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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 RESPONSE BRIEF IN  
OPPOSITION TO LAND BOARD'S  
MOTION FOR SUMMARY JUDGMENT**

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## INTRODUCTION

This brief is submitted by Sharlie-Grouse Neighborhood Association, Inc. (“SGNA”) in opposition to *Respondent’s Motion for Summary Judgment and Supporting Memorandum (“Board’s Opening Brief”)* filed by the Idaho State Board of Land Commissioners (“Land Board”) on April 15, 2019.

In a separate brief, *SGNA’S Response Brief in Opposition to Intervenors’ Motion for Summary Judgment (“Response to Intervenors”)*, SGNA responds to the *Motion for Summary Judgment (“Intervenors’ Motion”)* and *Memorandum in Support of Motion for Summary Judgment (“Intervenors’ Opening Brief”)* both of which were filed by Intervenors Payette Lakes Cottage Sites Owners Association, Inc. (“PLCSOA”) and Wagon Wheel Bay Dock Association (“WWBDA”) on April 15, 2019. Arguments made in that brief are not repeated here, but are instead incorporated herein by this reference. Likewise, SGNA incorporates by reference *SGNA’s Opening Brief on Motion for Summary Judgment (“SGNA’s Opening Brief”)* filed on April 15, 2019.

PLCSOA and WWBDA are referred to collectively as “Intervenors.” The Land Board and Intervenors are referred to collectively as “Auction Opponents.” The Land Board oversees the Idaho Department of Lands (“IDL”). This brief employs the same shorthand definitions as *SGNA’s Opening Brief*.

In its *Answer to Petition for Declaratory Ruling (“Board’s Answer”)* (June 19, 2018), the Land Board<sup>1</sup> spoke in absolute terms defending its actions on the merits.<sup>2</sup> When counsel met

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<sup>1</sup> When we speak of the Land Board taking a position in this matter (whether in a pleading or a brief), the peculiar nature of this proceeding should be borne in mind. The Land Board is the decision-maker, and thus does not take a position on the ultimate issue until it considers the Hearing Officer’s recommendation. Indeed, it is duty-bound to keep an open mind until all is said and done. The positions taken by the Land Board as this proceeding unfolds

with the Hearing Officer at the status conference on January 10, 2019, counsel for SGNA implored counsel for the Land Board to explain why it believes no auction was required. The Land Board's counsel declined to do so, saying this would be set out in its summary judgment motion. So it is curious that the Land Board has not sought summary judgment on the merits. Instead, it has dug in its heels in its efforts to avoid having to address the constitutional violation that gave rise to this proceeding.

The *Board's Opening Brief* is also interesting in that the Land Board has switched horses with respect to its jurisdictional defenses. The agency previously contended that SGNA lacks standing, *Land Board's Answer*, ¶ 20, page 5, and that the declaratory ruling provisions of the Idaho Administrative Procedure Act ("IAPA") do not provide subject matter jurisdiction for the relief sought, *Respondent's Response in Opposition to Petitioner's Motion to Compel Discovery*, page 2, n.1 (Oct. 25, 2018). The Land Board has not sought summary judgment on those defenses. Instead, it has raised a new argument not mentioned before, including in the *Board's Answer*, other pleadings, or at the status conference. Now, the Land Board's single defense is its contention that the IAPA's declaratory ruling provisions cannot be used to address or undo an action that already has occurred and that judicial review is the exclusive means to address an unconstitutional conveyance of state property. The Land Board sets these arguments out in part IV(A)(1) of its brief (pages 6-10) and then essentially repeats them in part IV(B) (pages 15-17).

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(other than its decision to initiate this contested case) are really no more than positions urged by the Land Board's counsel.

<sup>2</sup> "Respondent denies that a public auction was required, and denies that it did not receive financial compensation." *Board's Answer*, ¶ 12 at page 3. "Petitioner [sic] specifically denies this Paragraph to the extent it alleges the Deed and Amended Deed constituted the 'disposal' of endowment land." *Board's Answer*, ¶ 7, page 3. "Respondent specifically denies that the Deed and Amended Deed constituted a disposal." *Land Board's Answer*, ¶ 17, page 4.

The Land Board relies on out-of-state precedent for these contentions. In any event, these foreign cases are distinguishable or inapposite. At the end of the day, the Land Board has put all of its eggs in this single procedural argument. The argument fails, and it is time for the Land Board to recognize and address its violation of Idaho's Constitution.

### ARGUMENT

#### I. THE LAND BOARD ELECTED TO INITIATE A CONTESTED CASE, THEREBY MOOTING THE ISSUE OF SGNA'S AUTHORITY TO SEEK A DECLARATORY RULING.

The Land Board's contention that SGNA lacks authority to petition for a declaratory ruling was mooted by the Land Board's decision to initiate a contested case. This action was taken in accordance with Idaho Code § 67-5232(2), which provides: "A petition for a declaratory ruling does not preclude an agency from initiating a contested case."

The contested case provision in Idaho Code § 67-5232(2) was not part of the original 1965 IAPA.<sup>3</sup> It was added as a new, stand-alone subsection in 1992.<sup>4</sup> There is no legislative

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<sup>3</sup> When enacted in 1965, the declaratory ruling section of the IAPA read:

Each agency shall provide by rule for the filing and prompt disposition of petitions for declaratory rulings as to the applicability of any statutory provision or of any rule or order of the agency. Rulings disposing of petitions have the same status as agency decisions or orders in contested cases.

1965 Idaho Sess. Laws ch. 273, § 8 (later codified at Idaho Code § 67-5232).

<sup>4</sup> The 1992 amendment changed the provision as follows:

(1) Each agency shall provide by rule for the filing and prompt disposition of petitions for Any person may petition an agency for a declaratory rulings as to the applicability of any statutory provision or of any rule or order of administered by the agency.

(2) A petition for a declaratory ruling does not preclude an agency from initiating a contested case in the matter.

(3) Rulings disposing of petitions have the same status as agency decisions or orders in contested cases.—A declaratory ruling issued by an agency under this section is a final agency action.

1992 Idaho Sess. Laws ch. 263, § 23 (codified at Idaho Code § 67-5232).

history addressing the amendment to this section. However, the fact that the IAPA was amended to add a new subsection providing that an agency is not precluded from initiating a contested case *sua sponte* after a petition for declaratory ruling is filed shows that agencies have independent authority to initiate a contested case. In other words, when the agency determines to initiate a contested case, it has determined, of its own accord, that the issue is one that merits evaluation and determination.

