

JUL 15 2019

BOISE, IDAHO

Christopher H. Meyer [ISB No. 4461]  
GIVENS PURSLEY LLP  
601 West Bannock Street  
P.O. Box 2720  
Boise, Idaho 83701-2720  
Office: (208) 388-1200  
Fax: (208) 388-1300  
chrismeyer@givenspursley.com

T. Hethe Clark [ISB No. 7265]  
Matthew J. McGee [ISB No. 7979]  
SPINK BUTLER, LLP  
251 E. Front Street, Suite 200  
Boise, ID 83702  
P.O. Box 639  
Boise, ID 83701  
Office: (208) 388-1000  
Facsimile: (208) 388-1001  
hclark@spinkbutler.com  
mmcgee@spinkbutler.com

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

**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.

**DECLARATION OF CHRISTOPHER H.  
MEYER**

CHRISTOPHER H. MEYER, under penalty of perjury, hereby declares and states as follows:

1. I am co-counsel for the above-captioned Petitioners and make this declaration based upon my personal knowledge and belief.
2. Attached hereto as Exhibit A beginning on page 6 is a true and correct copy of a letter from Tricia K. Soper to the Idaho Department of Lands, dated January 17, 2017.
3. Attached hereto as Exhibit B beginning on page 10 is a true and correct copy of the Petition For Declaratory Ruling and Complaint in the matter of *Idaho Retired Fire Fighters Association, et al. v. Public Employee Retirement Board*, dated November 24, 2015.
4. Attached hereto as Exhibit C on page 20 is a true and correct copy of an email exchange between James Piotrowski, counsel for the Idaho Retired Fire Fighters Association, and me, dated June 20, 2019.
5. Attached hereto as Exhibit D beginning on page 21 is a true and correct copy of the Idaho State Board of Land Commissioners' final minutes from its regular meeting on April 16, 2019 regarding Commercial Recreation Lease No. M500031 (Tamarack Bay).
6. Attached hereto as Exhibit E on page 30 is a true and correct copy of the letter from William J. Petzak (Area Supervisor, Idaho Department of Lands) to Robert Hamill (applicant for an encroachment permit for Cougar Island Association), dated February 5, 1991.
7. Attached hereto as Exhibit F beginning on page 31 is a true and correct copy of the Final Order issued by the State Board of Land Commissioners to WWBDA in the matter of Encroachment Permit Application No. L-95-S-683, dated April 28, 2017. I do not know why the footers to this two-page document do not match.

8. Attached hereto as Exhibit G beginning on page 33 is a true and correct copy of the Preliminary Order issued by the State Board of Land Commissioners to WWBDA in the matter of Encroachment Permit Application No. L-65-S-683, dated April 27, 2017. I do not know why the Preliminary Order identifies Application No. L-65-S-683 and the Final Order identifies Application No. L-95-S-683.

9. Attached hereto as Exhibit H beginning on page 50 is a true and correct copy of a memorandum from Legal Counsel to Director (Idaho Department of Lands) with the subject line "Hansberger – Dedication of Plat," dated August 18, 1981. Note that this document was found in the files of my law firm. For some reason, that copy contains only pages 1-5. I have requested counsel for the Land Board to provide a complete copy.

10. Attached hereto as Exhibit I beginning on page 55 is a true and correct copy of a memorandum from Bob Becker, Deputy Attorney General, to Bill Petzak, Area Supervisor, Payette Lakes, with the subject line "Dedicated Streets, Roads, etc. on Lands Adjacent to Payette Lake," dated January 21, 1987.

I declare under penalty of perjury pursuant to the law of the State of Idaho that the foregoing is true and correct to the best of my knowledge and belief.

DATED this 15th day of July, 2019.

GIVENS PURSLEY LLP

By   
Christopher H. Meyer

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

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 15th day of July, 2019, the foregoing (together with attachments or exhibits, if any) was filed, served, and copied as follows:

**DOCUMENT FILED:**

IDAHO DEPARTMENT OF LANDS  
c/o Renee Miller  
300 North 6<sup>th</sup> Street, Suite 103  
Boise, ID 83720-0050  
Facsimile: 208-382-7107

- U. S. Mail
- Hand Delivered
- Overnight Mail
- Facsimile (208-382-7107)
- E-mail

**SERVICE COPIES TO:**

Angela Schaer Kaufmann, Esq.  
Joy M. Vega, Esq.  
Deputy Attorney General  
Natural Resources Division  
OFFICE OF THE ATTORNEY GENERAL  
P.O. Box 83720  
Boise, ID 83720-0010

- U. S. Mail
- Hand Delivered
- Overnight Mail
- Facsimile (208-854-8072)
- E-mail:  
angela.kaufmann@ag.idaho.gov  
joy.vega@ag.idaho.gov

Hand delivery or overnight mail:  
700 W State St, 2nd Floor  
Boise, ID 83702  
*(Counsel for Respondent)*

Mark D. Perison, Esq.  
Tricia K. Soper, Esq.  
MARK D. PERISON, P.A.  
P.O. Box 6575  
Boise, ID 83707-6575

- U. S. Mail
- Hand Delivered
- Overnight Mail
- Facsimile (208-343-5838)
- E-mail:  
mark@markperison.com  
tricia@markperison.com

Hand delivery or overnight mail:  
314 South 9th Street, Ste. 300  
Boise, ID 83702  
*(Counsel for Intervenors)*

COURTESY COPY TO:

Jim Jones, Esq.  
PARSONS BEHLE & LATIMER  
800 W Main St, Ste 1300  
Boise, ID 83702  
(Hearing Officer)

- U. S. Mail
- Hand Delivered
- Overnight Mail
- E-mail jimjones@parsonsbehle.com



Christopher H. Meyer

**Exhibit A**

**LETTER FROM TRICIA K. SOPER TO THE IDAHO DEPARTMENT OF LANDS, DATED JANUARY 17, 2017**

MARK D. PERISON, P.A.  
ATTORNEY AT LAW

---

TRICIA K. SOPER  
tricia@markperison.com

January 17, 2017

Scott Corkill  
Jasen King  
Idaho Department of Lands  
555 Deinhard Lane  
McCall, ID 83638

RE: Wagon Wheel Bay Dock Association, Inc.  
Application for Encroachment Permit for Payette Lake

Dear Mr. Corkill and Mr. King:

This office represents Wagon Wheel Bay Dock Association, Inc. ("WWBDA"), in their efforts to obtain an Encroachment Permit for a proposed community dock to be located at Community Beach Common Area located on Payette Lake, McCall, Idaho. To that end, my clients have put together their application packet, which I have enclosed with this letter.

As you know, my client's efforts to obtain a dock permit have been ongoing for some time. My client has now obtained approval from the Payette Lakes Cottage Sites Owners Association, Inc. ("PLCSOA"), after consultation with its attorney, Steve Milleman, to apply for the dock permit. To that end, PLCSOA has granted WWBDA a ten-year, renewable, non-exclusive lease of its littoral rights at Community Beach. The beach common area is owned by PLCSOA.

