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**BEFORE THE STATE BOARD OF LAND COMMISSIONERS**

SHARLIE-GROUSE NEIGHBORHOOD  
ASSOCIATION, INC.,

Petitioner,

v.

IDAHO STATE BOARD OF LAND  
COMMISSIONERS,

Respondent,

and

PAYETTE LAKES COTTAGE SITES  
OWNERS ASSOCIATION, INC., and  
WAGON WHEEL BAY DOCK  
ASSOCIATION, INC.,

Intervenors.

**SGNA'S OPENING BRIEF ON MOTION  
FOR SUMMARY JUDGMENT**

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## INTRODUCTION

This brief is submitted by Sharlie-Grouse Neighborhood Association, Inc. (“SGNA”) in support of its *Motion for Summary Judgment* filed herewith. This brief is supported by the Declarations listed in Attachment C hereto. SGNA seeks summary judgment granting declaratory relief in accordance with its *Petition for Declaratory Ruling* (“*Petition*”) dated May 29, 2018. SGNA’s *Petition* is opposed by Respondent Idaho State Board of Land Commissioners (“Land Board”) and Intervenor Payette Lakes Cottage Sites Owners Association, Inc. (“PLCSOA”) and Wagon Wheel Bay Dock Association (“WWBDA”). The Land Board and PLCSOA/WWBDA are referred to collectively as “Auction Opponents.” The Land Board oversees the Idaho Department of Lands (“IDL”).

This litigation addresses whether statutory and constitutional restrictions on the conveyance of endowment lands are applicable to a littoral property adjacent to Payette Lake known as Community Beach Common Area (“Community Beach”).<sup>1</sup>

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<sup>1</sup> Community Beach is a 1.01 acre lot created by the 1932 plat entitled *Amended Plat of State Land – Payette Lake Cottage Sites*. A copy is set out in *Declaration of Diane Bagley*, Exhibit A. It is the triangular-shaped lot labeled “Beach” at the northern end of Wagon Wheel Bay. An earlier plat of these cottage sites, filed in 1924, did not include Community Beach or other common areas. Prior to and in anticipation of the conveyance of Community Beach and other properties, IDL re-platted the area as “State Subdivision – Southwest Payette Cottage Sites” (Instrument No. 381834, recorded November 14, 2013) (“*2013 Plat*”). A copy is set out in *Declaration of Diane Bagley*, Exhibit B. The *2013 Plat*, sheet 6 of 26, shows “Community Beach Common Area” as Lot 1, Block 2.

Ironically, the *2013 Plat* acknowledges the very constitutional provision whose violation is the subject of this proceeding: “When Idaho became a state in 1890, the federal government endowed (granted) lands to Idaho on the condition they produce maximum long-term financial returns for public schools and other beneficiaries. Idaho now has over 2 million acres of endowment lands, held in trust, providing financial support to public schools and other institutions. The Idaho Department of Public Lands manages this Trust under the governance of the Idaho Board of Land Commissioners. The Board, acting in the capacity of trustee on behalf of the beneficiary schools and other institutions, was given responsibilities under Article IX, Section 8 of the Idaho Constitution (as amended) to manage lands in such a manner as will secure the maximum long-term financial return to the institution to which granted.”

SGNA is a neighborhood association, incorporated as a nonprofit corporation in 2013.<sup>2</sup> Its members, consisting of 14 families, own deeded property (former cottage sites) adjacent to Payette Lake. Their homes are the closest littoral properties to Community Beach. Illustrative maps are set out in Attachments A and B to this brief.<sup>3</sup>

Community Beach (together with roads and other community property) was conveyed by the Land Board to PLCSOA via two deeds. The first was the Quitclaim Deed of April 23, 2014 (State Deed No. SD13867) (Instrument No. 384477) (“*2014 Deed*”). The second was the Amended Quitclaim Deed of January 28, 2015 (State Deed No. SD13867) (Instrument No. 389629) (“*2015 Deed*”). These are referred to collectively as the “*Quitclaim Deeds*.” The *Quitclaim Deeds* are identical so far as Community Beach is concerned.<sup>4</sup>

At the time of its conveyance to private ownership, Community Beach was held in trust by the State of Idaho. *Answer to Petition for Declaratory Ruling*, ¶ 5, page 2. As evidenced by various IDL documents, the property was, and consistent with the declaratory ruling sought here, still is held in trust for the State “insane asylum” in Blackfoot, now known as State Hospital South.

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<sup>2</sup> The association is named for the streets providing access to the neighborhood and to Community Beach (Sharlie Lane, Sharlie Way, and Grouse Lane). Another street, depicted on various plats as Community Beach Road, was never constructed.

<sup>3</sup> The map in Attachment A corresponds to *Declaration of Zephaniah Johnson*, Exhibit B. Attachment B corresponds to *Declaration of Zephaniah Johnson*, Exhibit A. The map in Attachment B was prepared during the time SGNA was urging the Land Board not to convey Community Beach to PLCSOA. Since that time, a few of the properties have changed hands.

<sup>4</sup> The only difference between the two *Quitclaim Deeds* is that the *2014 Deed* contemplated a “State Subdivision Future Plat,” while the *2015 Deed* identified a newly created Syringa Park subdivision and added various provisions respecting this area. Again, this is not relevant to Community Beach.

When SGNA members learned that the Land Board was considering conveying Community Beach, they urged that it be conveyed to SGNA, so they could maintain it in its natural state for community and public use. Instead, the Land Board proceeded huckledeback to convey the property to a different association of cottage site owners (PLCSOA). The direct result of that conveyance was to allow PLCSOA to enter into a lease of adjacent littoral rights to WWBDA for purposes of constructing and operating a multi-slip dock<sup>5</sup> whose slips would then be leased for a fee to homeowners selected by WWBDA.<sup>6</sup>

The conveyance had these effects:

- Both SGNA and its members were deprived of the opportunity to bid at auction to acquire the property.
- SGNA's members lost the use and enjoyment of the community property which for decades they had used in its natural, undeveloped state for quiet relaxation, dog walking, swimming, and other peaceful pursuits. Prior to installation of the dock, the beach also was used by other members of the Payette Lakes community for swimming, fishing, and launching of kayaks, canoes, and other non-motorized craft.
- The conveyance and subsequent development of Community Beach into a parking lot subjected SGNA members to the traffic, noise, lights, commotion, and partying associated with the newly constructed private dock attached to the property.
- The conveyance caused a significant decline in the value of properties owned by SGNA members.

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<sup>5</sup> The enormous size of the dock (in comparison to other single-family or dual-family docks) is illustrated in the map in Attachment A to this brief. See description in *Declaration of Zephaniah Johnson*.

<sup>6</sup> PLCSOA is a large homeowners association consisting of 220 parcels divided into six neighborhoods. It is shown on the left-hand side of the map in Attachment A to this brief. (The different colors represent the six neighborhoods of PLCSOA.) SGNA, which is a portion of one of those six neighborhoods, consists of 18 parcels currently owned by 14 families. Chris Monthorpe, *Report and Professional Opinion*, page 1. A copy of Professor Monthorpe's report is set out in *Declaration of Christopher A. Monthorpe*, Exhibit B.

At the end of the day, the Land Board undertook no appraisal of the property. It ignored readily apparent opportunities to maximize the value obtained for the State in conveying the property. Instead of following its clear and singular constitutional duty to maximize the trust's value, the Land Board immersed itself in the local politics of competing homeowner interests. It chose which homeowner entities it preferred over others, and it bestowed upon those homeowners the gift of Community Beach for a fraction of its value.

SGNA seeks summary judgment on both jurisdictional issues and the merits.

As for the merits, SGNA seeks rulings that the Land Board's conveyance of Community Beach to PLCSOA violated constitutional and statutory requirements applicable to the State's endowment lands. Specifically, SGNA seeks a declaratory ruling, pursuant to Idaho Code § 67-5232, as to the applicability of Idaho laws requiring a public auction, an appraisal, and maximum long-term financial return with respect to this trust property.

SGNA also seeks rulings disposing of challenges to jurisdiction posed by Auction Opponents. First, SGNA seeks a ruling that the Land Board has subject matter jurisdiction under the Idaho Administrative Procedure Act ("IAPA") to grant the declaratory relief respecting the conveyance of Community Beach. Second, SGNA seeks a ruling that standing requirements are either not applicable, waivable, or satisfied.

## THE MERITS

### **I. THE COMMUNITY BEACH CONVEYANCE VIOLATES CONSTITUTIONAL AND STATUTORY RESTRICTIONS ON ENDOWMENT LANDS.**

By failing to conduct a public auction and to prepare an appraisal and by conveying the property substantially below market value, the Land Board breached its "sacred trust" duty to maximize the long-term financial return on trust property. In the sections below, SGNA first provides background on these requirements and then explains how the Land Board flouted them.

**A. History of restraints on alienation of endowment lands**

Idaho's endowment lands date to 1863, when Congress created the Territory of Idaho and reserved sections 16 and 36 in each township for school purposes. Organic Act of the Territory of Idaho, 12 Stat. 808, 814, § 14 (Mar. 3, 1863). The Organic Act contained no further provisions specifying what was to happen to the reserved lands.

When Idaho was admitted to the Union in 1890, Congress confirmed the prior reservation of sections 16 and 36, converting them to land grants for the support of common schools. Idaho Admission Act, 26 Stat. 215, 215, § 4 (July 3, 1890). In addition, the Idaho Admission Act granted additional acres (to be selected by the state) for various specific institutions, including 50,000 acres for the “insane-asylum located at Blackfoot.” *Id.*, § 11, page 217. The Idaho Admission Act further provided that “all lands herein granted for educational purposes shall be disposed of at public sale.” *Id.*, § 5, page 216. The federal act also imposed a limitation on all land grants: “None of the lands granted by this act shall be sold for less than ten dollars an acre.” *Id.*, § 11, page 217.

Idaho's Constitution, adopted at the time of admission, reinforced and broadened the restriction that lands may be sold only at auction, while adding other mandates respecting the management of endowment lands. It provides in pertinent part:

It shall be the duty of the state board of land commissioners to provide for the . . . sale or rental of all the lands . . . , under such regulations as may be prescribed by law, and in such manner as will secure the maximum long-term financial return to the institution to which granted or to the state if not specifically granted; provided, that no state lands shall be sold for less than the appraised price. . . . The legislature shall, at the earliest practicable period, provide by law that the general grants of land made by congress to the state shall be judiciously located and carefully preserved and held in trust, subject to disposal at public auction for the use and benefit of the respective object for which said grants of land were made . . . .

Idaho Const. art. IX, § 8 (emphasis supplied).<sup>7</sup>

Notably, these constitutional provisions are not limited to lands granted for educational purposes. They apply to “all the lands heretofore, or which may hereafter be granted to or acquired by the state by or from the general government.” *Id.*

The Idaho Admission Act authorized the State to adopt implementing legislation. Idaho Admission Act, § 12, page 217. Idaho accepted that invitation, adopting Chapter 3, Title 48 of the Idaho Code (Appraisal, Lease, and Sale of Lands). This chapter includes legislation mandating so-called conflict auctions for leases (Idaho Code § 58-310), providing for public auctions for all sales (Idaho Code § 58-313), and the disposal of “surplus” property via sale to the highest bidder (Idaho Code § 58-332). Each sets out procedural requirements implementing the constitutional mandate of maximizing long-term financial return.