The Land Board met on July 17, 2018 to consider what action to take in response to SGNA's petition. The Land Board met in executive session before reaching its decision to act on the petition. It could have determined that SGNA's petition was improper and denied the petition outright, thereby never issuing a declaratory ruling. Instead, it affirmatively determined to initiate a contested case. *Notice of Appointment of Hearing Officer ("Notice")* (Oct. 3, 2018).

That the Land Board initiated a contested case is evident from the Land Board's *Notice*. It states that the action is taken pursuant to Idaho Code § 58-122, which provides procedures for contested cases. Section 58-122, in turn, specifically references Idaho Code §§ 67-5240 through 67-5271, which address contested cases.

In sum, the Land Board has the power to initiate a contested case with respect to the constitutionality of the *Quitclaim Deeds* irrespective of a petition for declaratory ruling, and it elected to do so. That was the right thing to do. One would hope and expect that the Land Board would want to apply the law to the facts in order to resolve any doubt about the constitutionality of its action in issuing the *Quitclaim Deeds*.

The Land Board, through its own action, determined that this constitutional question should be addressed in a contested case. Having so acted, the Land Board has put to rest the question of whether SGNA is entitled to petition for a declaratory ruling.

**II. THE LAND BOARD’S ACTION WAS NOT APPEALABLE AND, IN ANY EVENT, SUCH AN APPEAL WAS NOT THE ONLY MEANS OF ADDRESSING THE CONSTITUTIONALITY OF THE QUITCLAIM DEEDS.**

**A. The issuance of CC&Rs and deeds was not an appealable action.**

The Land Board asserts that its vote to approve a plan to subdivide and dispose of certain state lands including Community Beach constitutes final agency action, which was subject to judicial review. *Board’s Opening Brief* at 2.

It is doubtful that SGNA could have sought judicial review of this action. The IAPA authorizes judicial review of final rules, final orders, and other final agency actions. Idaho Code § 67-5273.<sup>5</sup> Obviously, the Land Board’s action on April 25, 2013 was not a rule. Nor was it an order.<sup>6</sup> The third category (other “agency action”) is more broadly defined to include an “agency’s performance of, or failure to perform, any duty placed on it by law.” Idaho Code § 67-5201(3)(c). However, the Land Board was under no legal duty to file CC&Rs nor to issue any deeds. Indeed, SGNA’s position is that the Land Board was under a legal duty not to do so. The Land Board’s decision to impose CC&Rs and to convey the *Quitclaim Deeds* was a choice it made, not an action that was compelled by duty. Hence, it is not an action subject to judicial review.

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<sup>5</sup> The IAPA is the only statute providing for judicial review of Land Board actions. Unlike statutes governing other agencies, there is no provision in Title 58 providing for judicial review (though one statute eliminates judicial review for certain timber sales).

<sup>6</sup> The term “order” is defined as “an agency action of particular applicability that determines the legal rights, duties, privileges, immunities, or other legal interests of one (1) or more specific persons.” Idaho Code § 67-5201(12). The decision to proceed with the filing of CC&Rs and the issuance of the *Quitclaim Deeds* was a decision to convey legal interests, not a determination of what those interests are. A determination is an adjudicatory function, not a real estate transaction. Mere transactions (or decisions to convey) are not subject to judicial review.

**B. In any event, the availability of judicial review does not preclude issuance of a declaratory ruling.**

In its brief, the Land Board contends that judicial review was not only available, but is the exclusive means by which the constitutionality of the *Quitclaim Deeds* may be examined. For this proposition, it cites no Idaho law, statutory or otherwise. Indeed, there is none, so far as SGNA can determine. Instead, the Land Board relies on cases from other states, most notably Hawaii.<sup>7</sup>

In *Citizens Against Reckless Dev. v. Zoning Bd. of Appeals of the City & Cty. of Honolulu* (“CARD”), 159 P.3d 143 (Hawaii 2007), plaintiffs (“CARD”) opposed issuance of a conditional

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<sup>7</sup> In addition to three foreign cases, the Land Board cites some Idaho cases, which it suggests support its contention that judicial review is the exclusive means of addressing the constitutionality of the Land Board’s action. They are inapposite.

In *Cobbley v. City of Challis* (“*Cobbley I*”), 143 Idaho 130, 133-34, 139 P.3d 732, 735-36 (2006) (J. Jones, J.), the Court was called upon to untangle a procedural mess created by *pro se* plaintiffs in a road case. The Cobbleys had sued the City of Challis contending that the City owned and was required to maintain a road outside of the City in front of their home. Meanwhile, the County undertook validation proceedings on the road, in which the Cobbleys participated. When the County issued a decision that the County, not the City, owned the road. The Cobbleys mistakenly sought to appeal the County’s decision by filing a pleading in their ongoing lawsuit with the City (rather than a separate petition for judicial review initiating a new lawsuit). It was in this context that the Court ruled that a properly filed petition for judicial review is “the exclusive means by which a validation decision can be challenged.” *Cobbley II*, 143 Idaho at 133, 139 P.3d at 735. Here, in contrast, there has been no equivalent of a validation proceeding—*i.e.*, there has been no proceeding in which the Land Board has addressed and ruled on the applicability of public auction requirements to these facts.

In *City of Eagle v. Idaho Dep’t of Water Resources*, 150 Idaho 449, 247 P.3d 1037 (2011) (Burdick, J.), the Court ruled a water right applicant’s petition for judicial review was untimely, because the IAPA’s 28-day deadline is jurisdictional and began to run from the date the Idaho Department of Water Resources issued its order on reconsideration—not from the date of service. In other words, *City of Eagle* dealt with timeliness of judicial review, not alternatives to judicial review.

The Land Board cites a string of cases for the proposition that “[w]ithout an enabling statute, there is an absence of subject matter jurisdiction.” *Board’s Opening Brief* at 11. That is true enough (though it applies to judicial proceedings, not agency actions). But here, of course, we have an enabling statute: the IAPA’s provision for declaratory rulings. So these cases, too, are beside the point.

use permit (“CUP”) for a Wal-Mart and Sam’s Club. CARD filed two petitions for judicial review, both of which were rejected because they were not filed within the statutory 30-day time period. *CARD* at 147-48. CARD then petitioned the zoning board for a declaratory ruling pursuant to Hawaii’s Administrative Procedure Act.<sup>8</sup> The petition raised the same issues presented in the untimely judicial review petitions. *CARD* at 147-48, 155. The zoning board declined to issue a declaratory ruling on the basis that doing so would give CARD two bites at the apple. *CARD* at 150. CARD appealed, ultimately reaching the Hawaii Supreme Court.