As you also may be aware, certain PLCSOA cottage site owners have expressed their displeasure over the Department granting any dock permit at this site. Specifically, these owners cite various deeds from 1998 and 2001 from the State of Idaho as "deeding" the littoral rights to common area beaches then owned by the State, to second tier cottage site owners. The actual language of the deeds states "with this deed goes a right of enjoyment and use in and to the common areas . . . beaches and all other common facilities of Amended Payette Lake Cottage Sites

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P O Box 6575 • Boise ID 83707 • 314 S 9th Street, Ste. 300 • Boise ID 83702  
office 208.331.1200 fax 208.343.5838 website www.markperison.com

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Subdivision and such right shall be appurtenant to and pass with the title to each lot.”

Certain cottage owners have interpreted this language as the State having actually deeded the “littoral rights” of Community Beach to them. However, a quick check of the Idaho Statutes does not bear this out. “Littoral rights” is a defined term under Idaho statutes, and is defined to mean:

only the rights of owners or lessees of land adjacent to navigable waters of the lake to maintain their adjacency to the lake and to make use of their rights as riparian or littoral owners or lessees in building or using aids to navigation but does not include any rights to make any consumptive use of the waters of the lake.

Idaho Code § 58-1302(f). In other words, a littoral right is the right to access the lake, and it belongs to the owner of the property adjacent to the lake. As of April 23, 2014, the owner of Community Beach became PLCSOA.

The language of these prior deeds ensures the subdivision owners the “right of enjoyment and use in and to the common areas.” However, enjoyment and use are simply not the equivalent of the littoral rights to the common areas. In other words, “enjoyment and use” is clearly not the same as maintaining adjacency and access to the lake itself, which is the definition of littoral rights. Essentially, this language simply confirmed the cottage owners’ right to continue enjoying and using *the State’s* littoral rights to the common beach areas.

This interpretation also makes sense historically. Before the State of Idaho divested itself of all common areas and conveyed the same to PLCSOA in 2014, the State owned the common areas, including common area beaches and their accompanying littoral rights. It makes no sense that the State would “convey” its littoral rights to certain cottage site owners in the deeds of 1998 and 2001, thereby severing its ownership of the land from its ownership of the littoral rights. There is also no evidence from this language that the State intended to somehow become a co-tenant or joint owner of the littoral rights with the cottage site owners, which would require consent of the cottage site owners for any decision regarding the littoral rights. Rather, the common sense interpretation is that the language in the deeds simply confirmed the fact that the cottage site owners in the surrounding subdivisions would retain their ability to use and enjoy the common areas then owned by the

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State. The prior deeds did not “convey” the littoral rights themselves, nor is there any reason to so interpret these deeds.

Not only does this interpretation make sense historically, the language of the deeds themselves is key. Nowhere in any of the deeds does the term “littoral (or riparian) rights” appear. This is important, because certainly, as the owner of lakefront common areas, the State would have been well aware of its ownership of the littoral rights to such lake frontage. If the State had intended to actually “convey” its littoral rights, it surely knew how to do so. The term “littoral rights” would have been used rather than simply the words “right of enjoyment and use.” This is especially true given that the State itself has defined the term “littoral rights” under statute.

Based on my analysis of Idaho statutes, regulations, and caselaw, I am confident that PLCSOA owns the littoral rights to Community Beach and is fully and legally empowered to grant a lease of such littoral rights. The willingness of PLCSOA, as advised by their attorney Steve Milleman, to so grant a Non-Exclusive Lease of littoral rights, and to consent to WWBDA’s application for the Encroachment Permit, further evidences the fact that PLCSOA believes, after due analysis, that it indeed has the authority to lease its littoral rights for Community Beach to WWBDA.

I am also confident that the proposed community dock complies with all statutory and regulatory requirements, and will in no way adversely affect adjacent cottage site owners. The proposed dock will be approximately 25 feet from the littoral line of the adjacent owner to the west, and 228 feet from the littoral line of the adjacent owner to the northeast. Further, because only the dock itself will be owned by WWBDA, and no portion of Community Beach itself will in any way be off-limits to the adjacent or second-tier cottage site owners, their right to the use and enjoyment of Community Beach will not be impacted at all.

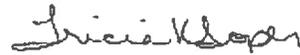
Given all of the above, WWBDA respectfully requests that the Department grant an Encroachment Permit for the proposed construction of its community dock. My client understands that in conjunction with being granted an Encroachment Permit, it will also be required to enter into a Submerged Lands Lease with the Department. My understanding is that the Department has a lease template that it will use, and that no separate application form for this lease is necessary. If my

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understanding is incorrect and my client needs to complete additional forms, please let me know.

Thank you for your consideration. If you receive any written objections to WWBDA's application, I would appreciate it if you would forward a copy to me. Feel free to contact me if you need any additional information to complete the application or if you have any questions.

Sincerely,



Tricia K. Soper

TKS/

**Exhibit B**

**PETITION FOR DECLARATORY RULING AND COMPLAINT IN THE  
MATTER OF THE *IDAHO RETIRED FIRE FIGHTERS ASSOCIATION, ET  
AL. V. PUBLIC EMPLOYEE RETIREMENT BOARD*, DATED NOVEMBER  
24, 2015**

Alan Herzfeld  
James M. Piotrowski  
Marty S. Durand  
HERZFELD & PIOTROWSKI, LLP  
P.O. Box 2864  
824 W. Franklin  
Boise, Idaho 83701  
Phone: (208)331-9200  
Facsimile: (208)331-9201

Attorneys for Petitioners

BEFORE THE PUBLIC EMPLOYEE RETIREMENT BOARD OF  
THE STATE OF IDAHO

IDAHO RETIRED FIRE FIGHTERS	)	
ASSOCIATION, SHARON KOELLING,	)	
and JOHN ANDERSON,	)	Case No. _____
	)	
	)	
Petitioners,	)	
	)	
v.	)	PETITION FOR DECLARATORY
	)	RULING AND COMPLAINT
PUBLIC EMPLOYEE RETIREMENT	)	
BOARD,	)	
	)	
Defendant.	)	
_____	)	

COME NOW the Petitioners, by and through counsel and Petition the Public Employee Retirement Board ("Board") for a declaration that the Board has and continues to violate the laws of the State of Idaho as shown herein, and for an order directing the payment of benefits to Fire Fighter Retirement Fund beneficiaries consistent therewith.

**I. Nature of the Case**

1. Petitioners, including an association of retired fire fighters and several Firefighter Retirement Fund ("FRF") benefit recipients allege herein, on behalf of all FRF recipients, that the Idaho Public Employee Retirement Board (to be precise, its staff) has unlawfully reduced the

benefits paid to FRF recipients. It has done so by including part-time firefighters in its calculations of average firefighter salaries in violation of the relevant statutes, and contrary to the clearly expressed intent of the Idaho legislature. Petitioners seek declaratory relief and an order directing the payment of FRF benefits at the appropriate rates.