The Land Board and its lawyers have provided useful summaries of this framework, emphasizing the wisdom of the Founders in establishing this “sacred trust.”

As it was deliberating the Idaho Admissions Act in 1889, the United States Congress displayed uncommon wisdom by granting what would become the Union’s 43rd member approximately 3,600,000 acres of land for the sole purpose of funding specified beneficiaries.

The Idaho Constitution was crafted to include Article IX, Section 8, which mandates that the lands will be managed “. . . in such manner as will secure the maximum long-term financial return to the institution to which [it is] granted.”

Idaho Department of Lands, *Brief History of Idaho’s Endowment Trust Lands*

[www.idl.idaho.gov/land-board/lb/documents-long-term/history-endowment-lands.pdf](http://www.idl.idaho.gov/land-board/lb/documents-long-term/history-endowment-lands.pdf)

(emphasis supplied).

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<sup>7</sup> Idaho’s Constitution was adopted by the Framers at the Constitutional Convention on August 6, 1889, ratified by the people of Idaho on November 4, 1889, and approved by Congress on July 3, 1890 in the Idaho Admission Act, § 1.

A former deputy attorney general wrote:

In addition to this charge, the constitution also established a permanent endowment fund primarily comprised of the proceeds of prior land sales and mineral receipts. These land sales must be held at public auction. The endowment fund “. . . shall forever remain inviolate and intact . . .,” and the interest from the fund must be used for the maintenance of the public beneficiaries of the State. These lands and their proceeds are given an almost sacred status in the constitution and the case law interpreting the various provisions addressing them. Consequently, our Supreme Court has recognized the high public function that these lands serve and has held that not only may endowment lands not be adversely possessed, but also statutes of limitations do not apply to actions concerning them.

Kahle Becker, *What are Endowment Lands, and What Issues Do I Need to Watch Out For When Dealing with Them?*, 50 *The Advocate* 26 (Mar. 2007) (all punctuation original, emphasis supplied).

Three constitutional provisions (and corresponding statutory requirements) are pertinent here.

- The first is the provision that endowment lands shall be “held in trust, subject to disposal at public auction for the use and benefit of the respective object for which said grants of land were made.” Idaho Const. art IX, § 8 (emphasis supplied).
- The second is that the Land Board “shall provide for the location, protection, sale or rental of all the lands . . . in such manner as will secure the maximum long-term financial return to the institution [for whose benefit the land was] granted.”<sup>8</sup> *Id.* (emphasis supplied).
- The third is that trust lands may not be sold for less than the appraised value, *Id.* (emphasis supplied), or for less than ten dollars an acre, Idaho Admission Act, § 11, page 217 (emphasis supplied).

The Land Board’s conveyance of Community Beach to PLCSOA violated each of these

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<sup>8</sup> The words in brackets are substituted for the words “to which.” This conforms to the generally understood meaning of this oddly phrased provision.

provisions. The Land Board failed to conduct an auction. In so doing, it bypassed an obvious and evident opportunity to obtain greater financial gain from the sale. Instead, it conveyed this trust land to private parties for little or nothing.

**B. The conveyance was a “disposal” subject to constitutional and statutory constraints on alienation of trust property.**

The constitutional and statutory constraints discussed above are triggered by a sale or disposal of trust property.<sup>9</sup> The Idaho Supreme Court ruled that any conveyance of trust property (even less than the full fee) constitutes a disposal. *Wasden v. State Bd. of Land Comm’rs* (“*Wasden I*”), 153 Idaho 190, 198, 280 P.3d 693, 701 (2012) (J. Jones, J) (“‘Disposal’ . . . means any lease or sale.”).<sup>10</sup>

In their answers, Auction Opponents inexplicably contend that the conveyance of Community Beach did not constitute a disposal.<sup>11</sup> This is in contrast to how IDL described the conveyance in a 2013 letter: “As you know, IDL is currently re-patting the entire West side of Payette Lake as part of the Land Board’s plan to dispose of the cottage sites and the roads and common areas.” Letter from Edith L. Pacillo to Heather Cunningham (June 24, 2013) (emphasis supplied). A copy is set out in *Declaration of Diane Bagley*, Exhibit C.

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<sup>9</sup> Idaho Const. art. IX, § 8 (refers to “sale or rental,” lands “sold,” “disposal,” and “sale, or other disposition”); Idaho Code § 58-313 (refers to lands “sold”).

<sup>10</sup> *Wasden II* was preceded by *Wasden ex rel. State v. Idaho State Bd. of Land Comm’rs* (“*Wasden I*”), 150 Idaho 547, 249 P.3d 346 (2010) (Horton, J.), which failed for procedural reasons that were corrected in *Wasden II*.

<sup>11</sup> “Petitioner [sic] specifically denies this Paragraph to the extent it alleges the Deed and Amended Deed constituted the ‘disposal’ of endowment land.” Land Board’s *Answer to Petition for Declaratory Ruling*, ¶ 7, page 3. “Respondent specifically denies that the Deed and Amended Deed constituted a disposal.” Land Board’s *Answer to Petition for Declaratory Ruling*, ¶ 17, page 4. PLCSOA/WWBDA adopted those statements. *Intervenor/Respondents’ Answer to Petition for Declaratory Ruling*, ¶ A, page 2.

In any event, Auction Opponents' denials that this is a disposal are baseless. They concede that Community Beach was endowment land and that the *Quitclaim Deeds* conveyed whatever interest the State had in Community Beach. Land Board's *Answer to Petition for Declaratory Ruling*, ¶ 5, page 2. Thus, the only way that the *Quitclaim Deeds* would not constitute a disposal would be if the State held no interest in the property at the time of the conveyance. But the State did hold an interest in the property, as the record and the Land Board's conduct demonstrates.

In its answer, the Land Board alludes to prior dedications and conveyances, apparently suggesting that it previously conveyed the property to someone else. If that were true, the prior conveyance also would be invalid. But there is no prior conveyance of record. And the only "dedication" is language contained in the *1932 Plat* creating Community Beach and the various access streets (see footnote 1 at page 7). That dedication was ineffective in divesting the State's ownership, and IDL has said so repeatedly.

IDL legal counsel addressed this issue in a memorandum on September 4, 1979 ("*1979 Memo*"). A copy is set out in *Declaration of Matthew J. McGee*, Exhibit A. The memorandum concluded that the dedication language was not effective in conveying roads and common areas (including Community Beach) to the public. "In summary, the County's lack of formal acceptance of the streets and alleys leads to the conclusion that the State retained ownership thereof." *1979 Memo*, page 3 (emphasis supplied).

IDL legal counsel addressed the subject again in a memorandum dated September 19, 1986 ("*1986 Memo*"). A copy is set out in *Declaration of Matthew J. McGee*, Exhibit B.<sup>12</sup> The

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<sup>12</sup> The *1986 Memo* references yet another memorandum dated August 18, 1981, which it says reached the same conclusions. SGNA has not obtained a copy of that memorandum.

*1986 Memo* reaffirms and reinforces IDL's earlier conclusion that the State retains ownership. The *1986 Memo* provided further reasoning and caselaw showing that, in addition to the County's failure to accept the dedication, the State is without power to make such a dedication of trust property in the first instance.

That the Land Board adheres to this view is reflected in the *Quitclaim Deeds* themselves. Both *Quitclaim Deeds* expressly state the Land Board's position that access to the conveyed property (including Community Beach) is private access, not dedicated public access.<sup>13</sup>

The Land Board's recognition of the absence of an effective prior dedication is further reflected in its *2013 Plat* (see footnote 1 at page 7), which includes no dedication language. A copy of the *2013 Plat* is set out in *Declaration of Diane Bagley*, Exhibit B.

Any argument that the Land Board's 1979, 1981, and 1986 memoranda were wrong and that the State no longer owns the property is destroyed by the Land Board's own conduct and statements with respect to the property. Until issuance of the *Quitclaim Deeds*, the Land Board acted consistently and unequivocally as the fee owner of Community Beach.

For decades, the Land Board rented a portion of Community Beach to one of SGNA's members, the Bagley family, which owns the deeded property abutting Community Beach on the north. *Declaration of Diane Bagley*. When it was determined that ancillary structures and lawn connected to the Bagleys' property encroached upon Community Beach, IDL demanded that the

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<sup>13</sup> "SUBJECT TO an agreement between Grantor and Grantee wherein Grantor agrees, with regard to, and solely for purposes of the Property, that Grantor will not dispute that access to and along the Property conveyed by this Amended Deed constitutes private access." *2015 Deed*, page 3 (emphasis supplied). The *2014 Deed* contains a substantively identical provision at page 2.

Bagleys enter into a lease for the strip of land corresponding the encroachment.<sup>14</sup>

The initial Bagley lease is identified as Special Lease No. M-294-94 (“*1985 Bagley Lease*”). A copy is set out in *Declaration of Diane Bagley*, Exhibit F. It was a ten-year lease, running from January 1, 1985 to December 31, 1994. In this lease, the Land Board expressly acknowledged and reserved the State’s “fee title” ownership of Community Beach:

SECTION 11: RESERVATIONS: The Lessor expressly reserves the following additional rights:

(a) All timber rights, mining rights, easements and rights-of-way, the fee title to the leased premises, and title to all appurtenances and improvements placed thereon by the Lessor.

*1985 Bagley Lease*, § 11, page 2.

The lease also expressly acknowledged and protected the Land Board’s right to sell the property, recognizing that such a sale would be a disposal pursuant to Idaho Code § 58-313:

SECTION 13. LESSOR’S RIGHT OF SALE, DISPOSITION OF IMPROVEMENTS: Lessor reserves the right to sell all or any portion of the leased premises . . . . In the event of such sale, Section 58-313, IDAHO CODE, with respect to approved improvements placed upon leased premises by the Lessee, shall not prevail due to the fact that portions of the improvements lie across the boundary line onto private land. . . .

*1985 Bagley Lease*, § 13, page 3.

Finally, the *1985 Bagley Lease* required payment to the State based on the same formula as other cottage sites held in fee by the State. *1985 Bagley Lease*, § 3, page 1.

The *1985 Bagley Lease* was renewed most recently in 2005 for another ten years, expiring on December 31, 2014 (“*2005 Bagley Lease*”). This was designated as Miscellaneous

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<sup>14</sup> This narrow strip of land (0.216 acres) is bounded by the Bagley property line and the centerline of the creek that runs through Community Beach. It amounts to about one-fifth of the 1.01 acre Community Beach lot. As a practical matter, due to the water barrier, no one but the Bagleys has ever used the portion of Community Beach north of the creek.