In its ruling upholding the zoning board’s decision, the Hawaii Supreme Court explained that the declaratory ruling provision “was not intended to allow review of concrete agency decisions for which other means of review are available.” *CARD* at 156.

At first blush, that sounds like the Hawaii Court is saying declaratory rulings are never appropriate when judicial review is available. That is the reading urged in the *Board’s Opening Brief*. But that is not what the decision says.

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<sup>8</sup> The Hawaii statute provides: “Any interested person may petition an agency for a declaratory order as to the applicability of any statutory provision or of any rule or order of the agency. Each agency shall adopt rules prescribing the form of the petitions and the procedure for their submission, consideration, and prompt disposition. Orders disposing of petitions in such cases shall have the same status as other agency orders.” Haw. Rev. Stat. § 91-8.

Hawaii’s statute is the analog to Idaho Code §§ 67-5232 and 67-5255. However, it differs from the 1961 Model State Administrative Procedure Act, whose language was incorporated into the IAPA in 1965 (see footnote 3 at page 6). And it differs from the 1992 amendments to the IAPA (see footnote 4 at page 6). Unlike Hawaii’s version, Idaho’s IAPA provides that “Any person may petition.” Also, Hawaii’s version does not incorporate the language in Idaho Code § 67-5232(2) providing that an agency is not precluded from initiating a contested case in the matter.

By the way, the *CARD* decision does not explain how this provision of Hawaii’s Administrative Procedure Act is applicable to a decision of a municipal zoning board. That, of course, would not be the case in Idaho, where the IAPA applies only to state agencies and LLUPA incorporates only the judicial review provisions of the IAPA.

In *CARD*, the zoning board’s initial decision approving the CUP fully articulated, evaluated, addressed, and ruled on each of the zoning criteria challenged by *CARD* in its petition. For that reason, it was not appropriate “to allow review of concrete agency decisions for which other means of review are available.” *CARD* at 156.

The situation here is quite different. There is no “concrete agency decision” on the subject. Other than a brief colloquy between the Governor and an IDL attorney about the auction requirement, the Land Board has never addressed the issue central to SGNA’s petition. It has not invited evidence, briefing, and argument on the subject. Nor has it issued a ruling on whether (and why) an auction is required. In short, it has never grappled with the subject.

As the Hawaii Court said:

Use of the declaratory ruling procedural device only makes sense where the applicability of relevant law is unknown, either because the agency has not yet acted upon particular factual circumstances, or for some other reason the applicability of some provisions of law have not been brought into consideration.

*CARD* at 156. That, of course, is exactly what we have here—a situation where “the applicability of relevant law is unknown . . . because the agency has not yet acted upon particular factual circumstances.”

In other words, if *CARD* is applicable here, it should be read to say only this: Where a contested case has been conducted and decided, and no appeal timely taken, a declaratory ruling may not be employed to re-hash the very issues addressed in the contested case. That makes some sense, though nothing in Idaho’s statute imposes that limitation. But it is altogether different where, as here, there was no prior contested case<sup>9</sup> and the agency has not previously

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<sup>9</sup> As discussed, the Land Board’s decision to issue the CC&Rs and *Quitclaim Deeds* was not made in a contested case, which would have resulted in a reviewable order.

issued a ruling on the applicability of the public auction requirement to these facts.

In other words, if the Land Board had opened a contested case to address the applicability of the auction issue and had issued an order on that subject, the failure to appeal such an order (and the filing instead of a petition for a declaratory ruling) would be analogous to what happened in *CARD*. Here, in contrast, SGNA is seeking for the first time a ruling by the Land Board on this question.

Thus, even if this matter were subject to precedent from a state where Owyhee is spelled Hawaii, the *CARD* decision would not prevent this issuance of a declaratory ruling. In any event, Hawaiian precedent is not controlling.

Moreover, Idaho's statute differs from Hawaii's (see footnote 4 at page 6 and footnote 8 at page 9). The Hawaii Court noted and relied on the legislative history of Hawaii's APA, which obviously is immaterial in Idaho. Idaho's legislative history (as to both the 1965 and 1992 enactments) is entirely silent on the subject of declaratory rulings. Accordingly, Idaho agencies and courts should apply the language of Idaho's statute in a sensible way consistent with its language. The statutory language contains no limitation as to the circumstances under which declaratory rulings may be issued. If any restriction is imposed, it should be limited to those circumstances where the agency already has conducted a contested case and issued a written order on the very issue presented in the petition for declaratory ruling.<sup>10</sup>

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<sup>10</sup> The second foreign case cited by the Land Board, *Petition of D.A. Associates*, 547 A.2d 1325 (Vt. 1988), is much the same as the Hawaii case. In it, the plaintiff was a business regulated by Vermont's Department of Water Resources and Environmental Engineering. At the conclusion of an administrative proceeding, the Department issued a certificate of compliance containing conditions to which the regulated party objected. The party should have appealed, of course. Instead, and quite inexplicably, it petitioned for a declaratory ruling. The Department noted the procedural blunder, but issued the declaratory ruling anyway. The Vermont Supreme Court said that an appeal was the only way to challenge the agency's decision to impose the conditions. As in *CARD*, this was a situation where the agency had issued a formal, clearly

### III. NOTHING IN THE LEGISLATIVE HISTORY OR OTHER COMMENTARY SUPPORTS THE LAND BOARD'S CONTENTION ABOUT DECLARATORY RULINGS.

Idaho Code § 67-5232 was first enacted in 1965 (see footnote 3 at page 6) and was at that time modeled on the 1961 Model State Administrative Procedure Act. It was amended in 1992 (see footnote 4 at page 6). In its briefing, the Land Board offers an incorrect quotation from Professor Cooper regarding the 1961 Model Act.<sup>11</sup> It is fair to say, however, that Professor Cooper and the Senate Report he discusses contemplate that a key factor behind the declaratory ruling provisions in both the Model Act and the federal APA was the need for a mechanism allowing members of the regulated community to obtain formal, binding rulings from agencies as to how and whether various laws, rules, and orders might apply to them, thus allowing them to know in advance how the agency views an action they are contemplating taking.

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appealable decision in a contested case specifically grappling with and addressing the subject of the declaratory ruling. In contrast, the Land Board has never grappled with or ruled upon the question of the applicability of public auction requirements to this conveyance. For this reason, both *D.A. Associates* and *CARD*, are readily distinguishable.