## **II. Parties**

2. Plaintiff Idaho Retired Fire Fighters Association (hereafter “the Association”), is a non-profit corporation, registered and domiciled in the State of Idaho. The Association exists to serve the needs of Idaho’s retired fire fighters, providing education and advocacy to protect the pensions and benefits of retirees from the fire services in Idaho. The Association is a membership organization, with membership consisting of Idaho fire fighter retirees and beneficiaries.

3. Petitioners John Anderson and Sharon Koelling are individuals who reside in the State of Idaho. John Anderson is a retired fire fighter who receives FRF retirement benefits from the Public Employee Retirement Board as a result of his 25 years in the fire service employed by the City of Boise. Sharon Koelling is the surviving widow of Edward Koelling, and receives FRF retirement benefits as a result of Edward Koelling’s 25 years of fire service with the City of Boise.

4. The Retirement Board is the governing body of the Public Employee Retirement System of Idaho (“PERSI”). PERSI is a public fund created by the Idaho Legislature to manage pension funds, investments, and benefits for employees and former employees of the State of Idaho, municipalities, political subdivisions and other entities.

## **III. Facts and Background**

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5. The Firefighter's Retirement Fund (hereafter "FRF") was established by the Idaho Legislature in 1945 and codified in Title 72, Chapter 14, Idaho Code. The creation of a fund to provide for pensions and disability payments to Idaho's fire fighters was "declared to be a public purpose" and one that would advance "the protection and conservation of property and lives and essential to the maintenance of competent and efficient personnel in fire service." I.C. 72-1401. From 1945 until 1980, the State Insurance Fund operated the FRF to provide pensions and disability benefits for Idaho's fire fighters.

6. In 1976, facing high inflation rates, a changing workplace and the resultant devaluation of pensions, the Idaho Legislature provided for an annual Cost of Living Adjustment ("COLA"). The newly codified section 72-1471 specified that beneficiaries would "be entitled to receive adjustments to such benefits, calculated on the percentage of increase or decrease in the average paid firefighter's salary or wage, in this state, as computed under the terms of section 72-1431, Idaho Code."

7. By 1979, the Legislature had concluded that maintaining two separate retirement systems for Idaho's public employees was inefficient, and passed legislation to merge the Firefighter's Retirement Fund into PERSI, effective October 1, 1980. The Legislature ensured however, that fire fighters who had begun employment under the FRF system were fully protected in the merger with PERSI, specifying that their "rights and benefits . . . shall not be less than the rights and benefits they would have received from the firefighters' retirement fund, had the fund not been integrated with the employee system." I.C. §59-1397.

8. From 1976 until 1980, the State Insurance Fund implemented FRF COLA increases by calculating the average salary or wages of full time, paid firefighters in the state of Idaho, and ensuring that retirees received a similar adjustment. This practice was consistent with both the

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COLA statute which required COLAs to match the adjustments earned by “paid firefighters,” I.C. §72-1471, and the definitions section of the FRF statute which defined “paid firefighter” as any individual employed by a city or fire district “who devotes his or her principal time of employment to the care, operation, maintenance or the requirements of a regularly constitute fire department.” I.C. §72-1403(A).

9. From October 1, 1980 until approximately 2009, PERSI and the Retirement Board implemented COLA increases for former FRF beneficiaries based on the average salary or wages of full time, paid firefighters employed in FRF covered fire departments, just as FRF had done. This practice was consistent both with the FRF statutes, as well as with Idaho Code §59-1397 (requiring that former FRF participants receive the same benefits they would have under the FRF) and with Idaho Code §59-1391(f) which defined paid firefighter in terms almost identical to the definition in §72-1403(A).

10. The Retirement Board bases its COLA calculations on pension contribution reports received from fire departments around the state. On information and belief, in 2009, the City of Lewiston began including in its reports part-time fire department employees known as “reservists.” The City of Lewiston reported such “reservists” because it believed they met the definition of “employee” under PERSI.

11. Beginning in 2009, PERSI staff included these part-time workers in their calculation of “the percentage of increase or decrease in the average paid firefighter’s salary or wage” to determine the annual COLA for FRF retirees and beneficiaries. I.C. §72-1471. The inclusion of part-time workers effectively reduced the COLAs received by FRF retirees and beneficiaries. The part-timers both increased the number of alleged “paid firefighters” and diluted the total wages earned because of their part-time status.

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12. The inclusion of part-time workers in the calculation of COLAs received by FRF retirees and beneficiaries has resulted in a reduction of benefits retirees and beneficiaries would otherwise have received. The 2013 COLA (which applied to benefits paid in 2014) for FRF retirees was 2.482%. Had part-time reservists from the Lewiston Fire Department not been included, the COLA would have been approximately 3.344%. The effect on FRF retirees and beneficiaries was a loss of over \$250,000 for that year alone. On information and belief, COLAs have been reduced by inclusion of part-time reservists each year since 2009.

13. The FRF is fully funded and in no danger of default.

#### **CLASS ACTION ALLEGATIONS**

14. Petitioners plead this case on behalf of all similarly situated FRF retirees and beneficiaries, including those receiving regular retirement benefits, spousal/survivor benefits, and disability retirement benefits, during the period from 2009 to the present.

15. While PERSI is capable of determining the precise number of individuals that make up the proposed class, it is in excess of five hundred, and it would be highly inefficient as well as impractical to join each of them individually in one case, or to have each of them bring their own case. Such an approach would, in any event, serve no purpose whatsoever, as each of the members of the proposed class has the same relationship with PERSI and the Retirement Board, and would have no personal interest in achieving any different outcome than the rest of the proposed class.

16. The listed, individual Petitioners Koelling and Anderson have claims that are typical of the claims of all other FRF retirees and beneficiaries. Because they seek to improve COLAs for all retirees, they have no legal or factual conflicts of interest with the proposed class of all FRF retirees and beneficiaries.

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17. The Idaho Retired Firefighters Association is an organization that exists for the sole and express purpose of representing Idaho fire service retirees and beneficiaries with respect to their retirement and disability benefits. The Association and the named Petitioners have secured competent counsel, and are capable of vigorously asserting the rights of the proposed class.

18. The COLA provisions of Idaho Code 72-1471 affect all retirees identically and, as a result, this case presents questions of law and fact that are common to all FRF retirees and beneficiaries. These common questions of fact and law include:

- a. Whether the inclusion of part-time, reserve officers in the calculation of COLAs effectively reduced the benefits received by FRF retirees and beneficiaries;
- b. Whether part-time, reserve officers are “paid firefighters” within the meaning of Idaho Code Section 72-1471;
- c. Whether the “the average paid firefighter’s salary or wage,” as that term is used in Idaho Code 72-1471 incorporates and/or utilizes the definition of “paid firefighter” in I.C. §72-1403(A);
- d. Whether part-time employees are “paid firefighters” within the meaning of I.C. §72-1403(A);
- e. Whether the inclusion of part-time employees in the calculation of the average paid firefighter’s salary or wage for purposes of COLAs violates the requirements of Idaho Code §59-1397 requiring maintenance of benefits as if FRF had not been merged with PERSI;
- f. The amount by which PERSI has understated and underpaid FRF benefits based on any improper calculation of COLAs;
- g. The number of years during which PERSI has understated and underpaid FRF benefits as a result of improper calculation of COLAs;

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h. The relevant remedial period for which the Industrial Commission is empowered and able to order a remedy.