Surface Lease No. M-5015. A copy of the *2005 Bagley Lease*, including Exhibit A thereto (“*2005 Lease Exhibit A*”), is set out in *Declaration of Diane Bagley*, Exhibit H. This lease contained terms functionally equivalent to the ones quoted above in the *1995 Bagley Lease*.<sup>15</sup>

The Bagley leases were not forgotten or disclaimed by the time of the conveyance of Community Beach. Indeed, the *2005 Bagley Lease* was recognized, reaffirmed, and reserved in each of the *Quitclaim Deeds*. *2014 Deed*, page 2; *2015 Deed*, page 3.

The *2005 Bagley Lease* expired in 2015 at the same time PLCSOA purportedly obtained fee title pursuant to the *Quitclaim Deeds*. Having purportedly acquired the State’s interest in Community Beach, they, in turn, required the Bagleys either to purchase the encroachment lands or to lease them. Accordingly, the Bagleys (acting through Cottage Site, LLC) entered into a multi-year lease on July 24, 2018. Notably, PLCSOA’s demand letter expressly affirmed that the State was “the prior owner,” a conclusion that “was compellingly confirmed by the fact that the Bagleys leased the property from the State.” Letter of March 1, 2016 from Stephen J. Millemann on behalf of PLCSOA (“*Millemann Letter*”). A copy of the *Millemann Letter* is set out in *Declaration of Diane Bagley*, Exhibit I. Thus, PLCSOA also acknowledges that the State owned Community Beach prior to its improper conveyance. Indeed, PLCSOA would not be in a position to lease the property to either the Bagleys or WWBDA if it had not acquired the fee, however illegally, from the State. The *Quitclaim Deeds* thus constituted a disposal.

The point of all this is that, whatever the effect of the 1932 dedication language, the State still owned something—something that the State consistently has referred to as the underlying

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<sup>15</sup> The *2005 Bagley Lease* includes these terms: rent based on the same formula as all other cottage sites owned by the State (*2005 Lease Exhibit A*, § A.1, page 1); reservation of IDL’s right to sell pursuant to Idaho Code § 58-313 (*2005 Lease Exhibit A*, § A.11, page 4); reservation of fee title (*2005 Lease Exhibit A*, § A.17, page 6).

fee. That ownership allowed the State to collect over a hundred thousand dollars in rent from the Bagleys. *Declaration of Diane Bagley*. That ownership ended when IDL conveyed Community Beach to PLCSOA, also ending the rent payments that once accrued to the Trust.

To be clear, SGNA has no objection to either community use or public use. SGNA's goal is not to privatize Community Beach (which was the practical effect of the *Quitclaim Deeds*). Indeed, SGNA's ideal outcome would be for SGNA to acquire Community Beach at auction and then to create a conservation easement to protect it in its natural state for enjoyment by future generations. See *Declaration of Zephaniah Johnson* and *Declaration of Diane Bagley*.

In sum, the State cannot credibly contend that it did not own Community Beach. It has acted as a landlord and accepted payment of rental fees for the property, and then took action to convey the property to private parties who now act as landlord under the State's former authority and profit from leasing the State's property to the Bagleys and to WWBDA (which, in turn, profits by leasing to eight slip lessees).

**C. The Land Board failed to hold an auction, to prepare an appraisal, or to obtain adequate compensation for Community Beach.**

The Land Board admits it conveyed Community Beach to PLCSOA without conducting an auction. Land Board's *Answer to Petition for Declaratory Ruling*, ¶¶ 3, 4, 12, pages 2-3. As a result of the Land Board's decision not to conduct an auction, it also failed to prepare an appraisal.

Evidently, the Land Board obtained little or nothing of value in exchange for the *Quitclaim Deeds*. The Land Board has not been forthcoming on this point, stating in its Answer only that it "denies that it did not receive compensation." Land Board's *Answer to Petition for Declaratory Ruling*, ¶ 12, pages 3.

Based on IDL's letter to SGNA and IDL's response of April 19, 2018 to a public records request, it appears that the Land Board sought no compensation and had only one thing on its mind: to dispose of roads and community property within the subdivision in a way that would avoid "fragmented" ownership. See Letter from counsel for IDL to counsel for SGNA dated Oct. 8, 2013. A copy of this letter is set out in *Declaration of Diane Bagley*, Exhibit E. In doing so, IDL took on a responsibility to resolve disputes among competing groups of homeowners that is beyond its mandate and is in direct conflict with its constitutional and statutory duties. IDL correctly perceived that people lucky enough to own homes on or near Payette Lake have conflicting views about the best use of Community Beach. IDL should not have chosen sides, giving away trust property in the process. It should have retained ownership or auctioned the property to the highest bidder.

If the Land Board believes it has a responsibility to maintain access to Community Beach, so be it. That is not inconsistent with the Land Board's duty to maximize trust value. Conveying the property to PLCSOA for a pittance is not the only way to maintain access. Instead, the Land Board could auction the property subject to the proviso that the purchaser permanently maintain public and/or homeowner access. Instead, it disposed of the property in violation of its constitutional duty.

Having exceeded its jurisdiction and violated Idaho's Constitution and statutes, the conveyance of Community Beach should be declared null and void.

## JURISDICTIONAL MATTERS

### I. THE LAND BOARD HAS SUBJECT MATTER JURISDICTION UNDER THE IAPA.

#### A. SGNA seeks declaratory rulings under the IAPA.

SGNA seeks declaratory rulings under Idaho Code § 67-5232, which authorizes agencies to issue “a declaratory ruling as to the applicability of any statutory provision or of any rule administered by the agency.”

SGNA seeks a ruling on whether and to what effect Idaho’s statutes governing the requirements for the sale of trust lands apply to the conveyance of Community Beach. In other words, what is their applicability? That brings this matter within section 67-5232.<sup>16</sup>

Auction Opponents contend this section does not authorize the Land Board to grant the declaratory relief sought or to initiate this contested case. *Respondent’s Response in Opposition to Petitioner’s Motion to Compel Discovery*, at 2, n.1 (Oct. 25, 2018) (joined in by PLCSOA/WWBDA at status conference). For the reasons discussed below, they are wrong.

#### B. The Land Board already has acted to initiate a contested case, thereby mooting the question of whether it has authority to grant SGNA’s petition.

At the outset, it must be observed that the Land Board already has determined to initiate this contested case. *Notice of Appointment of Hearing Officer* (Oct. 3, 2018). The IAPA provides, “A petition for a declaratory ruling does not preclude an agency from initiating a contested case in the matter.” Idaho Code §§ 67-5232(2). This provision provides that the

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<sup>16</sup> SGNA suggests that the reference in section 67-5232 to “statutes” should be read broadly to encompass both statutory and constitutional laws. There is no logical reason to draw a distinction between the two. Nothing in the legislative history (which is silent on the subject) suggests an intent to arbitrarily dissect and limit an agency’s authority to analyze its legal authority. In any event, the issue is academic. Idaho statutes implementing the pertinent constitutional provision are also in play, and they must be interpreted and applied in compliance with constitutional constraints.

initiation of a contested case is permissive and discretionary, a clear exception to Idaho Code § 67-5240's requirement that a proceeding by an agency that may result in an order is a contested case. The Land Board might have simply granted or denied the petition without initiating a contested case. It did not, demonstrating that it deems the issue worthy of resolution in a contested case proceeding.

Given that the Land Board has initiated a contested case, that puts to rest the question of whether SGNA had a right to petition for a declaratory ruling. By initiating a contested case, the Land Board has taken it upon itself to address whether its issuance of the *Quitclaim Deeds* was lawful. This moots the question of the scope of section 67-5232.

**C. SGNA's petition falls within the Land Board's authority under the IAPA to issue declaratory rulings.**

In any event, the Land Board's lack-of-subject-matter-jurisdiction argument is without merit. In pleadings to date, the Land Board relies on a three-page *per curium* decision, *Shobe v. Ada County* ("*Shobe I*"), 126 Idaho 654, 889 P.2d 88 (1995). *Respondent's Response in Opposition to Petitioner's Motion to Compel Discovery*, at 2 (Oct. 25, 2018). The Land Board extracts one sentence, while ignoring its context: "Moreover, we find no procedural mechanism in either the indigency statutes or the Administrative Procedures Act which permits the Commissioners to issue a declaratory ruling on a legal issue." *Shobe I*, 126 Idaho at 655, 889 P.2d at 89.

That the Court even spoke of the IAPA is curious. *Shobe I* was not an IAPA case; the IAPA governs agencies, not counties.<sup>17</sup> Not surprisingly, there is no reference to the IAPA in the

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<sup>17</sup> "By the plain language of this statute only state government entities are agencies. A local government entity, such as a county board of commissioners, is not included." *Arthur v. Shoshone Cty.*, 133 Idaho 854, 859, 993 P.2d 617, 622 (Ct. App. 2000) (Lansing, J.). The appellate review provisions of the IAPA are made applicable to counties. Idaho Code § 31-1506

*Shobe I* briefing (which is available on Westlaw). More significantly, the *Shobe I* decision did not reference or discuss Idaho Code § 67-5232. The Court’s only pinpoint reference to the IAPA was to its rulemaking provisions, Idaho Code §§ 67-5203 to 67-5208. In short, the Land Board is reading far too much into the sentence quoted above.

The thrust of the *Shobe I* decision was simple: The question presented in that case (whether three individuals qualified as “indigents” entitling them to financial support) was inextricably dependent upon a determination of the facts. The Court faulted the parties for trying to address it as an abstract question of law. “By submitting only the legal question the parties were requesting an advisory opinion from the Commissioners on matters which were largely factual.” *Shobe I*, 126 Idaho at 655, 889 P.2d at 89.<sup>18</sup>

Thus, *Shobe I* makes the observation that when a case turns on the facts, those facts must be established first—a point that the lawyers on both sides of that case failed to grasp. To the extent *Shobe I* really is precedent for the position that administrative agencies may never issue declaratory rulings on pure questions of law (a proposition that seems unlikely), we have no such situation here. The Hearing Officer has before him both undisputed facts and legal argument tied to those facts.

*Shobe I* is not on point, and there appear to be no reported cases actually addressing the scope of section 67-5232. The administrative rules add nothing to the words of the statute. *See*,

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(board decisions); Idaho Code §§ 67-6519(4) and 67-6521(1)(d) (LLUPA). But those statutes do not incorporate the rest of the IAPA. “Nothing in § 67–6521(1)(d) suggests a legislative intent to incorporate into LLUPA portions of the APA authorizing state agency proceedings that occur prior to the initiation of judicial review.” *Arthur* 133 Idaho at 860, 993 P.2d at 623.

<sup>18</sup> On remand, the parties returned to the ordinary process of presenting the facts together with legal argument, resulting in a decision that finally reached the merits. *Shobe v. Ada County* (“*Shobe II*”), 130 Idaho 580, 944 P.2d 715 (1997) (Schroeder, J.)