The third foreign case cited by the Land Board is *Chrysler Corp. v. Dep't of Civil Rights*, 323 N.W.2d 608, 613 (Mich. Ct. App. 1982). The decision has nothing whatsoever to do with the subject at hand. It deals with purely Michigan-specific questions dealing with discovery and with whether a plaintiff can seek a judicial "order of superintending control" as an alternative to initiating a court action for a declaratory judgment. The sentence quoted by the Land Board comes not from the *per curiam* decision but from a concurrence that specifically disagreed with the majority on a side-issue dealing with administrative declaratory rulings. In other words, as to this point, the judge was dissenting.

<sup>11</sup> The Land Board cites to Frank E. Cooper, 1 *State Administrative Law* 239-40 (1965) (quoting *Administrative Procedure in Government Agencies*, S. Doc. No. 8, 77<sup>th</sup> Cong., 1<sup>st</sup> Sess. 30-33 (1941)). The quoted words do not appear in Professor Cooper's treatise (which is now out-of-print but available at the State Law Library). Also the Land Board's reference to the Senate document is incorrect. The citation should be to Robert H. Jackson, *Final Report of the Attorney General's Committee on Administrative Procedure*, S. Doc. No. 8, 77<sup>th</sup> Cong., 1<sup>st</sup> Sess. (1941). The Land Board incorrectly refers to *Administrative Procedure in Government Agencies*, which is a different (and immaterial) Senate report dealing with the Fair Labor Standards Act of 1938 (S. Doc. No. 10, 77<sup>th</sup> Cong., 1<sup>st</sup> Sess. (1941)).

However, these commentaries do not limit the mechanism of declaratory rulings to that circumstance. They describe some limits on the use of the rulings, but nowhere do they say that the rulings may be used only prospectively with respect to actions that have not yet occurred.

For example, the Senate Report offers this caution:

But the declaratory ruling is not feasible in every circumstance in which doubt may be present. A necessary condition of its ready use is that it be employed only in situations where the critical facts can be explicitly stated, without the possibility that subsequent events will alter them.

Robert H. Jackson, *Final Report of the Attorney General's Committee on Administrative Procedure*, S. Doc. No. 8, 77<sup>th</sup> Cong., 1<sup>st</sup> Sess., page 32 (1941).

Thus, to the extent the decades-old commentary on the federal Administrative Procedure Act is even relevant here, it does not support the Land Board's contention that declaratory rulings are limited to advice on prospective actions. A declaratory ruling is a perfectly appropriate means for the Land Board to decide whether there is a constitutional problem here that will require further remedial steps.

**IV. THE LAND BOARD'S OWN RULES ON DECLARATORY RULINGS INCLUDE NO LIMITS ON WHEN SUCH RULINGS MAY BE EMPLOYED.**

One would think that if declaratory rulings could be used only to address prospective actions, the Land Board would have included a cautionary note to that effect in its implementing regulations. Instead, the Land Board's rules contain no hint that a declaratory ruling would be inappropriate in a matter like the one here. IDAPA 20.01.01.400 (Land Board's regulations on declaratory rulings); IDAPA 04.11.01.400 (Attorney General's identical regulations on declaratory rulings).

**V. THE LAND BOARD RECENTLY DID THE VERY THING IT SAYS HERE IT CANNOT DO: IT ACKNOWLEDGED, AFTER-THE-FACT, THAT A CONVEYANCE WAS UNCONSTITUTIONAL, AND RESCINDED IT.**

In its opening brief, the Land Board declares it “has no authority to declare a previously-conveyed deed to be void. . . . [N]either the Constitution nor the Idaho Code authorize the Land Board to unilaterally void such conveyances once a deed is delivered to the grantee.” *Board’s Opening Brief* at 15. Yet it seems the Land Board finds ample authority to unilaterally rescind its actions when it chooses to.

Two months ago, on April 16, 2019, the Land Board voted 5-0 to unilaterally rescind Commercial Recreation Lease No. M500031 for an event center at Tamarack Bay.<sup>12</sup> The Land Board found it was compelled to do so because the lease of endowment land adjacent to Payette Lake was issued without a public auction and without maximizing long-term financial return on this endowment property.

Lease M500031 was issued by the Land Board to The Grove McCall LLC on October 4, 2018. A number of nearby property owners wrote to the Land Board objecting to the lease on grounds that it was issued without a public auction and without maximizing long-term financial return on this endowment property. See, <https://www.idl.idaho.gov/land-board/lb/minutes-archive/2019/021919-final-materials-land-board-v0412-watermark.pdf>. On April 16, 2019, the Land Board met and went into executive session. It then voted unanimously to rescind the lease

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<sup>12</sup> Perhaps “rescind” is not the right word. The Court said in the Idaho Education Network litigation that “void contracts cannot be rescinded because they are deemed to have never existed.” *Syringa Networks, LLC v. Idaho Dep’t of Admin.* (“*Syringa II*”), 159 Idaho 813, 826, 367 P.3d 208, 221 (2016) (J. Jones, J.). But the word does not matter. What matters is the Land Board recognized that the illegal contracts cannot stand. The *Syringa* litigation is discussed in SGNA’s *Response to Intervenors*, section I(B) at page 9 and section III(C) beginning on page 17.

on the basis that it “failed to comply with constitutionally and legally required processes.” Land Board Minutes, page 8 (Apr. 16, 2019) (reproduced in Attachment A to this brief).

The Land Board took this action notwithstanding the fact that the lessee already had cleared the land and initiated construction of the events center. Indeed, the Land Board recognized that in doing so, it would need to “negotiate a mutually acceptable settlement with the current leaseholder to compensate the leaseholder for costs and expenses incurred.” Land Board Minutes at 8 (Apr. 16, 2019).

The Land Board’s minutes are not extensive. Most of the discussion took place in executive session. But the minutes amply and candidly articulate the Land Board’s recognition that its lease actions, being in violation of the Constitution, required rescission:

**Board Action:** A motion was made by Attorney General Wasden that the Land Board, one, rescind Lease M500031 on the basis that the Idaho Department of Lands failed to comply with constitutionally and legally required processes in issuing the lease. Two, direct the Idaho Department of Lands to prepare, market, and offer for lease at public auction the parcel of land subject to Lease M500031 in accordance with Idaho constitutionally, legally, and financially required processes. And, three, that the Department, with the assistance of the Office of the Attorney General, negotiate a mutually acceptable settlement with the current leaseholder to compensate the leaseholder for costs and expenses incurred by the leaseholder associated with the lease which were not otherwise addressed during the leasing process. Attorney General Wasden asked for the opportunity to address his motion, upon receiving a second. Controller Woolf seconded the motion.