19. The common questions of law and fact are actually the predominant questions presented in this case, with the only individualized questions being those relating to the extent of remedy that should be ordered for each retiree. Such individualized questions will be merely mathematical problems once the common questions of law and fact are resolved.

20. The Board should address the questions raised on behalf of the entire class, rather than piecemeal.

#### **DECLARATION SOUGHT**

21. Petitioners previously sought informal relief from the Director and the Board, asking that it calculate COLAs for FRF retirees and beneficiaries without including part-time firefighters from the City of Lewiston (or any other fire department to the extent that any other includes them). The Board denied relief and determined that it would continue to include part-time firefighters in its calculation of the COLAs under the FRF, as long as those part-time firefighters constituted “employees” under PERSI rules, and regardless of whether they also met the definition of “paid firefighter” as required by I.C. §72-1471. Petitioners are now forced to seek said relief via this method.

22. To qualify as an employee under PERSI, a person must “normally work twenty hours or more per week for an employer” for at least five consecutive months. I.C. §59-1302(14). PERSI Rule 113 provides that a person meets the “normally work twenty hours or more per week” requirement if he or she “works twenty hours or more per week for more than half of the weeks during the period of employment being considered.” IDAPA 59.01.02.113. Since

firefighters routinely work shifts of 24 hours, a single shift per week, during 11 weeks out of every five months would qualify a person as an “employee.”

23. PERSI’s method of calculating the average wages of paid firefighters violates the requirements of Idaho Code §72-1471 which requires that COLAs be calculated on the basis of the compensation paid to “paid firefighters,” which term is defined by Idaho Code §72-1403 as including only those career firefighters whose “principal time of employment” (I.C. 72-1403(A)), “principal means of livelihood” (I.C. 72-1403(D)&(H)), and/or “principal gainful occupation” (I.C. 72-1403(E)) was as a firefighter with an Idaho city or fire district. The determination also violates the requirements of Idaho Code §59-1397 which requires that PERSI ensure that FRF retiree benefits be no less than they would be if the FRF had never been integrated into PERSI. Since the FRF never adopted, and would thus not have applied the definition of “employee” that the Retirement Board uses for PERSI purposes (and which has no place in the structure of the FRF benefit system), the Retirement Board has set benefits at a rate lower than they would have been set by FRF.

24. Petitioners seek a declaration that COLAs have been improperly calculated by including part-time firefighters in the calculation of paid firefighter salaries or wages, that the miscalculation has unlawfully reduced COLAs, and that PERSI must recalculate COLAs since 2009 (or whenever such miscalculation first began), and must in the future exclude part-time workers who do not meet the definition of paid firefighter when calculation the average salary or wages of paid firefighters for purposes of determining the annual COLA.

#### **Other Relief Sought**

25. Petitioners Anderson and Koelling, along with all members of the proposed class have each suffered a reduction in their benefits as a result of the PERSI staff’s COLA calculation

method, in comparison to the benefits they would have received if the FRF were not merged with PERSI, or if I.C. §§72-1471, 1403 and 59-1397 were properly applied.

26. The petitioners, as well as all class members, had their rights to FRF benefits fully vested prior to the determination to change the manner in which PERSI calculated COLAs. As a result, the modification of the method of calculating COLAs constitutes an unlawful, unconstitutional impairment of contract in violation of Article I, Section 16 of the Idaho Constitution and of Article I, Section 10 of the United States Constitution.

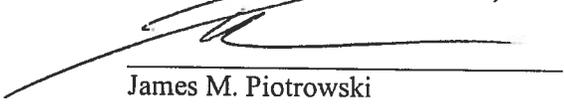
27. On behalf of the proposed class, Petitioners seek an order awarding additional benefits for the period from 2009 to the present for all class members, and that the Retirement Board make such payment based upon new COLA calculations for each year, all in amounts to be proved.

WHEREFORE, Petitioners petition for relief as follows:

- a. For a declaration as set forth above;
- b. For an order directing the that COLAs be calculated in a manner consistent with the statutory definitions and requirements;
- c. For an order directing payment of back benefits pursuant to the recalculated COLAs;
- d. For an award of attorney fees and costs;
- e. For all other and further relief the Board deems appropriate.

DATED this 24<sup>th</sup> day of November, 2015.

~~HERZFELD & PIOTROWSKI, LLP~~

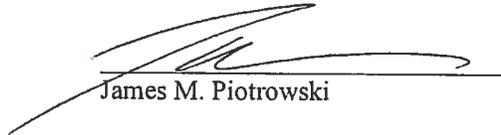


James M. Piotrowski  
Attorneys for Petitioners

**CERTIFICATE OF SERVICE/FILING**

I hereby certify that on this the 24<sup>th</sup> day of November, 2015, I caused the foregoing Petition and Complaint, along with two copies of the same, to be mailed via first class mail, postage prepaid to the following:

Don Drum, Executive Director  
Public Employee Retirement System of Idaho  
607 N. 8<sup>th</sup> Street  
Boise, Idaho 83702

  
James M. Piotrowski

**Exhibit C**

**EMAIL FROM JAMES PIOTROWSKI, COUNSEL FOR THE IDAHO  
RETIRED FIRE FIGHTERS ASSOCIATION, DATED JUNE 20, 2019**

**From:** [James Piotrowski](#)  
**To:** [Christopher H Meyer](#)  
**Subject:** RE: Idaho Retired Fire Fighters Case [IWOV-GPDMS.FID862156]  
**Date:** Thursday, June 20, 2019 12:51:43 PM

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That's exactly right. And in the prayer, we specifically request recalculation of "back benefits."

**From:** Christopher H Meyer  
**Sent:** Thursday, June 20, 2019 12:47 PM  
**To:** James Piotrowski ; Matthew J. McGee, Esq. (MMcGee@spinkbutler.com)  
**Cc:** John Bunn  
**Subject:** RE: Idaho Retired Fire Fighters Case [IWOV-GPDMS.FID862156]

Thank a million, Jim!

As I read paragraph 24, this shows that the Firefighters sought the recalculation back to "2009 (or whenever such miscalculation first began)" in order to ultimately enable payment of the underpaid benefits since that time. Do I have this right?

