water quality, and
biological condition.
HEATHER ELLIOTT
Associate Professor
The University of Alabama School of Law
P.O. Box 870382, Tuscaloosa, AL 35487
205-348-9965 (w) • 205-348-5829 (f)
helliott@law.ua.edu

EXPERTISE
A leading expert in Alabama water resources law and U.S. water law more generally. Teaches water resources law, land use planning, and comparative environmental law at the University of Alabama School of Law. Has written articles on Alabama water law and U.S. water law.

PROFESSIONAL PREPARATION
J.D. with Environmental Law Certificate, Order of the Coif, University of California School of Law (Boalt Hall), 2000
M.A., M. Phil., Political Science, Yale University, 1994
B.A., magna cum laude, Political Science, Philosophy, Duke University, 1990

PROFESSIONAL APPOINTMENTS
University of Alabama School of Law, Associate Professor, August 2010-present (tenure effective August 16, 2012); Assistant Professor, June 2008-August 2010; Hugo Black Faculty Fellow, August 2002-July 2003
Columbus School of Law, The Catholic University of America, Assistant Professor, 2005- 2008
Law clerk, Justice Ruth Bader Ginsburg, Supreme Court of the United States, 2001-2002

RELEVANT PUBLICATIONS
Alabama’s Water Crisis, 63 ALA. L. REV. 383 (2012)
We Face a Water Emergency, CAPSTONE LAWYER (2012)
WATER LAW 101 (ABA May 20, 2010) (with Christine Klein)

SYNERGISTIC ACTIVITIES
Speaks at conferences, at colleges and universities, and to community groups about water resources issues:
American Bar Association Annual Water Law Conference
Has served as a consultant to the Alabama Office of Water Resources on water resources issues.
WILLIAM ANDREEN
Edgar L. Clarkson Professor of Law
The University of Alabama School of Law
P.O. Box 870382, Tuscaloosa, AL 35487
205-348-7091 (w) • 205-348-3917 (f)
wandreen@law.ua.edu

EXPERTISE
A leading expert on the federal Clean Water Act and on Alabama water resources law. Has taught administrative law, environmental law, international environmental law, comparative environmental law, Ethiopian environmental law, and water pollution law.

PROFESSIONAL PREPARATION
J.D., Columbia University School of Law, New York, New York, 1977
B.A., College of Wooster, Wooster, Ohio, 1975

PROFESSIONAL APPOINTMENTS
The University of Alabama School of Law, Edgar L. Clarkson Professor of Law (1992-present); Professor of Law (1989-1992); Associate Professor of Law (1986-1989); Assistant Professor of Law (1983-1986); Director, University of Alabama/Australian National University Reciprocal Summer School Program (2000-present)
The Australian National University, Adjunct Professor of Law (2006-2015)

RELEVANT PUBLICATIONS
Editor, ALABAMA WATER LAWS (2007) (two volumes; produced for the Alabama Office of Water Resources and published by the Alabama Law Institute).

Editor, ENVIRONMENTAL LAW AND REGULATION IN ALABAMA (1990 ed.) (Bradley Arant Rose & White).


(published as part of a special edition on “Sustainable Water Management in Australia, Europe, and the United States”)


**SYNERGISTIC ACTIVITIES**

Member, University of Alabama Freshwater Studies Center

Senior Fulbright Specialist in Law, The Australian National University, Canberra (Fall 2005), convened the International Symposium on Sustainable Water Management: Comparative Perspectives from Australia, Europe and the United States at the National Museum of Australia (September 15-16, 2005).

Scholar, Center for Progressive Reform, Washington D.C.


BENNETT BEARDEN
Director
Water Policy and Law Institute
The University of Alabama
P.O. Box 20276, Tuscaloosa, AL 35402
205-247-3683(w) • 205-349-2861(f)
bbearden@ua.edu

EXPERTISE
Serves as Director of the Water Policy and Law Institute at the University of Alabama (UA) under the Vice President for Research; responsible for the development and management of the UA water policy and law initiative; develops relationships with federal and state agencies involved in water policy and coordinates the expertise resident at the UA to provide these agencies with information and guidance related to water policies and laws; coordinates with the science centers and institutes at the UA to integrate science with policy and law.

Serves as Special Counsel on Water Law and Policy for the Office of the Governor; provides the forward-thinking Executive Division with constructive resolution of emerging environmental challenges and water resources issues at the intersection of law and policy; emphasizes strategic counseling, crisis management, creative dispute resolution and enhanced relations with stakeholders and community groups in order to ensure compliance with mandates under Senate Joint Resolution No. 28, creating the Alabama Permanent Joint Legislative Committee on Water Policy and Management, in the development of the Alabama Water Management Plan to recommend to the Governor and Legislature courses of action to address the State’s long-term and short-term water resources challenges.

Serves as Chairman (appointed by Governor Robert Bentley on April 18, 2012) of the Alabama Water Agencies Working Group, a five-member coalition of state agencies (Alabama Department of Environmental Management (ADEM), Alabama Department of Conservation and Natural Resources (DCNR), Alabama Department of Agriculture and Industries (AGI), Geological Survey of Alabama (GSA) and Alabama Office of Water Resources (OWR)) charged with developing water policy and a comprehensive water management plan for the State of Alabama.