Attorney General Wasden remarked that in the Board’s review of this lease, the Board has to acknowledge that there were some mistakes made in the processes employed. The best thing for the Board to do is to rescind the lease and then to engage in proper processes that meet the financial, legal, and constitutional requirements to offer this property at lease, which will give the greatest opportunity for all of the parties involved to address that lease. Attorney General Wasden noted that also of importance is that the persons who were the lessees under this lease, in a sense were led down the primrose path, and the Board has an obligation to make them whole within the confines of the law. Attorney

General Wasden stated that this provides an opportunity to address the lessees, and to see that they are legally made whole.

Land Board Minutes, pages 8-9 (Apr. 16, 2019) (reproduced in Attachment A to this brief).

In short, the Land Board stepped up, recognized its error, and did the right thing. It should be commended. It should do the same here.

Notably, no one in the Tamarack Bay proceedings sought judicial review of the decision to issue a lease, and the Land Board did not use that as a shield or excuse to avoid taking appropriate remedial measures.

### CONCLUSION

In its decision to rescind the Tamarack Bay lease, the Land Board concluded, wisely and correctly, it had the authority and the responsibility to unwind an illegal transaction. There is no reason the Land Board should not do the same here.

The Land Board has offered no defense of its action on the merits. Instead, it has sought to shield its unconstitutional breach of a sacred duty by employing procedural defenses rooted in Hawaiian law. In initiating this contested case, it recognized the propriety of addressing the merits. It should not be allowed to reverse course and avoid that constitutional issue.

It is time for the Land Board to recognize that the *Quitclaim Deeds* were issued in violation of law. Doing so will enable that error to be corrected, in a manner protective of the legitimate interests of all concerned, thereby enabling the State to obtain the full value of its trust resources.

Intervenors obtained a windfall at the expense of the Trust.<sup>13</sup> SGNA seeks no such windfall. Its goal is to protect Community Beach in its natural state in perpetuity for the benefit

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<sup>13</sup> Windfall or not, SGNA recognizes that Intervenors, like the lessee in the Tamarack Bay lease, were “led down the primrose path” by the Land Board. As discussed in its *Response*

of all.<sup>14</sup> (See *SGNA's Opening Brief*, section I(B) at 19, *Declaration of Zephaniah Johnson*, ¶ 4, page 2, and *Declaration of Diane Bagley*, ¶ 7, pages 3-4.) To do that, it will need to put its money where its mouth is, at a public auction. All it seeks is the opportunity that the Constitution mandates.

Respectfully submitted this 14<sup>th</sup> day of June, 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.*

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*to Interveners*, section I(A) at 7, SGNA recognizes that WWBDA may be entitled to compensation (by the Land Board or, perhaps, by the successful bidder in a future auction) for the value of the dock it has installed.

<sup>14</sup> It bears emphasis that SGNA has committed, if it were to prevail at auction, to protect public access to Community Beach, through a conservation easement or otherwise. If the Land Board believes that access by other cottage site owners or the public at large is important, it could so stipulate in any public auction.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 14<sup>th</sup> day of June, 2019, the foregoing was filed, served, and copied as follows:

DOCUMENT FILED:

IDAHO DEPARTMENT OF LANDS	<input type="checkbox"/>	U. S. Mail
c/o Renee Miller	<input checked="" type="checkbox"/>	Hand Delivered
300 North 6 <sup>th</sup> Street, Suite 103	<input type="checkbox"/>	Overnight Mail
Boise, ID 83720-0050	<input type="checkbox"/>	Facsimile (208-382-7107)
Facsimile: 208-382-7107	<input type="checkbox"/>	E-mail

SERVICE COPIES TO:

Angela Schaer Kaufmann, Esq.	<input checked="" type="checkbox"/>	U. S. Mail
Joy M. Vega, Esq.	<input type="checkbox"/>	Hand Delivered
Deputy Attorney General	<input type="checkbox"/>	Overnight Mail
Natural Resources Division	<input type="checkbox"/>	Facsimile (208-854-8072)
OFFICE OF THE ATTORNEY GENERAL	<input checked="" type="checkbox"/>	E-mail:
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700 W State St, 2nd Floor		
Boise, ID 83702		
<i>(Counsel for Respondent)</i>		

Mark D. Perison, Esq.	<input checked="" type="checkbox"/>	U. S. Mail
Tricia K. Soper, Esq.	<input type="checkbox"/>	Hand Delivered
MARK D. PERISON, P.A.	<input type="checkbox"/>	Overnight Mail
P.O. Box 6575	<input type="checkbox"/>	Facsimile (208-343-5838)
Boise, ID 83707-6575	<input checked="" type="checkbox"/>	E-mail:
Hand delivery or overnight mail:		mark@markperison.com
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Boise, ID 83702		
<i>(Counsel for Intervenors)</i>		

COURTESY COPY TO:

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(Hearing Officer)

- U. S. Mail
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Christopher H. Meyer

## Attachment A Land Board Minutes – Tamarack Bay Lease



### **Idaho State Board of Land Commissioners**

Brad Little, Governor and President of the Board  
Lawrence E. Denney, Secretary of State  
Lawrence G. Wasden, Attorney General  
Brandon D Woolf, State Controller  
Sherri Ybarra, Superintendent of Public Instruction  
Dustin T. Miller, Director and Secretary to the Board

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*Be it remembered, that the following proceedings were had and done by the State Board of Land Commissioners of the State of Idaho, created by Section Seven (7) of Article Nine (IX) of the Constitution.*

Final Minutes  
State Board of Land Commissioners Regular Meeting  
April 16, 2019

The regular meeting of the Idaho State Board of Land Commissioners was held on Tuesday, April 16, 2019, in the Boise City Council Chambers, Boise City Hall, 3rd Floor, 150 N. Capitol Blvd., Boise, Idaho. The meeting began at 9:00 a.m. The Honorable Governor Brad Little presided. The following members were in attendance:

Honorable Secretary of State Lawrence Denney  
Honorable Attorney General Lawrence Wasden  
Honorable State Controller Brandon Woolf  
Honorable Superintendent of Public Instruction Sherri Ybarra

For the record, all Board members were present.

**1. Department Report** – Presented by Dustin Miller, Director

**Endowment Transactions**

- A. Timber Sales – March 2019
- B. Leases and Permits – March 2019

**Status Updates**

- C. Land Bank Fund
- D. Legislative Summary – Final

**Discussion:** None.

**2. Endowment Fund Investment Board Report** – Presented by Chris Anton, EFIB Manager of Investments

- A. Manager's Report; and
- B. Investment Report

**Discussion:** Mr. Anton reported that the endowment portfolio was up 1% for the month of March and was up 3.3% fiscal year-to-date, through March 31st. Over the last two weeks it gained another 2%; through April 15th it was up 5.3%. Mr. Anton added that the portfolio gained 10.1% during the first quarter of 2019, offsetting some of the losses experienced late in calendar year 2018—a nice rebound.