IDAPA 20.01.01.400. And SGNA has found no commentary on point.<sup>19</sup>

This scarcity of authority suggests that no one has questioned that declaratory rulings are broadly available to Idaho administrative agencies (just as they are under the federal APA<sup>20</sup>). A recent example of their use by an Idaho agency is *Idaho Retired Fire Fighters Ass'n v. Public Employee Retirement Bd.*, IC 17-000044, 2017 WL 6949778 (Idaho Indus. Comm'n, Dec. 29, 2017) (declaratory ruling issued pursuant to Idaho Code § 67-5232 on the question of whether PERSI acted in violation of statute by including part-time firefighters when calculating the cost-of-living adjustments for the firefighters' retirement fund).

In sum, the Land Board has subject matter jurisdiction under the IAPA to address the law applicable to its decision to convey trust property without appraisal or auction for a below-market price. It would be frightful if it did not.

**II. STANDING IS NOT REQUIRED IN ADMINISTRATIVE CASES. ALTERNATIVELY, IT MAY BE WAIVED. IN ANY EVENT, SGNA MEETS ALL STANDING REQUIREMENTS.**

Auction Opponents contend that SGNA lacks standing to seek declaratory relief as to the unlawful conveyance of Community Beach.<sup>21</sup> SGNA responds at three levels. First, Article III standing requirements do not apply to administrative agencies. In particular, those requirements

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<sup>19</sup> Michael S. Gilmore & Dale D. Goble, *The Idaho Administrative Procedure Act: A Primer for the Practitioner*, 30 Idaho L. Rev. 273, 305, 334 (1993) addresses the subject only glancingly; Richard Henry Seamon, *Idaho Administrative Law: A Primer for Students and Practitioners*, 51 Idaho L. Rev. 421 (2015) does not mention declaratory rulings.

<sup>20</sup> This provision of the IAPA is the Idaho counterpart to 5 U.S.C. § 554(e) of the federal Administrative Procedures Act (“The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.”). See Jeffrey S. Lubbers & Blake D. Morant, *A Reexamination of Federal Agency Use of Declaratory Orders*, 56 Admin. L. Rev. 1097 (2004) (urging more extensive use of declaratory orders).

<sup>21</sup> Land Board's *Answer to Petition for Declaratory Ruling*, § 20, page 5 (June 19, 2018); *Intervenor/ Respondents' Answer to Petition for Declaratory Ruling*, § A, page 2 (Jan. 2, 2019).

do not apply to declaratory rulings under the IAPA, which authorizes “any person” to seek such a ruling. Second, standing requirements may be waived when, as here, important constitutional rights are involved. Third, if standing requirements were applicable here, SGNA plainly has standing.

**A. Though not required to do so, Idaho courts have adopted Article III standing requirements.**

Before turning to why standing is not a hurdle here, it is necessary to lay some groundwork on the law of standing. The federal law of standing derives from Article III of the federal Constitution. Article III establishes federal courts, but these are not courts of general jurisdiction. Rather, the Constitution extends federal court jurisdiction only to a list of specifically enumerated “Cases” and “Controversies.” U.S. Const. art. III, § 2. Over the years, federal courts have fashioned a complex body of constitutional law describing the reach of this grant of judicial authority.

Article III applies only to federal courts. Consequently, it is curious that the federal law of standing would apply at all in Idaho. Indeed, the U.S. Supreme Court consistently has stated that Article III limitations do not apply to state courts.<sup>22</sup>

Idaho’s Constitution places no limitation on state court jurisdiction similar to Article III.

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<sup>22</sup> “We have recognized often that the constraints of Article III do not apply to state courts, and accordingly the state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability even when they address issues of federal law, as when they are called upon to interpret the Constitution or, in this case, a federal statute.” *ASARCO Inc. v. Kadish*, 490 U.S. 605 (1989) (Kennedy, J.).

The *ASARCO* plaintiffs were taxpayers and teachers challenging an Arizona statute that allows school lands to be leased for less than their full appraised value in violation of the Mexico-Arizona Enabling Act and Arizona’s Constitution. They lacked Article III standing under long-standing taxpayer-standing precedent because the injury they suffered was not particularized and was speculative. The U.S. Supreme Court found that plaintiffs were not required to meet Article III standing, and affirmed the Arizona Supreme Court’s ruling that the state statute violated federal law and the state Constitution.

Unlike federal courts, Idaho's courts are courts of general jurisdiction.<sup>23</sup> Accordingly, Idaho's Constitution contains no "case or controversy" limitation. Nevertheless, Idaho courts have embraced the federal jurisprudence of standing. (This has been sharply criticized, without effect.<sup>24</sup>) Some decisions have spoken of standing as if the requirement were inherent in the judicial power.<sup>25</sup> More recently, the Court has come to describe its adoption of federal standing law as a "self-imposed constraint":

When determining whether a party has standing, this Court has looked to United States Supreme Court decisions for guidance. *Koch v. Canyon Cnty.*, 145 Idaho 158, 161, 177 P.3d 372, 375 (2008). In fact, the origin of Idaho's standing is a self-imposed constraint adopted from federal practice, as there is no "case or controversy" clause or an analogous provision in the Idaho Constitution as there is in the United States Constitution.

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<sup>23</sup> Idaho Const. art. V, § 2 ("judicial power of the state shall be vested in . . . a Supreme Court, district courts, and such other courts . . ."); Idaho Const. art. V, § 20 ("The district court shall have original jurisdiction in all cases . . ."); Idaho Const. art. V, § 1 ("Feigned issues are prohibited . . .").

Notably, Idaho's Constitution has no "case and controversy" clause like the federal Constitution. Rather, Idaho's Constitution speaks generally of the "judicial power," without defining its limits. Idaho Const. art. V, § 2. Furthermore, the Idaho Constitution empowers this Court to review any decision of the district courts. Idaho Const. art. V, § 9. And, the Legislature, exercising its limited authority to constitute inferior courts under Idaho Const. art. V, § 13, has directed the district courts to "hear [ ] and determin[e] all matters and causes arising under the laws of this state." I.C. § 1-701.

*Wasden II*, 153 Idaho at 194-95, 280 P.3d at 697-98 (brackets original).

<sup>24</sup> Michael S. Gilmore & Dale D. Goble, *The Idaho Administrative Procedure Act: A Primer for the Practitioner*, 30 Idaho L. Rev. 273, 340-41 (1993); Melinda K. Harm, "Was The Lorax A Professional Outfitter and Guide? A Shift In Idaho's Standing Doctrine: *Boundary Backpackers v. Boundary Cty. and Selkirk-Priest Basin Ass'n v. State*," 1997 Idaho L. Rev 127 (1997).

<sup>25</sup> E.g., *Van Valkenburg v. Citizens for Term Limits*, 135 Idaho 121, 124, 15 P.3d 1129, 1132 (2000) (Silak, J.); *Noh v. Cenarrusa*, 137 Idaho 798, 800, 53 P.3d 1217, 1219 (2002).

*Coeur d'Alene Tribe v. Denney*, 161 Idaho 508, 513, 387 P.3d 761, 766 (2015) (Burdick, J.).<sup>26</sup>

Because the application of Article III precedent is a self-imposed constraint in Idaho, it may be relaxed or waived altogether in cases of constitutional import. See discussion in section II.D at page 31. Likewise, the Legislature is free to authorize “any person” to seek a declaratory ruling. See discussion in section II.C at page 30.

**B. Standing is a limitation on courts, not agencies.**

Article III standing does not apply here for the simple reason that this is an administrative proceeding, not a judicial one. As explained by the commentators below, the non-applicability of Article III restrictions is settled law.

The case or controversy requirement of Article III of the United States Constitution does not restrict an agency’s authority to issue declaratory rulings pursuant to the Administrative Procedure Act (APA); since an administrative agency is not subject to Article III and related prudential limitations, it may issue a declaratory order in mere anticipation of a controversy or simply to resolve an uncertainty even though an Article III court may not adjudicate a dispute until it has both crystallized as an actual case or controversy and satisfied the prudential requirements of the ripeness doctrine. Accordingly, the APA provides that an agency, in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.

*Declaratory Orders*, 2 Fed. Proc. L. Ed. § 2:226 (2019) (footnotes omitted).

[The federal] Administrative Procedure Act authorizes agencies to issue ‘declaratory judgments,’ and Article III does not seem to require those proceedings to involve justiciable cases or controversies.

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<sup>26</sup> This description of standing as a “self-imposed constraint” that may be relaxed in rare cases has been repeated in *Employers Resource Management Co. v. Ronk*, 162 Idaho 774, 777, 405 P.3d 33, 36 (2017) (Horton, J.), *Westover v. Idaho Counties Risk Management Program*, 164 Idaho 385, 389, 430 P.3d 1284, 1288 (2018) (Horton, J.), and *Regan v. Denney*, 2019 WL 1372182 (Idaho Feb. 5, 2019) (Burdick, C.J.).

Zachary D. Clopton, *Justiciability, Federalism, and the Administrative State*, 103 Cornell L. Rev. 1431, 1447 (2018).

The Fifth Circuit, in a well reasoned opinion, responded to these jurisdictional allegations. The court found that the Administrative Procedure Act specifically provides that administrative agencies may, in their “sound discretion, [issue declaratory orders] to terminate a controversy or remove uncertainty.” Accordingly, the Article III requirement for a case or controversy was not violated, at least in this instance.

Warren E. Byrd, II, *Administrative Law*, 37 Loyola L. Rev. 413, 417 (1991) (brackets original, footnote omitted).

These commentaries above rely on a consistent line of federal cases. There is no contrary authority. In *Cent. Freight Lines v. ICC*, 899 F.2d 413 (5th Cir. 1990), a trucking company petitioned for and obtained a declaratory order from the ICC favorable to its position regarding anticipated future shipments. Another trucking company challenged the ICC order in court, and the State of Texas intervened. Texas contended that, because the shipments had not yet begun the opinion was advisory, thereby not constituting a case or controversy under Article III of the federal Constitution.

The Fifth Circuit said this did not matter because Article III restrictions do not apply to agencies. “It is also well established that the case or controversy requirement of Article III ‘does not restrict an agency’s authority to issue declaratory rulings under 5 U.S.C. § 554(e) [the federal APA].’” *Cent. Freight*, 899 F.2d at 417 (quoting *Texas v. United States*, 866 F.2d 1546, 1551 (5th Cir. 1989)). Thus, the ICC had the power to issue the ruling, even if it might be deemed advisory.

The *Cent. Freight* and *Texas* cases have been cited and relied upon by the Ninth Circuit.

As an initial matter, we note that, to the degree that they are applicable at all, ripeness concerns should be given less weight in

agency adjudications than in judicial ones. *See Central Freight Lines v. ICC*, 899 F.2d 413, 417–19 (5th Cir.1990); *California Ass’n of Physically Handicapped, Inc. v. FCC*, 778 F.2d 823, 826 n. 8 (D.C. Cir. 1985). The ripeness doctrine is, at least partially, derived from Article III limitations on federal judicial power, limitations obviously inapplicable to administrative agencies.

*Chavez v. Dir., Office of Workers Comp. Programs*, 961 F.2d 1409, 1414 (9<sup>th</sup> Cir. 1992)

(Reinhardt, J.) (emphasis supplied).