PROFESSIONAL PREPARATION

Master of Laws (LL.M.) in Commercial and Corporate Law, (with Merit (honors)) University of London, November 2006

Post-Graduate Certificate in Watershed Management, University of British Columbia, Institute for Resources, Environment and Sustainability, December 2004
Juris Doctor (J.D.) degree, Birmingham School of Law, May 1992


Bachelor of Science in Geology degree (45 hour specialized degree), University of Alabama, May 1981

Bachelor of Science degree (Geography), University of Alabama, May 1980

PROFESSIONAL APPOINTMENTS

Chair, Alabama Water Agencies Working Group

Special Counsel on Water Law and Policy to the Governor of Alabama

Member of Executive Committee of the Environmental Law Section of the Alabama State Bar

RELEVANT PUBLICATIONS


Bearden, B.L., Update on Water Issues, 2010 Alabama Oil and Gas Seminar, October 29, 2010, University of Alabama School of Law, Tuscaloosa, Alabama, 20 p.


SYNERGISTIC ACTIVITIES

Provides forward-thinking institutions, organizations and governments with constructive resolution of emerging environmental challenges at the intersection of law and policy; emphasizes strategic counseling, crisis management, creative dispute resolution and enhanced relations with stakeholders and community groups.
PATRICK E. O’NEIL  
Director, Ecosystems Investigations Program  
Geological Survey of Alabama  
P.O. Box 869999, Tuscaloosa, AL 35486-6999  
205-247-3586 (w) • 205-349-2861 (f)  
poneil@gsa.state.al.us

EXPERTISE
Proposal preparation and grant solicitation, personnel management, conduct independent re- 
search, budget preparation and management, information presentation and publication/report 
development. Technical skills and interests include: ichthyology, limnology, aquatic ecology, 
water quality, hydrology, wastewater disposal and management, environmental regulation, 
environmental engineering practices, watershed assessment and monitoring. Recent work has 
focused on developing stream bioassessment procedures using fish communities and 
implementation of instream flow principles into water policy.

PROFESSIONAL PREPARATION
Ph.D. Civil Engineering, University of Alabama, 1993  
M.S. Environmental Engineering, University of Alabama, 1990  
M.S. Biology, University of Alabama, 1980  
B.S. Biology, University of Alabama, 1977

PROFESSIONAL APPOINTMENTS
Alabama Water Agencies Working Group  
Clean Water Partnership Board of Directors

RELEVANT PUBLICATIONS
1004, 126 p.
system for recovery and restoration of rare mussel species: Alabama Geological Survey Bulletin 
183, 65
and Valley/Piedmont Ichthyoregion in Alabama: Alabama Geological Survey Open-File Report 
1109, 140 p.


**SYNERGISTIC ACTIVITIES**

Works closely with the Alabama Department of Conservation and Natural Resources to evaluate instream flow methodologies, explore instream flow policy options, and develop plans for instream flow research.

Works as part of the Alabama Water Agencies Working Group to evaluate Alabama's water issues, provide policy options and develop recommendations for the Governor of Alabama.

Works as part of the Alabama Rivers and Streams Network to investigate water quality, habitat conditions, and biological quality with regard to restoration and recovery of imperiled aquatic species. The goal of this group is to investigate Alabama's water resources in a comprehensive, scientific way and encourage responsible resource development so all users benefit.

Works closely with many state agencies, conservation organizations, universities, businesses and industries to better understand our impacts to aquatic resources and how best to implement improvement through a watershed understanding and approach.
Q. Training Potential. Estimate the number of graduate and/or undergraduate students, fields of study, graduation date, and degrees expected to result from participation in the project.

This project will use law student and graduate student research assistants throughout. The budgeted opportunities include research assistantships for two law students and two graduate students for each of four semesters, plus summer research assistantships for two law students and two graduate students for summer 2014 and summer 2015. The research tasks include

- Finding all Alabama case law regarding water resources and water rights;
- Finding all Alabama statutes regarding water resources and water rights;
- Writing analyses of Alabama case law and statutes;
- Interviewing stakeholders in Alabama about their view of water policy;
- Determining the content of Georgia, Florida, Tennessee, and Mississippi water policy and law;
- Writing analyses comparing Alabama water law to the laws of these other states.
R. Budget Form. Budget information should be included by cost categories on the attached budget form (Attachment B). Also provide a budget justification for items 3 through 7 on the budget form.

Item 3 (Supplies): Supplies are needed to generate the final report.

Item 4 (Equipment): None.

Item 5 (Subcontracts/Consultants): None.

Item 6 (Travel): Travel is needed to meet with stakeholders around the state and to present the research to the Alabama Water Resources Symposium and Conference in September 2014 and September 2015.

Item 7 (Other Direct Costs): No other direct costs.
ATTACHMENT B

BUDGET
WATER RESOURCES RESEARCH PROJECT
FISCAL YEAR 2014

Proposed Starting Date: March 2014

Proposed Completion Date: March 2016

Project Title: Water Policy and Law in Alabama

Principal Investigator(s): Heather Elliott

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