-Chris

Cc: Co-counsel and my assistant  
CHRISTOPHER H. MEYER

Givens Pursley llp

[chrismeyer@givenspurslev.com](mailto:chrismeyer@givenspurslev.com) / [www.givenspurslev.com](http://www.givenspurslev.com)

**From:** James Piotrowski <[james@idunionlaw.com](mailto:james@idunionlaw.com)>  
**Sent:** Thursday, June 20, 2019 12:41 PM  
**To:** Christopher H Meyer <[ChrisMeyer@givenspurslev.com](mailto:ChrisMeyer@givenspurslev.com)>  
**Subject:** Idaho Retired Fire Fighters Case

Chris,

Take a look at paragraph 24, as well as the prayer for relief. I think it has exactly what you need.

James Piotrowski

**Exhibit D**

**IDAHO STATE BOARD OF LAND COMMISSIONERS FINAL MINUTES  
FROM ITS REGULAR MEETING ON APRIL 16, 2019**



**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

*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.

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 tilled 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



Exhibit E

LETTER FROM WILLIAM J. PETZAK TO ROBERT HAMILL, DATED  
FEBRUARY 5, 1991

IDAHO DEPARTMENT OF LANDS

PAYETTE LAKES AREA OFFICE  
P.O. BOX 45  
McCALL, IDAHO 83638  
(208) 634-7125

STANLEY F. HAMILTON  
DIRECTOR

RECEIVED

MAY 10 1991

Givens, Pursley, Webb &  
Huntley

February 5, 1991

Robert Hamill  
200 N. 6th St.  
Boise, ID 83702

Dear Mr. Hamill:

We have completed advertisement of your encroachment application. This office has received several letters from owners of property in the subdivision surrounding the site of the dock proposal.

I have reviewed the comments made and in light of these and after review of our obligations to owners within the subdivision the Department must deny your application to install a dock on this access site.

The question came down to ownership and it appears there was an oversight in this office on that point. The ownership of the riparian rights to that access site belong in part to the owners of secondary lots within the adjacent subdivision and thus we cannot issue you a permit and lease without their agreement.

I believe we are at fault for not researching this matter more thoroughly before accepting your application, fee and ordinarily this is not refundable but I am asking that your permit fee be refunded.

I apologize for any inconvenience this oversight has caused you.

If you have any questions concerning this matter please contact this office.

Sincerely,



WILLIAM J. PETZAK  
Area Supervisor

WJP/sk

KEEP IDAHO GREEN  
PREVENT WILDFIRE

**Exhibit F**

**FINAL ORDER RE ENCROACHMENT PERMIT APPLICATION NO. L-95-S-683, ISSUED TO WWBDA, DATED APRIL 28, 2017**

BEFORE THE STATE BOARD OF LAND COMMISSIONERS  
STATE OF IDAHO

In the Matter of:	)	
	)	
Encroachment Permit Application	)	<b>FINAL ORDER</b>
No. L-95-S-683.	)	
	)	
Wagon Wheel Bay Dock Association, Inc.-	)	
Applicant.	)	

**I. NATURE OF PROCEEDINGS/ISSUES**

Encroachments, including docks, placed on navigable waters require a permit issued by the Idaho Department of Lands (IDL) pursuant to the requirements of the Lake Protection Act, Title 58, Chapter 13, Idaho Code, and the corresponding administrative rules promulgated by the State Board of Land Commissioners, IDAPA 20.03.04, Rules for the Regulation of Beds, Waters and Airspace over Navigable Lakes in the State of Idaho.

On January 18, 2017, Wagon Wheel Back Dock Association, Inc. (Applicant), applied for an encroachment permit for an eight-slip community dock on Payette Lake. A public hearing was held on March 29, 2017 in McCall, Idaho. Andrew Smyth served as Hearing Coordinator. The Hearing Coordinator issued his Findings of Fact, Conclusions of Law, and Recommendation (Recommendation) on April 27, 2017.

My responsibility is to render a decision pursuant to Idaho Code § 58-1306(c) and IDAPA 20.03.04.030.07 on the behalf of the State Board of Land Commissioners based on the record reviewed in the context of my personal expertise gained through education, training, and experience. In making this determination I have relied on the record for this matter. Specifically,

- I have read the transcript of the public hearing conducted in McCall, Idaho on March 29, 2017.
- I have reviewed the record including all documents and exhibits.
- I have examined the Hearing Coordinator's Recommendation in light of the entire record.

**II. FINDINGS OF FACT**

I concur with the Findings of Fact presented by the Hearing Coordinator.

**III. CONCLUSIONS OF LAW**

I concur with the Conclusions of Law presented by the Hearing Coordinator.

**IV. FINAL ORDER**

I conclude the Hearing Coordinator's Recommendation is based on substantial evidence in the record, and I adopt the Recommendation as my decision in this matter. The Recommendation is incorporated by reference herein and attached to this Final Order. The Applicant is qualified to make application for an encroachment permit for a community dock in Payette Lake, and the proposed encroachment is in conformance with the applicable standards.

On the basis of the record, it is my order that Encroachment Permit No. L-95-S-683 is approved by IDL contingent upon WWBDA continuing to hold the required littoral rights. In addition, as long as the lease between PLCSOA and WWBDA remains in effect, no other individual or entity is qualified to make application for an encroachment permit for the Community Beach.

This is a final order of the agency. Pursuant to Idaho Code § 58-1306(c) and IDAPA 20.30.04.030.09, the Applicant or any aggrieved party who appeared at the hearing shall have the right to have the proceedings and Final Order reviewed by the district court in the county in which the encroachment is proposed by filing a notice of appeal within thirty (30) days from the date of this Final Order. Because this Order is for approval of a permit, any party appealing this Final Order must file a bond with the district court in accordance with Idaho Code § 58-1306(c).

DATED this 28<sup>th</sup> day of April, 2017.

  
\_\_\_\_\_  
THOMAS M. SCHULTZ, JR.  
Director, Department of Lands

**Exhibit G**

**PRELIMINARY ORDER, RE ENCROACHMENT PERMIT APPLICATION  
NO. L-65-S-683, ISSUED TO WWBDA, DATED APRIL 27, 2017**

**BEFORE THE STATE BOARD OF LAND COMMISSIONERS  
STATE OF IDAHO**

In the Matter of:	)	
	)	Case No. PH-2017-PUB-50-001
Encroachment Permit Application	)	
No. L-65-S-683	)	<b>PRELIMINARY ORDER</b>
	)	
Wagon Wheel Bay Dock Association, Inc.	)	
Applicants.	)	
_____	)	

**I. BACKGROUND**

On January 18, 2017, the Idaho Department of Lands (“IDL”) received an encroachment permit application (“Application”) from Wagon Wheel Bay Dock Association, Inc. (“WWBDA”). IDL assigned number L-65-S-683 to the Application. In the Application, WWBDA seeks authorization to construct a community dock that would extend 100 feet beyond the ordinary high water mark of Payette Lake, total 1,520 square feet of surface decking area and provide 8 private moorages to the members of WWBDA. Agency Record (“AR”), Doc. 3.

On January 18, 2017, IDL provided notice of the Application to various government agencies as well as the adjacent littoral owners. AR, Doc. 6. IDL also caused a notice of application to be published in The Star-News (a newspaper local to the McCall area) on January 19 and 26, 2017, pursuant to Idaho Code § 58-1306(b). AR, Doc. 9.