Further, we have previously noted that “to the degree that they are applicable at all, ripeness concerns should be given less weight in agency adjudications than in judicial ones.” *Chavez v. Director, Office of Workers Compensation Programs*, 961 F.2d 1409, 1414 (9<sup>th</sup> Cir.1992); see also *Central Freight Lines v. ICC*, 899 F.2d 413, 417 (5<sup>th</sup> Cir.1990) (“the case or controversy requirement of Article III ‘does not restrict an agency’s authority to issue declaratory rulings under 5 U.S.C. § 554(e).’”) (quoting *Texas v. United States*, 866 F.2d 1546, 1551 (5<sup>th</sup> Cir.1989)); *California Ass’n of Physically Handicapped v. FCC*, 778 F.2d 823, 826 n.8 (D.C. Cir. 1985).

*Wilson v. A.H. Belo Corp.*, 87 F.3d 393, 398 (9<sup>th</sup> Cir. 1996) (Tashima, J.).

Likewise, in *Gardner v. FCC*, 530 F.2d 1086 (D.C. Cir. 1976) (Wilkey, J.), the D.C.

Circuit held that a petitioner seeking relief from the FCC was not required to establish his standing.<sup>27</sup>

The adjudication in the Commission, upon which this appeal is based, was not an Article III proceeding to which either the “case or controversy” or prudential standing requirements apply. Within their legislative mandates, agencies are free to hear actions brought by parties who might be without party standing if the same issues happened to be before a federal court.

*Gardner* at 1099 (emphasis supplied).

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<sup>27</sup> The petitioner complained to the FCC that he was the subject of a personal on-air attack by a radio station. He arguably lacked standing because the station later agreed to air time for a response thus giving him “everything he stands to gain” in the administrative action. *Gardner*, 530 F.2d at 1090.

In short, the conundrums and niceties that inhabit the law on standing are academic here. Agencies are not courts. Any petitioner affected by a matter within the agency's jurisdiction may seek a declaratory ruling.

**C. The plain language of section 67-5232 allows “any person” to seek a declaratory ruling.**

Any doubt that standing is not a requirement is resolved by the plain language of the applicable statute.<sup>28</sup> The IAPA authorizes “any person” to petition an agency for a declaratory ruling. Idaho Code §§ 67-5232(2). The term “any person” could hardly be clearer. Indeed, this language is broader than that employed in the IAPA's judicial review provision, Idaho Code §§ 67-5260(2) & (3) (“person aggrieved” and “party aggrieved”) or under the Local Land Use Planning Act, Idaho Code §§ 67-6521(1)(a) & (d) (“affected person” which is defined as “one having a bona fide interest in real property which may be adversely affected”).

It is thus evident that the Legislature has resolved the question of standing in the context of petitions to an agency for declaratory rulings. The Legislature determined that this important and efficient vehicle for obtaining legal guidance and determinations from agencies should be open to any person. Perhaps there is a limit to who may seek such relief (though none appears on the face of the statutes). But that may be explored in another case. In this case, it is inconceivable that “any person” could be read to not to include persons like members of SGNA

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<sup>28</sup> Statutory language addressing standing matters. In *Ashton Urban Renewal Agency v. Ashton Memorial, Inc.*, 155 Idaho 309, 311 P.3d 730 (2013) (Burdick, C.J.), the Court noted that where statutes specify who may seek relief, standing is analyzed under the statute as a matter of statutory construction. “AURA has standing to challenge the BOE's decision if it is a ‘person aggrieved’ under I.C. § 63-511(1). The construction and application of a statute are pure questions of law over which we exercise free review. . . . This Court's precedent does not require such a high standard for a person to be aggrieved by a decision for the purpose of establishing standing pursuant to a statute.” *Ashton*, 155 Idaho at 311-12, 311 P.3d at 732-33.

who own immediately adjacent property, the enjoyment and value of which is directly and profoundly affected by the Land Board's unconstitutional action.

Having shown that standing requirements do not apply to administrative agencies in general, and that the particular statute involved here authorizes petitions by any person, one could end the discussion of standing here. The sections that follow are but nails in the coffin of this argument.

**D. Article III standing requirements, if applicable, can and should be waived.**

Even if Article III standing requirements applied to agencies, they may be waived in constitutional cases like this.

As noted, Article III standing requirements are merely a “self-imposed constraint” in Idaho. Consequently, standing constraints may be relaxed or waived altogether when deemed necessary to enforce important constitutional constraints on government.

This began with a relatively narrow exception to restrictions on taxpayer standing. It has evolved to a more broadly articulated waiver of standing requirements where important constitutional questions are presented and no other potential parties have standing to raise them.

The seminal case for relaxation of standing requirements is *Koch v. Canyon Cty.*, 145 Idaho 158, 177 P.3d 372 (2008) (Eismann, C.J.). *Koch* involved a non-appropriation lease challenged by taxpayers as violating Idaho Const. art. VIII, § 3. Although the Court ultimately found the case moot and did not reach the merits, the Court first established that taxpayers and citizens have standing to challenge alleged violations of Idaho Const. art. VIII, § 3 notwithstanding the absence of particularized injury that would ordinarily deny them standing.<sup>29</sup>

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<sup>29</sup> In a subsequent decision, the Court did reach the merits in a challenge involving this constitutional provision. *Greater Boise Auditorium Dist. v. Frazier* (“GBAD”), 159 Idaho 266, 360 P.3d 275 (2015) (W. Jones, J.; Eismann, J., concurring). The decision does not mention

Even though standing is jurisdictional and may be raised at any time, including on appeal, *Beach Lateral Water Users Ass'n v. Harrison*, 142 Idaho 600, 130 P.3d 1138 (2006), this Court has never questioned the standing of a taxpayer to challenge expenditures that allegedly violate Article VIII, § 3.

If this Court were to hold that taxpayers do not have standing to challenge the incurring of indebtedness or liability in violation of that specific constitutional provision, we would, in essence, be deleting that provision from the Constitution. The County acknowledged during oral argument that nobody would have standing. Other than a political subdivision invoking the provision when it does not want to pay for what it has received, e.g., *McNutt v. Lemhi Cty.*, 12 Idaho 63, 84 P. 1054 (1906), there would be nobody who could require that political subdivisions comply with this constitutional provision.

*Koch*, 145 Idaho at 162, 177 P.2d at 376. Accordingly, the Court “carved out a narrow exception against the general prohibition against taxpayer standing.” *Koch*, 145 Idaho at 161, 177 P.2d at 375.

In *Coeur d’Alene Tribe v. Denney*, 161 Idaho 508, 513, 387 P.3d 761, 766 (2015) (Burdick, J.), the Court moved beyond taxpayer standing and recognized that any standing requirements may be relaxed in the appropriate case. In this case, the Tribe sought a writ of mandamus requiring the Secretary of State to recognize as law a gaming statute that was tardily vetoed by the Governor. The statute effectively eliminated a competitor to the Tribe’s gambling operation. The Court found that the Tribe lacked Article III standing because “increased competition alone” (from historical horse-racing gambling machines) is insufficient to confer standing. The Court nonetheless ruled on the merits of the matter, essentially waiving the

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standing, presumably because standing to challenge a constitutional violation was established in *Koch*. The Auditorium District’s brief acknowledged that the challenger had standing: “*Koch v. Canyon Cnty.*, 145 Idaho 158, 177 P.3d 372 (2008) (Eismann, C.J.) also involved a non-appropriation lease, but the Court found the case moot and did not reach the merits. The *Koch* decision, however, established that taxpayers and citizens have standing to challenge alleged violations of Idaho Const. art. VIII, § 3.” Appellant’s Opening Brief in *GBAD*, 2015 WL 4151671, n.3 at \*6.

standing requirement where relief is sought on a matter of significant constitutional importance and no other party would have standing to bring the claim. The Court said:

*Beem* [*v. Davis*, 31 Idaho 730, 733, 175 P. 959, 960 (1918)] is consistent with this Court’s willingness to relax ordinary standing requirements in other cases where: (1) the matter concerns a significant and distinct constitutional violation, and (2) no party could otherwise have standing to bring a claim. *See Koch*, 145 Idaho at 162, 177 P.3d at 376; *see also State ex rel. Miller v. State Bd. of Educ.*, 56 Idaho 210, 217, 52 P.2d 141, 143 (1935). For instance, in *Koch*, this Court held that Canyon County taxpayers had standing to litigate whether Canyon County had incurred indebtedness or liability in violation of article VIII, section 3, of the Idaho Constitution. 145 Idaho at 162, 177 P.3d at 376. The Court recognized that if it held otherwise, it would essentially “be deleting that provision from the Constitution” because no party would have standing to enforce it. *Id.*

...  
The public has a significant interest in the integrity of Idaho’s democratic government, and a writ of mandamus is a remedy by which public officials may be held accountable to the citizens for their constitutional duties. If the Tribe does not have standing to bring this writ, the question would then become, who does?

*Coeur d’Alene*, 161 Idaho at 514, 387 P.3d at 767.

In *Tucker v. State*, 162 Idaho 11, 26, 394 P.3d 54, 69 (2017) (Burdick, C.J.), the Court once again recognized its authority to “relax ordinary standing requirements.” In *Tucker*, criminal defendants sued various state defendants alleging Idaho’s public defense system violated the state and federal constitutions. The Court found they had standing as to the State and the Public Defense Commission, but nevertheless explored their argument in the alternative that the “relaxed” standing analysis should apply. The Court found that “violations of right to counsel constitute significant and distinct constitutional violations” thus satisfying the first prong of the relaxed standing principle. *Tucker*, 162 Idaho at 26, 394 P.3d at 69. However, the Court found the criminal defendants did not meet the second requirement. In contrast to *Coeur d’Alene*

*Tribe*, “Appellants are not the only ones who could bring this lawsuit. . . . Because any one of those thousands of indigent defendants could bring this lawsuit.” *Tucker*, 162 Idaho at 26-26, 394 P.3d at 69-70 (internal quotation marks omitted).<sup>30</sup>

SGNA is different than the criminal defendants in *Tucker*. If Article III applies and if SGNA lacks Article III standing to challenge this illegal conveyance, then no homeowner would have standing. Indeed, SGNA members are the best positioned of any homeowners to challenge the ruling, because they are closest to and most affected by the conveyance.

The most recent application of the “relaxed standing” principle is in *Regan v. Denney*, 2019 WL 1372182 (Idaho Feb. 5, 2019) (Burdick, C.J.). This was the constitutional challenge to the voter-approved initiative to expand the availability of Medicaid. In *Regan*, the Court waived the requirement outright, noting the urgency of the constitutional question. Citing *Koch* and *Coeur d’Alene*, the Court declared:

However, even though Regan cannot demonstrate a distinct palpable injury sufficient to confer standing, due to the urgent nature of the alleged constitutional violations, we will relax the traditional standing requirements and consider Regan’s petition.

*Regan*, at \*5.