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State Board of Land Commissioners  
Final Minutes  
Regular Meeting (Boise) – April 16, 2019  
Page 1 of 9

Mr. Anton stated that the global economy is slowing, but there seems to be optimism in the financial markets that it is temporary and there will be a recovery in the second half of the calendar year, primarily due to support from the Federal Reserve. The Federal Reserve indicated there will be no further increase in interest rates this year. After the announcement, interest rates came down, and home construction and auto sales—very interest rate sensitive sectors—picked up again. Mr. Anton remarked that growth in Europe is very soft right now; there is concern about Brexit and what will happen in terms of Brexit. The trade negotiations in China are still ongoing, but investors seem to be patient. There will be positive outcomes from those negotiations. The financial markets are largely moving sideways until there is positive growth in the second half of the year, and until there is resolution to negotiations with China.

Mr. Anton indicated that distributions for fiscal years 2019 and 2020 are well secured. The estimated reserves as of February 28th are 5.8 years for Public School, and 6.3 to 8 years for the other endowments. Mr. Anton referenced the chart provided in the Board materials; it shows the level of earnings reserves for each of the endowments expressed in years of reserves. Earnings reserves move not just based on investments. They also change based on revenue coming in from the Department of Lands, and expenses going out for EFIB, or the Department of Lands, and for the beneficiaries. Overall the reserves are very solid.

Mr. Anton mentioned that the Investment Board had a special meeting on March 25th and approved the hiring of Sycamore Capitol as a mid-cap value manager in place of Systematic Financial; that transition was completed at the end of last week. Mr. Anton thanked Governor Little for the appointment of Tom Wilford to the Investment Board, replacing Gavin Gee, who was probably the longest-serving member. The Investment Board is excited to have Mr. Wilford. Mr. Wilford was the CEO for the J.A. and Kathryn Albertson Foundation for many years and he will add some strong experience to the Investment Board.

Mr. Anton noted that EFIB has been working on an investment consultant request for proposal (RFP). EFIB's policy is to issue an investment consultant RFP every 10 years. At this point, the scope of work includes investment consulting for EFIB and the State Insurance Fund, and includes a scope of services for the Idaho Department of Lands. The RFP is constructed so that those are three very distinct scopes of service. EFIB intends to distribute the RFP broadly, and interested companies can respond to all three pieces, or to individual pieces. There is not a need to select one consultant for all three entities, but there may be economies in doing so. EFIB has consulted with the State Insurance Fund and the Department of Lands. Both agencies reviewed the scope of services that are needed from an investment consultant. The RFP will be issued by the end of this week.

#### **Consent—Action Item(s)**

- 3. Transfer Old Penitentiary Parcel (Non-Endowment Land) to Idaho Department of Agriculture –**  
*Presented by Ryan Montoya, Bureau Chief-Real Estate Services; Dan Salmi, Bureau Chief, Bureau of Laboratories, ISDA; and Kelly Nielsen, Administration Administrator, ISDA*

**Recommendation:** Approve the transfer of control of the two acres, identified herein, of Penitentiary Reserve Lands to ISDA for the construction of a new laboratory.

**Discussion:** Superintendent Ybarra inquired if the City of Boise has been notified, given the proximity to the city park. Mr. Salmi replied that the City Parks Department was contacted and

staff concern was for a main water line at the back of the property, that caution be used so summer irrigation is not cut off. Governor Little asked if Department of Agriculture will be fixing roads to the facility. Mr. Salmi said yes, that project is now out for bid and will be contracted in the next couple of months. Controller Woolf mentioned that Department of Corrections had tending a garden plot on that parcel and asked about coordination with that agency. Mr. Salmi indicated that Department of Corrections had not yet been contacted, but he believed that garden was actually maintained by Department of Agriculture staff who then donated the produce to the food bank.

**4. Approval of Minutes – March 19, 2019 Regular Meeting (Boise)**

**Consent Agenda Board Action:** A motion was made by Controller Woolf that the Board adopt and approve the Consent Agenda. Attorney General Wasden seconded the motion. The motion carried on a vote of 5-0.

**Regular—Action Item(s)**

**5. FY2020 Timber Sales Plan – Presented by Jim Elbin, Bureau Chief-Forest Management**

**Recommendation:** Direct the Department to proceed with implementation of the FY20 Timber Sales Plan.

**Discussion:** Controller Woolf noticed that the recommendation for Maggie Creek's annual sale volume was significantly lower in FY20 than FY13. Mr. Elbin explained the difference was due to the Maggie Creek Pulp Plan, a ten-year plan which entailed harvesting high volumes of diseased trees and then replanting with healthy, productive tree species.

Governor Little asked how the 100-year sustained harvest forecast works, with different species and different silvicultural needs. Mr. Elbin responded that the Department models for each individual supervisory area, using either continuous forest inventory or stand-based inventory. Using forest modeling, the Department looks at growth projections for the future and standing inventory, and tries to determine how much volume, over what is growing, will be cut to bring the standing inventory down. At the same time, past management efforts result in more growth so there is a kind of push-pull relationship going on. The goal is to attain the balance where growth matches what is cut.

Attorney General Wasden recalled the Board made this decision to increase the cut rate because of aging timber that was beginning to exceed the sizes that were acceptable to the mills. Attorney General Wasden noted that what this evidence shows is the right decision was made. The Department is cutting timber at an increasing rate and yet growth rate is more than compensating for what is harvested. Mr. Elbin said that is correct. The Department is converting old stands that have reached a point in their growth where they are actually declining or very slowly growing, and is replacing old stands with super-fast growing stands. Mr. Elbin commented that it is a good problem to have.

Controller Woolf inquired if Department staff has a percentage of what is the growth of the cut rate, over the next 5-10 years. Mr. Elbin indicated it would be just a projection and estimated that annual harvest volume would be over 300 MMBF in the next five years.

Governor Little remarked that with programs like Good Neighbor Authority, there will be timber coming off grounds that have not been logged before, or not logged in a great number of years, and asked if the Department takes into account perpetuation of mills that have carriages for bigger logs. Mr. Elbin replied that the Department will likely never be able to accelerate harvest fast enough to get rid of all oversized timber; there will always be some segment of endowment forestland that is in that size class. Governor Little commented that having some oversized timber keeps those large carriage mills in business; those mills are essential in getting a return on the timber product from forest health projects such as Good Neighbor Authority.