On January 27, 2017, IDL received an objection to the Application and a request for hearing from Zephaniah and AnnMarie Johnson. AR, Docs. 5 and 6. IDL ultimately received approximately seventy-six objections to the Application (*see* Exhibit A hereto). Because it received an objection and request for hearing, on March 2, 2017, IDL ordered a hearing regarding this matter pursuant to Idaho Code § 58-1306(c). WWBDA’s counsel requested that the hearing date be changed, and several people filed objections to moving the hearing date. AR,

PRELIMINARY ORDER – PAGE 1

Docs.11-12,17, 19-20, 22 and 25. WWBDA's President, Kevin Hannigan, ultimately requested that the original hearing date be retained. AR, Doc. 27.

On March 29, 2017, IDL held a public hearing regarding this matter pursuant to Idaho Code § 58-1306(c). At the hearing, Mr. Hanigan presented testimony in support of the Application, including reading a letter of support from the President of the Payette Lakes Cottage Site Owners Association ("PLCSOA"). David Shuss testified in favor of the Application. Mark Billmire presented neutral testimony on behalf of the McCall Fire Protection District. Zepheniah (Zeke) Johnson, AnnMarie Johnson, Don Copple, Steven Ryberg, John Dahl, Eizelle Taino, Andrea Umbach, Don Johnson, Donna Jacobs, Diane Bagley, Crane Johnson, Marlee Wilcomb, Yvonne Sandmire, Stephanie Dahl, Matt Dahl, and Kathleen Worthy Dahl testified in opposition to the Application. Mr. Hannigan presented rebuttal testimony. Hearing Transcript ("Tr.").

## II. FINDINGS OF FACT

1. In 1932, the State Board of Land Commissioners ("Land Board") recorded subdivision plats for endowment properties on the west side of Payette Lake. The plats included language by which the Land Board purported to "donate and dedicate the streets roads alleys commons and public grounds shown on [the] plats to the use of the public forever." AR Doc. 105.

2. On January 28, 2015, the State Board of Land Commissioners executed an Amended Quitclaim Deed, State Deed No. SD13867 ("2015 Deed") to the Payette Lakes Cottage Sites Owners Association, Inc. ("PLCSOA"). AR, Doc. 106. The 2015 Deed, which was issued without warranty or covenant of title, included the "Community Beach Common Area" located

PRELIMINARY ORDER – PAGE 2

in Lot 1, Block 2 of the SW Payette Cottage Sites Subdivision (“Community Beach”), which is the littoral property associated with this Application.

3. The 2015 Deed specifically provides that:

The Grantor, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, does hereby convey, release and quitclaim unto Grantee, without warranty or covenant of title, and subject to the reservations and conditions specifically set forth herein, all of Grantor’s right, title and interest in and to the following described real property . . .

AR, Doc. 105. The Community Beach lot is listed as one of the lots conveyed via quitclaim deed from the State to PLCSOA.

4. PLCSOA consists of approximately 225 members who own property within the greater neighborhood. Tr., pp. 30, 63.

5. WWBDA consists of eight members who are also members of the PLCSOA. Tr. pp. 7-8.

6. WWBDA is incorporated as a non-profit corporation under the laws of the State of Idaho. AR, Doc. 3.

7. Historically, and through the present time, owners or lessees of property in the vicinity of the Community Beach, as well as their families, guests, and lessees, and members of the general public, have swam, fished, and boated in the location of the proposed dock. *See, e.g.*, AR, Docs 23, 32, and 44.

8. WWBDA submitted into the record a “Memorandum of Lease” between itself (and its individual members) and PLCSOA. AR, Doc 3. The Memorandum of Lease provides, in part, that:

On January 12, 2017, PLCSOA and WWBDA, along with the individual members of WWBDA, entered into a Non-Exclusive Lease Agreement, wherein PLCSOA granted WWBDA and its individual members a non-exclusive lease of

PRELIMINARY ORDER – PAGE 3

PLCSOA's littoral rights for certain property located on Payette Lake, McCall, Valley County, Idaho, for the purpose of constructing a community dock.

The property is commonly referred to as the "Community Beach Common Area" and is more particularly described as Lot 1, Block 2 of the State Subdivision-Southwest Payette Cottage Sites Subdivision as the same is filed of record with the Office of Recorder of Valley County, Idaho.

PLCSOA has also consented to WWBDA seeking an Encroachment Permit from the Idaho Department of Lands for construction of the community dock.

*Id.*

9. Between January 27 and March 29, 2017, IDL received approximately 76 objections to the Application. *See* AR, Docs. 5-6, 13-16, 18, 21, 23-24, 26, 28-52, 55-62, 64-85, 89-92 and 94-98. The concerns of the various objectors can be summarized as follows:

- a. There is no parking area for the dock, and dock users would end up parking along streets in the neighborhood.
- b. Parking and/or traffic would block fire hydrants in the neighborhood.
- c. Increased traffic would adversely affect pedestrian safety in the neighborhood.
- d. The depth of the lake at the location of the dock is too shallow to support boat traffic.
- e. The dock and use of the dock would interfere with littoral owners' enjoyment of their property.
- f. The dock and increased boat traffic would interfere with swimming, nonmotorized boating and similar activities in the area.
- g. Increased boat traffic could also interfere with aquatic habitat, and lead to beach erosion.
- h. There are no public restroom facilities, and there would be problems with human waste and litter.
- i. WWBDA members should use existing marinas.
- j. The community dock and its usage would adversely affect property values of lakefront owners in the vicinity.

10. WWBDA presented an exhibit which indicated that there are approximately 43-45 total lots in the PLCSOA neighborhood, and that of those owners, only eight objected to the Application. AR, Doc. 101.

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11. As set forth in the Application, the proposed dock structure would include a 10' x 6' pier; a 6' x 22' ramp; a 6' x 66' walkway; four dividers, 4' x 20' each, and a 6' x 102' dock, totaling 1,520 square feet. AR, Doc. 3.

12. As further set forth in the Application, the proposed structure will include up to sixteen posts, and will extend approximately 100 feet beyond the high water line. *Id.*

13. The dock will be 25 feet from the littoral right line of the neighboring lot to the southwest (which is owned by Zephaniah Johnson), and 228 feet from the littoral right line of the neighboring lot to the northeast (which is owned by Cottage Site LLC). *Id.*

14. The Community Beach includes approximately 345 feet of shoreline frontage, although the mouth of a creek takes up a portion of the shoreline. AR, Doc. 101.

15. IDL submitted copies of the Application to the Idaho Department of Fish and Game, the Idaho Department of Health and Welfare, the Idaho Department of Environmental Quality ("DEQ"), the Army Corps of Engineers, Valley County Planning and Zoning, Idaho Department of Water Resources, Central District Health, the City of McCall, Payette Lake Recreational Water and Sewer District, as well as the adjacent landowners (Zephaniah Johnson and Cottage Site, LLC). AR, Doc. 6.