The constitutional principles implicated by the conveyance of Community Beach are of similar import to the issues raised in *Koch*, *Coeur d’Alene*, *Tucker*, and *Regan*. “The State’s endowment lands are part of a sacred trust reserved for the benefit of Idaho’s public schools and public institutions. The Land Board, which manages those endowment lands, is the epitomic

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<sup>30</sup> In addition to addressing the relaxation of standing requirements, the *Tucker* Court joined a number of sister states in carving out a waiver of sovereign immunity in constitutional challenges. The underlying reasoning is much the same: “Were we to accept Respondents’ position that sovereign immunity shields the State from suit in this instance, we would leave parties unable to vindicate constitutional rights against the State. This we decline to do.” *Tucker*, 162 Idaho at 18, 394 P.3d at 61.

public trustee.” *Wasden II*, 153 Idaho at 195, 280 P.3d at 698 (emphasis supplied). “Thus these public school endowment funds are trust funds of the highest and most sacred order, made so by Act of Congress and the Constitution, so considered by the members of the Constitutional Convention and so recognized and declared by this court.” *State v. Peterson*, 61 Idaho 50, 97 P.2d 603, 604 (1939) (Givens, J.) (emphasis supplied). “The Fund is a trust of the most sacred and highest order.” *State, ex rel. Moon v. State Bd. of Examiners*, 104 Idaho 640, 642, 662 P.2d 221, 223 (1983) (Huntly, J.).

Likewise, if SGNA is denied standing, no landowner will be in a position to challenge the Land Board’s unconstitutional action. The Land Board is not likely to challenge its own decisions. And State Hospital South hardly can be expected to monitor and enforce every Land Board conveyance. Moreover, the hospital has other reasons, such as protection of its other funding sources, to steer clear of controversial matters such as this. See *Declaration of Zepheniah Johnson*.

In sum, agencies must not be allowed to use standing requirements as a shield, allowing them to violate constitutional constraints on governmental conduct with impunity.

**E. In any event, SGNA satisfies Article III standing requirements.**

**(1) Article III standing requires injury-in-fact, causation, and redressability.**

For all the reasons given above, there is no need to delve further into the law of standing. If need be, however, SGNA easily meets the tests established by Article III.

The three basic tests for Article III standing were first articulated by the U.S. Supreme Court in *Lujan v. Defenders of Wildlife* (“*Lujan v. Defenders*”), 504 U.S. 555, 560 (1992) (Scalia, J.). They have been repeated by our Supreme Court on many occasions.

Under the traditional standing analysis, “the plaintiff must show (1) an ‘injury in fact,’ (2) a sufficient ‘causal connection between the injury and the conduct complained of,’ and (3) a ‘like[lihood]’ that the injury ‘will be redressed by a favorable decision.’”

*Tucker v. State*, 162 Idaho 19, 394 P.3d 54 (2017) (Burdick, C.J.) (quotation marks original) (citing *State v. Philip Morris, Inc.*, 158 Idaho 874, 881, 354 P.3d 187, 194 (2015) (Horton, J.)).

SGNA meets each of these. They are addressed in turn below.

**(a) There are two components to “injury-in-fact.”**

The underlying principle of standing and the core of the injury-in-fact requirement is that only those with a concrete stake in the outcome of a contest should be allowed to challenge agency action. Mere bystanders, no matter how emotionally involved or concerned they may be with the principles at stake, are not proper litigants. Our Supreme Court (quoting the U.S. Supreme Court) summarized it this way:

The essence of the standing inquiry is whether the party seeking to invoke the court’s jurisdiction has “alleged such a personal stake in the outcome of the controversy as to assure the concrete adversariness which sharpens the presentation upon which the court so depends for illumination of difficult constitutional questions.” As refined by subsequent reformation, this requirement of “personal stake” has come to be understood to require not only a “distinct palpable injury” to the plaintiff, but also a “fairly traceable” causal connection between the claimed injury and the challenged conduct.

*Miles v. Idaho Power Co.*, 116 Idaho 635, 641, 778 P.2d 757, 763 (1989) (Johnson, J.) (quoting *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 72 (1978) (Burger, C.J.)).

More recently, the ‘injury-in-fact’ requirement has been distilled into two components: “Injury in fact requires the injury to be ‘concrete and particularized’ and ‘actual or imminent, not conjectural or hypothetical.’” *Employers Resource Management Co. v. Ronk*, 162 Idaho 774, 777, 405 P.3d 33, 36 (2017) (Horton, J.) (internal quotation marks omitted).

(i) **“Concrete and particularized injury” is established here through proximity.**

In order to be “concrete and particularized,” the injury must be different from the injury felt by the community at large. “But even if a showing can be made of an injury in fact, standing may be denied when the asserted harm is a generalized grievance shared by all or a large class of citizens.” *Young v. City of Ketchum*, 137 Idaho 102, 104, 44 P.3d 1157, 1159 (2002) (Trout, C.J.).

The concept of particularized injury arises in many contexts, from taxpayer standing, to environmental injury, to land use matters. In our situation, land use cases provide the best guidance. In order to show particularized harm to real property, it is necessary to show that the property is affected in some particular way. A key element is proximity to the thing causing the injury.

Proximity is a very important factor. . . . However, this Court will not look to a predetermined distance in deciding whether a property owner has, or does not have, standing to seek judicial review of a LLUPA decision.

*Evans v. Teton Cty.*, 139 Idaho 71, 75, 73 P.3d 84, 88 (2003) (Kidwell, J.).

In *Butters v. Hauser*, 131 Idaho 498, 501, 960 P.2d 181, 184 (1998) (Walters, J.), the Court found that a homeowner had standing to challenge approval of a cell tower because “she owns land in close proximity to the tower; the tower looms over her land; and its physical invasiveness affects her enjoyment of her property.” *Butters*, 131 Idaho at 501, 960 P.2d at 184.

In *Cowan v. Bd. of Comm’rs of Fremont Cty.*, 143 Idaho 501, 148 P.3d 1247 (2006) (Burdick, J.), the Court held that a next door neighbor had standing to challenge a subdivision approval because his property value might be affected by the development of the subdivision.

Like the appellants in *Evans* whose rural homes might be adversely affected by the development of a large resort

development adjacent to their properties, Cowan’s property might be adversely affected by the construction of Eagle’s Nest adjacent to his property. Therefore, Cowan has standing to pursue his claims.

*Cowan*, 143 Idaho at 509-10, 148 P.3d at 1255-56.

In *Ciszek v. Kootenai Cty. Bd. of Comm’rs*, 151 Idaho 123, 254 P.3d 24 (2011) (J. Jones, J.), the Court found that property owners suffered particularized harm and therefore had standing to challenge a zoning change allowing additional mining adjacent to their property. “Like *Butters*, Ciszek lives on, and owns, property located adjacent to property that has been approved for activities that are substantially different from those which previously existed on the Agricultural Lots.” *Ciszek*, 151 Idaho at 129, 254 P.3d at 30.

SGNA easily satisfies the injury-in-fact requirement. Its members are the nearest neighbors, and in some cases immediately adjacent, to Community Beach.<sup>31</sup> The value of their properties has declined significantly as a direct result of the transformation of Community Beach from a quiet beachside park to a staging ground for a large dock.<sup>32</sup> The injury suffered by SGNA members is much the same as that experienced by the plaintiffs in *Butters*, *Cowan*, and *Ciszek*.

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<sup>31</sup> “Additionally, the distance between the community beach and any parcel within the Sharlie-Grouse neighborhood is less than 200 meters [656 feet].” Chris Monthorpe, *Report and Professional Opinion*, page 5. A copy of Professor Monthorpe’s report is set out in *Declaration of Christopher A. Monthorpe*, Exhibit B.

<sup>32</sup> “Preliminary estimates of the value reduction for lakefront properties in the Sharlie-Grouse community range between \$2.4 million and \$7.7 million.” Chris Monthorpe, *Report and Professional Opinion*, page 1. A copy of Professor Monthorpe’s report is set out in *Declaration of Christopher A. Monthorpe*, Exhibit B.

“It is my opinion the market value of the subject property [lot owned by Zephaniah and AnnMarie Johnson] has been reduced 35 percent, due to the resulting change of use caused by the Idaho State Board of Land Commissioners effective transfer of real property rights from a parcel of land formerly noted on the State Subdivision—Southwest Payette Lake Cottage Sites plat as *Community Beach* to the Payette Lakes Cottage Sites Owners Association.” Letter Report of Mark W. Richey (Oct. 1, 2018), reproduced as *Declaration of Mark Richey*, Exhibit B.

**(ii) The “actual or imminent” test is a non-issue, because the injury has occurred.**

The “actual or imminent” component of the injury-in-fact requirement means either the injury has occurred or will soon. *Schneider v. Howe*, 142 Idaho 767, 772, 133 P.3d 1232, 1237 (2006) (Burdick, J.). If the injury has not already occurred, it must be “imminent, not conjectural or hypothetical.” *State v. Philip Morris, Inc.*, 158 Idaho 874, 881, 354 P.3d 187, 194 (2015) (Horton, J.) (quoting *Lujan v. Defenders of Wildlife* (“*Lujan II*”), 504 U.S. 555, 560 (1992) (Scalia, J.)). This can get tricky when the injury has not yet occurred. *E.g.*, *Pasley v. A&B Irrigation Dist.*, 162 Idaho 866, 406 P.3 878 (2017) (Brody, J.) (future injury in water rights context).

It is a non-issue here, because the injury has occurred.

**(b) The “causation and redressability” requirements are satisfied here.**

The discussion above establishes that SGNA has experienced injury-in-fact. We turn now to causation and redressability.

These requirements boil down to requiring the litigant to show that the case is not an academic exercise: the injury suffered can be traced to actions of the defendant, and the relief requested is likely to lessen that injury. A helpful summary of these intertwined requirements is found in *Tucker v. State*, 162 Idaho 11, 394 P.3d 54 (2017) (Burdick, C.J.) (discussed above in the context of waiver of standing requirements):

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In an evaluation in early 2018, prior to the construction of the dock, Mr. Richey preliminarily estimated the impact of the conveyance of Community Beach to PLCSOA on nine lots within SGNA. “My initial conclusion is that market values at the time of this investigation, February 2018, have been reduced by 10 to 20 percent, in comparison to what each could have received if the April 23, 2014 transfer had not occurred.” *Declaration of Mark Richey in Opposition to Intervenor Defendant’s Second Motion for Summary Judgment* (Feb. 27, 2018), reproduced in *Declaration of Mark Richey*, Exhibit A.

Causation requires the injury to be “fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court.”

*Tucker*, 162 Idaho at 21, 394 P.3d at 64 (citing *Bennett v. Spear*, 520 U.S. 154, 167 (1997) (Scalia, J.)).

In *Tucker*, criminal defendants sued various state defendants alleging Idaho’s public defense system violated the state and federal constitutions. The Court found they had standing (as to the State and the Public Defense Commission), emphasizing that it is not necessary to prove redressability with certainty.

Redressability requires a showing that “a favorable decision is likely to redress [the] injury, not that a favorable decision will inevitably redress [the] injury.” *Beno v. Shalala*, 30 F.3d 1057, 1065 (9th Cir. 1994). . . .