**Board Action:** A motion was made by Attorney General Wasden that the Board adopt the Department recommendation and direct the Department to proceed with the implementation of the FY20 Timber Sales Plan. Controller Woolf seconded the motion. The motion carried on a vote of 5-0.

**6. Negotiated Rulemaking IDAPA 20.03.04, Rules for the Regulation of Beds, Waters, and Airspace Over Navigable Lakes in the State of Idaho – Presented by Andrew Smyth, Program Manager-Public Trust**

**Recommendation:** Authorize the Department to initiate negotiated rulemaking for IDAPA 20.03.04 Rules for the Regulation of Beds, Waters, and Airspace Over Navigable Lakes in the State of Idaho.

**Discussion:** Attorney General Wasden pointed out the discussion on page 2 of the memo about whether the fee schedule would remain in the rules or be moved to allow fees to be set by the Land Board. Attorney General Wasden acknowledged Idaho Code § 58-127; however, the Attorney General is not yet convinced that the fee setting can be removed from the rules, despite the current controversy concerning rules. Attorney General Wasden wondered if the Department had discussed with the Office of the Attorney General the legality, the legal structure properly required, concerning the setting of those fees. Mr. Smyth responded that the Department is working with the Attorney General's staff on the legality. Attorney General Wasden noted that discussing it is one thing, proposing it is another, and asked the Department to make certain to fit the legal requirements in the rulemaking process.

Controller Woolf inquired when was the last time the fees listed at the bottom of page 1 were adjusted or changed, and if the change was up or down. Mr. Smyth replied the last time was 2008 and said the water intake line permit fee was actually adjusted down from \$1,000 to \$300.

**Board Action:** A motion was made by Attorney General Wasden that the Board adopt the Department recommendation and authorize the Department to initiate negotiated rulemaking for IDAPA 20.03.04 Rules for the Regulation of Beds, Waterways, and Airspace Over Navigable Lakes in the State of Idaho. Controller Woolf seconded the motion. The motion carried on a vote of 5-0.

**7. Negotiated Rulemaking IDAPA 20.03.03, Rules Governing Administration of the Reclamation Fund – Presented by Todd Drage, Program Manager-Minerals**

**Recommendation:** Authorize the Department to initiate negotiated rulemaking for IDAPA 20.03.03 *Rules Governing Administration of the Reclamation Fund*.

**Discussion:** Attorney General Wasden reiterated his concern about the fee issue and advised the Department to make certain to meet statutory requirements when addressing the fees. Mr. Drage assured the Attorney General that the Department would coordinate with his office.

**Board Action:** A motion was made by Controller Woolf that the Board authorize the Department to initiate negotiated rulemaking for IDAPA 20.03.03 *Rules Governing Administration of the Reclamation Fund*. Attorney General Wasden seconded the motion. The motion carried on a vote of 5-0.

**8. Cancellation of Reclamation Plan S01020 and Use of the Bond Assurance Fund for Reclamation – Presented by Todd Drage, Program Manager-Minerals**

**Recommendation:** Authorize the Department to cancel Reclamation Plan S01020, and authorize the Department to expend up to \$126,997 from the Reclamation Fund to reclaim the entire site.

**Discussion:** Attorney General Wasden questioned how the operator ended up mining 20 acres outside of the mine site. Mr. Drage surmised that is where the good sand and gravel was so the operator ignored the rules and went after it.

Superintendent Ybarra asked if the Department exhausted all possibilities of recovering money from Prime Earth, Inc. and its principals, to pay for this site's reclamation. Mr. Drage said the Department did look into it and his understanding is the company has been defunct for quite a while. Director Miller added that the Department worked with the Attorney General's office to try and collect from Prime Earth, Inc.; the company has disbanded and has no assets.

Governor Little observed that somebody has purchased this piece of ground and wants to develop it and asked if the Department is sure that after it pays to place dirt in the hole as part of the reclamation, it will not then be dug right back out again. Governor Little asked if the Department has given any consideration to speaking with the new owner, acknowledging the state's liability while working out a way to minimize the cost of site rehabilitation to the Department and still accommodate the owner's plans for the ground. Mr. Drage indicated that there has been no discussion with the new owner, but the Department could do so. Presently, the Department has developed a scope of work to reclaim per the reclamation plan, which is to smooth out the area, add top soil and then seed it. Governor Little speculated that the Department would add top soil and the developer would scrape it off.

**Board Action:** A motion was made by Attorney General Wasden that the Board adopt the Department recommendation and authorize the Department to cancel Reclamation Plan S01020, and authorize the Department to spend up to \$126,997 from the Reclamation Fund to claim the entire site. Controller Woolf seconded the motion. The motion carried on a vote of 4-1; Governor Little cast the opposing vote.

## Information

*Background information was provided by the presenter indicated below. No Land Board action is required on the Information Agenda.*

### 9. Strategic Reinvestment and Central Idaho Land Exchange – Presented by David Groeschl, Deputy Director and State Forester

**Discussion:** Superintendent Ybarra thanked Mr. Groeschl for the overview, saying it was very thorough, and wondered if the Department has an anticipated date for bringing the exchange back to the Board for approval, as mentioned in the presentation. Mr. Groeschl stated the Department's preference would be the next 2-3 months, to bring this forward to the Land Board for an action item. There is support needed still from key groups; if the Department does not feel that it can get that support, then the Land Board would be advised that staff is discontinuing efforts on this exchange.

Controller Woolf referred to page 3 of the memo, the last sentence in the summary says some groups have expressed support to move forward with a more formal land exchange process while others are outright opposed, and Attachment 7 is referenced. Attachment 7 is from Idaho County Commissioners who seem to be in the middle. Controller Woolf asked for clarification that Idaho County is not opposed right now, just in the middle. Controller Woolf also asked if there are others in support. Mr. Groeschl replied that Idaho County is interested simply in seeing the process move forward in a more formal process and is willing to continue engagement with the Department and others in that process. Mr. Groeschl said two groups have expressed outright opposition—Friends of the Clearwater, and Friends of the Palouse. Those organizations are opposed to any exchange proposal, regardless of the parties involved, and do not want to see any federal lands leave federal estate.

Controller Woolf commented that Attachment 5, which describes the exchange concept, identifies Idaho County as potentially receiving funds equal to five years' worth of property taxes, approximately \$500,000-\$600,000. Controller Woolf inquired if Clearwater County has tried to negotiate anything along that line. Mr. Groeschl stated that only about 1,800 acres of Western Pacific Lands in the Upper Lochsa are in Clearwater County and there was not a request to consider some sort of compensation. Idaho County made the request because of the significant amount of acreage coming off its tax roll.