16. DEQ does not review projects on a project-specific basis, but did provide general comments. AR, Doc. 4. No other state agency provided comments.

17. Marlee Wilcomb, one of the Objectors in this matter, also provided a copy of the Application to the Army Corps of Engineers, which indicated that it would issue a permit for the discharge of roughly two cubic yards of concrete and one cubic yard of lake bed material below the summer pool of Payette Lake. AR, Doc. 8. The Army Corps further indicated that if

PRELIMINARY ORDER – PAGE 5

construction of the dock impacts a wetland, WWBDA would need to obtain a permit for those activities. *Id.*

18. Cutler Umbach, one of the Objectors in this matter, contacted McCall Fire & EMS about the proposed application. Mark Billmire, who is the Fire Chief for McCall Fire & EMS, sent correspondence to IDL, in which he stated, in pertinent part:

My interest/concern and involvement has nothing to do with building the dock, but rather maintaining access to the dry hydrant so that fire apparatus can use it to draft water from the lake in the event of a fire. The closest city hydrant is back up the road near Pilgrim Cove Camp, making this dry hydrant a critical water supply should a structure fire or wildland fire ever occur in the PLCSOA area.

AR, Doc. 7.

19. At the hearing, Mr. Billmire further testified that:

I am neutral on the dock itself. I don't have a dog in that fight at all. My only concern is maintaining access to the dry hydrant that is in the proposed parking area for the dock. That is a dry hydrant that was installed to provide a water supply that could be drafted from the lake itself. The nearest hydrant is down next to Quaker Hill I believe so 2.5 miles away which would add significant time if we were in the process of fire protection or suppression. That is our only concern.

With drafting from a supply like that we have to be within 10 feet because of the hydraulics that are involved when drafting from the water. And we have to be parallel to where the hydrant is located. So we can't nose into it, we have to be parallel so that means that access around that has to allow for a fire engine to maneuver around and then pull up sideways to that in order to be able to draft from it. And we have to be within 20 feet because of the limitations of drafting. So that is my concern. As long as they meet those as far as where they're parking or allowing people to park and they maintain access to the hydrant I don't have any other concerns with that. . . .

Tr. pp. 19-20.

20. There are fish in Payette Lake in the vicinity of the proposed dock. There was testimony that deer, moose, bears, raccoons, foxes, beavers, osprey, songbirds, muskrats, ducks, geese visit the Community Beach or surrounding area. *See, e.g.*, Tr. p. 41, 57, and 60; AR Doc.

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99. There was no testimony or evidence that the wildlife, fish, or other aquatic life will in fact be adversely impacted by the proposed dock.

### III. ANALYSIS AND CONCLUSIONS OF LAW

1. The State of Idaho Board of Land Commissioners (“Board” or “Land Board”) is authorized to regulate, control, and permit encroachments in, on or above the beds of navigable lakes in the state of Idaho. I.C. §§ 58-104(9) and -1303.

2. The Board exercises its authority through the instrumentality of IDL. *See* I.C. §§ 58-101 and -119. As a result, “the duty of administering the Lake Protection Act falls upon the IDL.” *Kaseburg v. State, Bd. of Land Comm’rs*, 154 Idaho 570, 578, 300 P.3d 1058, 1066 (2013).

3. IDL’s authority under the LPA includes the authority to adopt such rules and regulations as are necessary to effectuate the purposes of the Lake Protection Act, Title 58, Chapter 13, Idaho Code (“LPA”) I.C. § 58-1304. IDL has exercised that authority and promulgated the Rules for the Regulation of Beds, Waters and Airspace Over Navigable Lakes in the State of Idaho, IDAPA 20.03.04.000 *et seq.* (“Rules”).

4. In enacting the LPA, the legislature expressed its intent that:

the public health, interest, safety and welfare requires that all encroachments upon, in or above the beds or waters of navigable lakes of the state be regulated in order that the protection of property, navigation, fish and wildlife habitat, aquatic life, recreation, aesthetic beauty and water quality be given due consideration and weighed against the navigational or economic necessity or justification for, or benefit to be derived from the proposed encroachment. No encroachment on, in or above the beds or waters of any navigable lake in the state shall hereafter be made unless approval therefor has been given as provided in this act.

I.C. § 58-1301.

5. Under the LPA and Rules, a navigable lake is defined as

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any permanent body of relatively still or slack water, including man-made reservoirs, not privately owned and not a mere marsh or stream eddy, and capable of accommodating boats or canoes. This definition does not include man-made reservoirs where the jurisdiction thereof is asserted and exclusively assumed by a federal agency.

I.C. § 58-1302(a); IDAPA20.03.04.010.024. Payette Lake is a navigable lake under the LPA.

6. For purposes of the LPA, the “beds of navigable lakes” are defined as “the lands lying under or below the ‘natural or ordinary high water mark’ of a navigable lake and, for purposes of this act only, the lands lying between the natural or ordinary high water mark and the artificial high water mark, if there be one.” I.C. § 58-1302(b); IDAPA 20.03.04.010.04. The proposed community dock would lie in whole or in part of the bed of a navigable lake. IDL therefore has jurisdiction to regulate the proposed encroachment.

7. Several objectors questioned whether PLCSOA is the littoral owner of the Community Beach lot. Under the Rules, a riparian or littoral owner is defined as “[t]he fee owner of land immediately adjacent to a navigable lake, or his lessee, or the owner of riparian or littoral rights that have been segregated from the fee specifically by deed, lease or other grant.” IDAPA 20.03.04.010.033. In the 2015 Deed, the Land Board (as Grantor) “convey[ed], release[d] and quitclaim[ed] unto Grantee [PLCSOA], . . . all of Grantor’s right, title and interest in and to . . .” the Community Beach Common Area, Block 2, Lot 1, SW Payette Cottage Sites. AR, Doc. 106 (bracketed material added). There is no dispute that the Community Beach is immediately adjacent to Payette Lake.

8. In Idaho, “[a] quitclaim deed conveys whatever interest the grantors possess at the time of the conveyance. [Citation omitted]. This includes legal title.” *Luce v. Marble*, 142 Idaho 264, 270, 127 P.3d 167, 173 (2005) (additional citations omitted). In addition, “Idaho law presumes that the holder of title to property is the legal owner of that property.” *Id.* PLCSOA

PRELIMINARY ORDER – PAGE 8

holds record title to the Community Beach. Objectors did not provide any legal authority to rebut the presumption of ownership that the law accords to the quitclaim deed.

9. Idaho law presumes that because PLCSOA is the grantee in the 2015 Deed, it is the legal owner of and has legal title to the Community Beach. In the absence of evidence sufficient to rebut the presumption, PLCSOA is the littoral owner, as defined in IDAPA 20.03.04.010.033.