. . . Redressability does not require certainty, but only a substantial likelihood that the injury will be redressed by a favorable judicial decision.” *Id.* (citations omitted).

*Tucker*, 162 Idaho at 26, 394 P.3d at 69 (emphasis and brackets are original).

SGNA meets these tests. Causation is clear. The Land Board deprived SGNA and its members of the opportunity to bid at auction. The resulting below-market sale allowed a group of private citizens to destroy the quiet use and enjoyment of this community property in its natural state. What was once a tranquil relaxation spot used by SGNA members and kayakers from all over the lake is now a busy, noisy parking lot (and frequent party zone) serving a private dock installed for the sole benefit of eight homeowners and their many guests.

Redressability is also likely. If a declaratory order is issued to the effect that the sale of Community Beach without an auction violates law, it is fair to assume that something will come of that. As the Idaho Supreme Court said:

The Attorney General is obligated to remedy noncompliance with trust responsibilities in order to safeguard the interests of trust beneficiaries.

*Wasden II*, 153 Idaho at 195, 280 P.3d at 698.

This conclusion was based on statutes mandating this duty:

Among other things, the Attorney General has the duty:  
[t]o supervise . . . persons holding property subject to any public or charitable trust and to enforce whenever necessary any noncompliance or departure from the general purpose of such trust . . . . In case of any such failure or departure, the attorney general shall institute, in the name of the state, any proceeding necessary to enforce compliance with the terms of the trust or any departure therefrom.

*Wasden II*, 153 Idaho at 195, 280 P.3d at 698 (quoting Idaho Code § 67-1405(5)).

Moreover, Idaho law directs him “[t]o seek injunctive and any other appropriate relief as expeditiously as possible to preserve the rights and property of the residents of the state of Idaho.”

*Wasden II*, 153 Idaho at 195, 280 P.3d at 698 (quoting Idaho Code § 67-1401(15)).

As a trustee, the Attorney General has the obligation “to prosecute or defend actions . . . for the protection of trust assets and of the trustee in the performance of his duties.”

*Wasden II*, 153 Idaho at 195, 280 P.3d at 698 (ellipses original, quoting Idaho Code § 68-106(c)(25)).

In a different part of the case, the Court, in dictum, expressed skepticism that terms of a lease executed pursuant to a statute later found to be unconstitutional could be honored. In other words, past transactions are not immune from the consequences of subsequent determinations of unconstitutionality.

They will also need to convince the district court that the provisions of the 2001 leases, which were drafted to comport with I.C. § 58–310A, are still valid despite this Court’s holding that the

statute is unconstitutional. . . . [T]hey will have the unenviable task of trying to convince the court to force the adoption of an unconstitutional rental rate.

*Wasden II*, 153 Idaho at 199, 280 P.3d at 702.

Surely we can presume that if a constitutional violation is found, the Land Board, acting through the Attorney General, will take appropriate steps to redress the error consistent with its sacred trust duties. In other words, if it is determined that the Land Board's action was unconstitutional and the *Quitclaim Deeds* are void, there a substantial likelihood that the State of Idaho will not stand by idly but will take action to remedy the situation. In any event, it is likely that SGNA would be in a good position to compel such a result.

**(2) SGNA's standing is not, and need not be, premised on being a trust beneficiary.**

Two cases arising in the 1990s dealt with challenges by environmental groups to timber sales on endowment land, each alleging violations of the Land Board's Article IX fiduciary duties. *Selkirk-Priest Basin Ass'n, Inc. v. State ex rel. Andrus* ("*Selkirk I*"), 127 Idaho 239, 241, 899 P.2d 949, 951 (1995) (McDevitt, C.J.); *Selkirk-Priest Basin Ass'n, Inc. v. State el rel. Batt* ("*Selkirk II*"), 128 Idaho 831, 834, 919 P.2d 1032 (1996) (Silak, J.).

These cases create no hurdle for SGNA and, in fact, establish that standing may be based on injury unrelated to trust purposes.

In *Selkirk I*, two environmental groups<sup>33</sup> sued the Land Board over a timber sale in the Trapper Creek watershed above Priest Lake. They asserted standing based on (1) the interest held by their children and grandchildren in the school land trusts created by Idaho Const. art. IX, §§ 4, 8 and (2) their environmental interest in the public trust in navigable waters. The Court

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<sup>33</sup> The two groups were Selkirk-Priest Basin Association, Inc. ("SPBA") and Idaho Environmental Council ("IEC").

found the environmental groups had no standing as to the first, because only schools and school districts are beneficiaries of those constitutional trusts.<sup>34</sup> In contrast, the Court found the environmental groups established standing (at least sufficient to survive summary judgment) to enforce the public trust based on a showing of environmental injury to waters below the high water mark.

The only injury asserted under the environmental groups' Article IX constitutional claim was that of injury to their members as parents and grandparents of school children.<sup>35</sup> They might have asserted environmental injury as a basis for standing in their constitutional challenge, too. But, for some reason, they did not. Their assertion of environmental injury was made only with respect to their public trust argument.<sup>36</sup> The Court found this assertion of injury to the public trust in submerged lands was sufficient.<sup>37</sup>

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<sup>34</sup> "Neither environmental group represents a single school or school district. Consequently, the district court correctly ruled that the environmental groups lack the standing necessary to challenge the administration of school endowment lands trust assets." *Selkirk I*, 127 Idaho at 242, 899 P.2d at 952.

<sup>35</sup> "SPBA and IEC assert associational standing on behalf of their members as beneficiaries of the common school lands trust established by art. IX, § 8 of the Idaho Constitution." Opening Brief in *Selkirk I*, 1994 WL 16179832, at \*18.

<sup>36</sup> "The public trust doctrine applies to this case because Trapper Creek is a navigable stream. This Court has consistently recognized the standing of environmental groups or associations of users of public lands to bring an action to protect public trust resources." Opening Brief in *Selkirk I*, 1994 WL 16179832, at \*46.

<sup>37</sup> "Accordingly, we reverse the district court's ruling granting summary judgment in favor of the Land Board on the environmental groups' claim brought under the public trust doctrine only as it relates to public trust resources below the natural high water mark of Trapper Creek." *Selkirk I*, 127 Idaho at 245, 899 P.2d at 955.

Curiously, the *Selkirk I* decision contained no discussion of whether the environmental injury to SPBA and IEC was a particularized or a generalized injury.

*Selkirk II* concerned a different timber sale on state endowment lands.<sup>38</sup> SPBA challenged two recently adopted statutes aimed at restricting judicial review of timber sales. It also sued under the IAPA alleging procedural and substantive violations, among them the Land Board's "failure to manage endowment lands for long-term forest productivity and maximum long-term financial return." SPBA's Opening Brief in *Selkirk II*, 1995 WL 17199658 at \*8. This is the same Article IX constitutional claim pressed in *Selkirk I*.

Plaintiffs in *Selkirk I* were represented by different counsel than represented SPBA in *Selkirk II*, and they took different approaches to standing. In *Selkirk II*, SPBA abandoned its contention that it had standing as a school lands beneficiary and instead asserted standing on grounds of environmental injury.<sup>39</sup>

The *Selkirk II* Court rejected the environmental injury grounds for standing on the basis that injury was too generalized.<sup>40</sup> *Selkirk II*, 128 Idaho at 834, 919 P.2d at 1035.<sup>41</sup>

Here is the important part: Even though SPBA's claim of standing as a trust beneficiary was rejected in *Selkirk I* and abandoned in *Selkirk II*, the *Selkirk II* Court entertained the

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<sup>38</sup> In *Selkirk I*, there were two plaintiffs, SPBA and IEC. Only SPBA participated in *Selkirk II*. In *Selkirk I*, the environmental groups challenged the Lower Green Bonnet timber sale in the Trapper Creek drainage. In *Selkirk II*, SPBA challenged the Bugle Ridge timber sale. Both were in the vicinity of Priest Lake.

<sup>39</sup> "[The *Selkirk I*] opinion establishes that the lower court properly denied standing on that [trust beneficiary] basis. Yet SPBA also alleged standing on other grounds as well, including injury to its members' recreational and aesthetic uses of the area." Opening Brief in *Selkirk II*, 1995 WL 17199658, at \*11.

<sup>40</sup> Oddly, the *Selkirk II* Court made no attempt to reconcile its characterization of SPBA's injury as "generalized" with the holding in *Selkirk I* that the same environmental injury was sufficient to establish standing for purposes of the public trust.

<sup>41</sup> The *Selkirk II* Court also rejected the SPBA's two remaining standing theories. First, it said the broad grant of judicial review under the IAPA, Idaho Code § 67-5270, is foreclosed by

environmental injury standing allegation. Indeed, it did so even though SPBA continued to press its substantive argument that the timber sale violated the constitutional mandate to maximize long-term financial return.<sup>42</sup> Although the Court ultimately found that this plaintiff's environmental injury was too generalized to support standing, the decision shows that a proper plaintiff (one with a more particularized injury) could establish standing to mount a constitutional challenge to the administration of the trust lands on grounds other than being a trust beneficiary.<sup>43</sup> In other words, *Selkirk II* makes clear that, even though SPBA failed to show a sufficiently particularized injury, it is possible to establish standing to challenge violations of the Idaho Const. art. IX, § 8 by showing a particularized injury other than being a trust beneficiary.

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another statute expressly precluding judicial review of timber sales. Second, it said that Idaho's Declaratory Judgment Act does not confer standing.

<sup>42</sup> The retention of the constitutional claim is evident in the decision itself. "[I]n this case we are asked to determine whether the alleged injury to SPBA's members' recreational and aesthetic use of land confers upon them standing to challenge the administration of the endowment trust lands." *Selkirk II*, 128 Idaho at 833, 919 P.2d at 1034. "SPBA appeared before the Land Board challenging the sale's compliance with trust duties and various environmental laws." *Selkirk II*, 128 Idaho at 831, 919 P.2d at 1033.

This constitutional claim is also identified in SPBA's briefing. "The third cause of action sets forth SPBA's challenges to the Bugle Ridge sale under the Idaho APA. . . . The substantive claims center on the Defendants' . . . failure to manage endowment lands for long-term forest productivity and maximum long-term financial return." SPBA's Opening Brief in *Selkirk II*, 1995 WL 17199658 at \*8.

<sup>43</sup> This holding in *Selkirk II* is not at odds with the holding in *Selkirk I*. In *Selkirk I*, the Court rejected the environmental plaintiffs' assertion of standing based on their status as trust beneficiaries, but allowed them to pursue their public trust claim based on environmental injury. Why weren't they allowed to pursue both claims based on environmental injury? Because they did not frame their case that way. For unknown reasons, the *Selkirk I* lawyers alleged standing for their constitutional challenge solely on the plaintiffs' trust beneficiary status, while alleging separate standing grounds for their public trust claim. It was not until *Selkirk II* (and new legal counsel) that SPBA suggested that standing for its "maximum financial return" constitutional challenge could be premised on environmental injury.