Governor Little invited public comments from interested persons. Comments were received from the following:

Phil Lambert, Benewah County Commissioner: Mr. Lambert expressed concern about the Board's strategic reinvestment policy. Mr. Lambert said the plan is good but that it causes problems for counties. In the last two years, approximately 15,000 acres have come off tax rolls in Benewah County, which is detrimental to county health in the short term. Five northern counties affected by this exchange feel the same. The short-term effect is budgetary restriction and long-term it requires a tax shift. A tax shift dramatically increases taxes without an appropriate increase in services. Mr. Lambert noted that there is about 66,500 acres of state-owned land in Benewah County; taxes on that acreage would be approximately \$300,000. Public schools receive \$199,000 from endowments; the county is losing more than it is gaining. There is other land in the county not taxed—federal lands, tribal lands, Idaho Fish and Game land—the county receives payments in lieu of taxes for

those. Mr. Lampert indicated that if the state purchased another 20,000 acres, that would be about 20% of acres in Benewah County that are not taxed. Funds go to public schools and other entities, but very little comes to the county. If Benewah County Commissioners could have that land, according to Department of Lands' annual report, at \$46/acre net profit for timberland, that would be \$3 million into county coffers. As it stands, the county gets \$200,000; it is not fair to taxpayers. Mr. Lampert stated that Benewah County was not contacted prior to the last land purchase; commissioners were notified a month ago that Department of Lands purchased 12,500 acres and suddenly \$58,000 came off the tax rolls. The Land Board needs to consider ways to make counties whole.

**10. Stimson Request for Audience** – *Presented by Keith Williams, Vice President-Resources, Stimson Lumber Company*

**Discussion:** Mr. Williams, on behalf of Stimson Lumber Company, communicated concerns regarding the Department of Lands' policy of purchasing private timberlands as part of its reinvestment strategy. Stimson Lumber Company provided a letter with these concerns and additional information; the letter was included in the Board materials. Mr. Williams stated that Stimson Lumber Company is opposed to the scale of the reinvestment strategy as it places the state in direct competition with private investment and enterprise.

Governor Little invited public comments from interested persons. Comments were received from the following:

John Robison, Idaho Conservation League: Mr. Robison testified on behalf of Idaho Conservation League in support of the Department of Lands' purchase of 32,000 acres of private timberlands in north Idaho in December 2018. Idaho Conservation League supports the goals of the Central Idaho Land Exchange and wants to see the process move forward. Mr. Robison remarked that Idaho was granted 3.6 million acres of land at statehood to generate revenue for beneficiaries, including Idaho public schools; approximately 2.4 million acres remain today. In the last several decades, the Department of Lands has disposed of 167,000 acres in Benewah, Bonner, Boundary, Latah and Shoshone counties. It is reasonable for the Department of Lands to acquire private timberlands in those areas from a willing seller. Mr. Robison encouraged the Land Board to continue to work with affected counties to address concerns about tax shifts. Mr. Robison recognized that endowment lands are managed to maximize long-term financial returns, and not for the same multiple purposes as national forests, but said sustainably managed state timberlands can provide greater benefits for wildlife and recreationists than private properties that are developed. Mr. Robison referenced the Land Board's recreation policy that allows continued public recreation access on state endowment lands. Many private timberlands also allow public access, which is appreciated, but this privilege can be revoked at any time and has been in other areas. Mr. Robison noted that the Department of Lands has increased the capacity for forest restoration across forest boundaries by investing significantly in the Good Neighbor Authority and providing leadership in Idaho in the shared stewardship agreement with Regions 1 and Regions 4 of the Forest Service. Mr. Robison thanked Governor Little for his role in the upcoming Idaho Forest Restoration Partnership conference. The conference brings together members of local forest restoration collaboratives, from across the state, to learn how to work better with the Forest Service, and the Idaho Department of Lands, on increasing the pace and scale of forest and watershed restoration.

For the record, Governor Little commented that he was not a member of the Land Board at the time the policy was put in place and proposed that a subcommittee of the Land Board review the current situation. Governor Little noted that EFIB reported earlier in the meeting that a request for proposal for an investment consultant is being advertised, and also noted that \$200 million is a large sum of cash to be spending in a significant manner. Governor Little asked for volunteers to serve on a subcommittee of the Land Board to review the asset management plan [strategic reinvestment] going forward. Attorney General Wasden and Secretary of State Denney volunteered to serve on the subcommittee; Governor Little so ordered.

At 10:32 a.m. a motion was made by Attorney General Wasden to resolve into Executive Session pursuant to Idaho Code § 74-206(1)(f) to communicate with legal counsel for the Land Board to discuss the legal ramifications of and legal options for pending litigation, or controversies not yet being litigated but imminently likely to be litigated. Attorney General Wasden requested that a roll call vote be taken and that the Secretary record the vote in the minutes of the meeting. Controller Woolf seconded the motion. *Roll Call Vote: Aye:* Denney, Wasden, Woolf, Ybarra, Little; *Nay:* None; *Absent:* None.

Governor Little called for a short break before the Board convened in Executive Session.

#### **Executive Session**

- A. Idaho Code § 74-206(1)(f) - to communicate with legal counsel for the public agency to discuss the legal ramifications of and legal options for pending litigation, or controversies not yet being litigated but imminently likely to be litigated. The mere presence of legal counsel at an executive session does not satisfy this requirement. [Topic: Lease M500031]

At 11:09 a.m. the Board resolved out of Executive Session by unanimous consent. No action was taken by the Board during the Executive Session.

#### **Regular—Action Item(s)**

- 11. Lease M500031** – Presented by Darrell Early, Deputy Attorney General, Chief-Natural Resources Division, Office of the Attorney General

**Board Action:** A motion was made by Attorney General Wasden that the Land Board, one, rescind Lease M500031 on the basis that the Idaho Department of Lands failed to comply with constitutionally and legally required processes in issuing the lease. Two, direct the Idaho Department of Lands to prepare, market, and offer for lease at public auction the parcel of land subject to Lease M500031 in accordance with Idaho constitutionally, legally, and financially required processes. And, three, that the Department, with the assistance of the Office of the Attorney General, negotiate a mutually acceptable settlement with the current leaseholder to compensate the leaseholder for costs and expenses incurred by the leaseholder associated with the lease which were not otherwise addressed during the leasing process. Attorney General Wasden asked for the opportunity to address his motion, upon receiving a second. Controller Woolf seconded the motion.

Attorney General Wasden remarked that in the Board's review of this lease, the Board has to acknowledge that there were some mistakes made in the processes employed. The best thing for the Board to do is to rescind the lease and then to engage in proper processes that meet the