This, of course, is what SGNA does here. Unlike SPBA's generalized environmental injury, SGNA's members have experienced particularized injury to their property resulting from the Land Board's action. The fact that SGNA is not the beneficiary of the endowment trust does not matter. SGNA's injury is based on harm to its real property, not on reduced income to the trust.

It is not surprising that standing may be established for injuries unrelated to the purpose of the constitutional or statutory violation. Consider the Idaho Supreme Court's ruling in *AmeriTel Inns, Inc. v. Greater Boise Auditorium Dist.*, 141 Idaho 849, 119 P.3d 624 (2005) (Eismann, J.). In that case, the Court found that a hotel company that paid hotel taxes had standing to challenge advertising expenditures by the Greater Boise Auditorium District ("GBAD") in support of a bond to expand its downtown auditorium. AmeriTel contended that this use of funds was a violation of GBAD's responsibility to use its funds solely for authorized purposes. AmeriTel was not the intended beneficiary of the statutory constraints imposed on auditorium districts. Its injury was based on business competition—unrelated to statutory constraints on spending. That injury, combined with other factors, was sufficient to establish standing.<sup>44</sup> In other words, being the beneficiary of a trust (or of other obligations) is one way to establish standing. But it is not the only way. The particularized injury may or may not be related to the statutory or constitutional violation alleged.

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<sup>44</sup> In *Martin v. Camas Cty. ex rel. Bd. of Comm'rs.*, 150 Idaho 508, 514, 248 P.3d 1243, 1249 (2011) (Burdick, J.), the Court explained that AmeriTel had standing because two other factors were aggregated with the increased competition (which, alone, would have been insufficient): "(1) Ameritel's status as a taxpayer whose tax funds were being used to advocate in favor of approving the bond, and (2) the imminent and certain increase in the taxes Ameritel would be subjected to if the bond were passed."

In sum, anyone experiencing a particularized injury has standing to challenge a constitutional or statutory violation giving rise to that injury. The *Selkirk* cases say so.

**(3) SGNA has organizational standing.**

The seminal organizational standing (aka associational standing) case in Idaho is *Glengary-Gamlin Protective Assn., Inc. v. Bird*, 106 Idaho 84, 675 P.2d 344 (Ct. App. 1983) (Burnett, J.) (citizens group had standing to oppose a conditional use permit for an air strip). The Court identified three requirements:

[W]e have recognized that an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted, nor the relief requested, requires the participation of individual members in the lawsuit.

*Glengary-Gamlin*, 106 Idaho at 87-88, 675 P.2d at 347-48 (quoting *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977) (Burger, C.J.)).

SGNA meets these tests.

- First, for the reasons shown above, its members have standing.
- Second, the organization was founded to advance the interests of the 14 families who own homes in the immediate vicinity of Community Beach. The protection of Community Beach in its natural state is not only germane, it is central to its purpose.
- Third, SGNA seeks no individual-specific relief (such as damages) that would require participation by members of SGNA in this proceeding.

In sum, SGNA has standing to represent its members' interests.

This has been a long slog through the law of standing. It is offered to provide assurance that, any way one looks at it, standing is no bar to the relief sought here. Before closing, this bears repeating: Although SGNA has shown it meets Article III standing requirements, that demonstration is not necessary. Standing is not required in administrative matters and, in any

event, may be waived. The Land Board may not invoke standing requirements designed for federal courts to gain immunity from violations of trust duties imposed by the Framers. Were it otherwise, “we would, in essence, be deleting that provision from the Constitution.” *Koch v. Canyon Cty.*, 145 Idaho 158, 162, 177 P.3d 372, 276 (2008) (Eismann, C.J.).

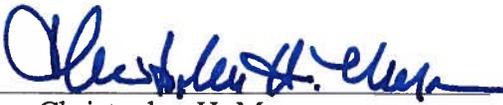
#### CONCLUSION

It would seem that the Land Board did not take to heart the message about trust responsibility delivered in *Wasden II*. Instead, the Land Board has played favorites, choosing which homeowners to favor with the below-market-price gift of trust property. That is not its role under the Constitution and the statutes. The Land Board’s sole and sacred duty is to maximize value to the State’s trust institutions through compliance with requirements the Framers thought wise. Holding an auction is a simple and obvious responsibility. Apparently, a reminder is in order.

SGNA prays for a declaratory ruling that the constitutional and statutory constraints applicable to the conveyance of trust property were violated, rendering the conveyance of Community Beach unlawful, null, and void.

Respectfully submitted this 15<sup>th</sup> day of April, 2019.

GIVENS PURSLEY LLP

By   
Christopher H. Meyer

SPINK BUTLER, LLP

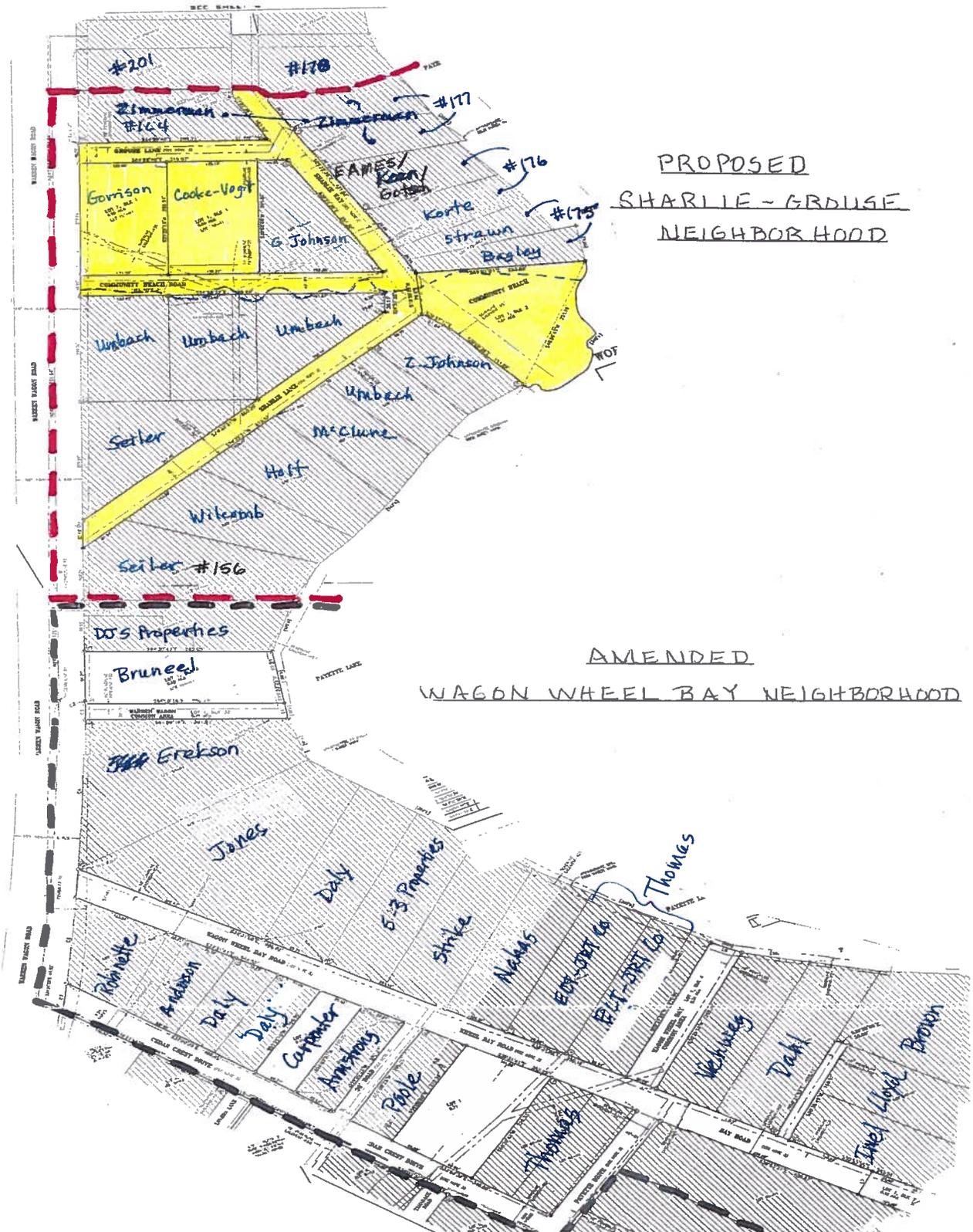
By   
T. Hethe Clark  
Matthew J. McGee

*Attorneys for Petitioner, Sharlie-Grouse  
Neighborhood Association, Inc.*

**SHARLIE-GROUSE NEIGHBORHOOD**



**Attachment B ILLUSTRATIVE MAP #2 OF COMMUNITY BEACH AND NEARBY LOTS**



PROPOSED  
SHARLE - GRDUSE  
NEIGHBORHOOD

AMENDED  
WAGON WHEEL BAY NEIGHBORHOOD

**Attachment C    INDEX TO DECLARATIONS AND EXHIBITS**

**I.    Declaration of Zephaniah Johnson**

**Exhibit A.**    Map of SGNA and Community Beach

**Exhibit B.**    Map showing SGNA and PLCSOA

**II.   Declaration of Diane Bagley**

**Exhibit A.**    1932 Plat (Amended Plat of State Land – Payette Lake Cottage Sites)

**Exhibit B.**    2013 Plat (State Subdivision – Southwest Payette Cottage Sites)

**Exhibit C.**    IDL’s letter regarding termination of Bagley lease (June 24, 2013)

**Exhibit D.**    SGNA’s request to IDL dated Sept. 23, 2013

**Exhibit E.**    IDL’s response to SGNA’s request dated Oct. 8, 2013

**Exhibit F.**    Special Lease No. M-294-94 (“1985 Bagley Lease”)

**Exhibit G.**    Lease No. M-5015-4 (“1995 Bagley Lease”)

**Exhibit H.**    Miscellaneous Surface Lease No. M-5015 (“2005 Bagley Lease”)

**Exhibit I.**    Letter from PLCSOA to Bagley family (Mar. 1, 2016)

**Exhibit J.**    Letter from PLCSOA (Aug. 15, 2016)

**Exhibit K.**    Non-Exclusive Lease Agreement with PLCSOA (July 24, 2018)

**III.   Declaration of Matthew J. McGee**

**Exhibit A.**    Memorandum from IDL legal counsel (Sept. 4, 1979)

**Exhibit B.**    Memorandum from IDL legal counsel (Sept. 19, 1986)

**IV. Declaration of Christopher A. Mothorpe**

**Exhibit A.** Curriculum Vitae

**Exhibit B.** Report and Professional Opinion (Aug. 11, 2018)

**V. Declaration of Mark Richey**

**Exhibit A.** Declaration of Mark Richey in Opposition to Intervenor Defendant's Second Motion for Summary Judgment (Case No. CV-2017-204) (Feb. 27, 2018)

**Exhibit B.** Consultant's Report (Oct. 1, 2018)

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 15<sup>th</sup> day of April, 2019, the foregoing was filed, served, and copied as follows:

**DOCUMENT FILED:**

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