10. Idaho Code § 58-1306(a) provides, in part, that “[a]pplications for nonnavigational, community navigational, or commercial navigational encroachments must be submitted or approved by the riparian or littoral owner. PLCSOA executed a “Memorandum of Lease” with WWBDA (AR Doc. 3) and also presented oral and written testimony in support of the Application. Tr. pp. 29-30, AR, Doc. 86. Therefore, the Application was approved by PLCSOA, the riparian or littoral owner, as required by Idaho Code § 58-1306(a).

11. Littoral owners or lessees hold littoral rights, which are:

the rights of owners or lessees of land adjacent to navigable waters of the lake to maintain their adjacency to the lake and to make use of their rights as riparian or littoral owners or lessees in building or using aids to navigation but does not include any right to make any consumptive use of the waters of the lake.

I.C. § 58-1302(f); *see also* IDAPA 20.03.04.010.032. As the littoral owner, PLCSOA holds the littoral rights for the Community Beach.

12. IDAPA 20.03.04.020.02 provides that :

[o]nly persons who are littoral owners or lessees of a littoral owner shall be eligible to apply for encroachment permits. A person who has been specifically granted littoral rights or dock rights from a littoral owner shall also be eligible for an encroachment permit; the grantor of such littoral rights, however, shall no longer be eligible to apply for an encroachment permit. Except for waterlines or utility lines, the possession of an easement to the shoreline does not qualify a person to be eligible for an encroachment permit.

As the littoral owner, PLCSOA would be eligible to apply for an encroachment permit.

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13. Under the Memorandum of Lease, PLCSOA granted WWBDA a non-exclusive lease of PLCSOA's littoral rights "for purposes of constructing a community dock." Because WWBDA has leased PLCSOA's littoral right, WWBDA is eligible to apply for an encroachment permit.

14. Having leased its littoral right, neither PLCSOA, its members or any future lessees are eligible to apply for an encroachment permit adjacent to the Community Beach, unless the lease between PLCSOA and WWBDA is terminated.

15. IDAPA 20.03.04.015.02.c provides that

[a] community dock shall not have less than fifty (50) feet combined shoreline frontage. Moorage facilities will be limited in size as a function of the length of shoreline dedicated to the community dock. The surface decking area of the community dock shall be limited to the product of the length of shoreline multiplied by seven (7) square feet per lineal foot or a minimum of seven hundred (700) square feet. However, the Department, at its discretion, may limit the ultimate size when evaluating the proposal and public trust values.

IDAPA 20.03.04.015.02.c. There is some disagreement about the mouth of the creek that empties into Payette Lake at the Community Beach, with testimony that it could be 25 to 50 feet wide. Tr. p. 38, 63. The Application reflects that there is approximately 345 feet shoreline frontage at the Community Beach. Even if the mouth of the creek is 50 feet wide, there would still be approximately 290 feet of shoreline frontage, well over the required 50 feet.

16. The proposed dock is 1,520 square feet. To qualify for a community dock of this size, the shoreline must be at least 218 feet long (1,520 divided by 7). Even if the mouth of the creek was deducted from the total frontage and if the mouth was up to 127 feet wide, the Community Beach would still have enough shoreline frontage to justify the size of the proposed dock.

17. The proposed dock meets the requirements of IDAPA 20.03.04.015.02.

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18. Most objectors raised concerns about increased traffic, parking issues, potential blockage of a fire hydrant, enforcement of the lease, and sanitation issues on shore. IDL is authorized to regulate and control the use or disposition of lands in, on or above the beds of navigable lakes in the State of Idaho, to the natural or ordinary high water mark, or to the artificial high water mark, if there is one. *See* I.C. §§ 58-104(9)(a) and -1303. IDL does not have authority to regulate or address potential issues lying above the artificial or ordinary high water mark.

19. Pursuant to Idaho Code § 58-1301,

all encroachments upon, in or above the beds or waters of navigable lakes of the state be regulated in order that the protection of property, navigation, fish and wildlife habitat, aquatic life, recreation, aesthetic beauty and water quality be given due consideration and weighed against the navigational or economic necessity or justification for, or benefit to be derived from the proposed encroachment. No encroachment on, in or above the beds or waters of any navigable lake in the state shall hereafter be made unless approval therefor has been given as provided in this act.

20. As to the economic necessity or justification for or benefit derived from the proposed encroachment, the location of the proposed dock is within approximately six-tenths of a mile from the lots owned by the eight members of the WWBDA, and would allow members to walk to access their boats. In contrast, the cited alternative location, Mile High Marina, is further away, and has a two to three year waiting list. Tr. p. 9-10. That facility also charges \$1,800 per boat per summer boating season to use its slips. *Id.* In addition, there was unrebutted testimony at the hearing that Community Beach is the only remaining common area within the area owned by PLCSOA that has sufficient lake frontage for a community dock. Tr. p. 10.

21. I find that the Applicant has established the justification for or benefit derived from the proposed encroachment.

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22. The economic necessity or justification or benefit derived must be weighed against the protection of property, navigation, fish and wildlife habitat, aquatic life, recreation, aesthetic beauty and water quality, i.e., the “Lake Values”.

a. Protection of property: the proposed dock would be located 25 feet from the littoral line of one neighbor, and 228 feet from the littoral line of the other. Some objectors raised concerns about work that would need to be done on the Community Beach in order to allow access to the dock, but those concerns are not within the jurisdiction of IDL.

b. Navigation: There was testimony at the hearing that motorized and nonmotorized boats use the area of the proposed dock location to navigate. *See* Tr. pp. 36, 44, 55-56. However, there is no evidence that the proposed dock would impede navigation on the lake. It may impact the ability of boats to access certain parts of the water in front of Community Beach, but that is true of any dock. The public has a right, and will continue to have a right, to navigate anywhere above the beds of Payette Lake, below the ordinary high water mark.

c. Fish and wildlife habitat and aquatic life: As noted above in Section II, Paragraph 21, the record contains evidence and there was testimony about the variety of wildlife that access the Community Beach lot, the water in front of the lot, and surrounding areas. However, there was no evidence that the proposed dock would in fact negatively impact fish, wildlife and aquatic life.

d. Recreation: The record also includes a significant amount of testimony (both written and oral) about the kayaking, swimming, and other activities that have historically taken place in front of the Community Beach lot. Those activities may be impacted by the presence of the proposed dock. However, given that the public has a right to navigate over the beds of navigable lakes below the ordinary high water mark, boaters could potentially disrupt the above-

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listed activities, with or without the proposed dock. Moreover, the fact that PLCSOA leased its littoral right to WWBDA does not change the fact that those with the right to use the Community Beach lot and its access points to the water, will still have the right to do so.

e. Aesthetic beauty: There was testimony about the aesthetic beauty of the Community Beach and views from the Beach. *See* Tr. pp. 21, 40-41. However, over time the Community Beach has been developed with sod, a trail and riprap. While those opposed to the Application may negatively view the aesthetic changes to the Community Beach and the view, proponents of the Application may view the changes in a more positive light. I find that this criteria is neutral.

f. There is no evidence in the record that the proposed dock will adversely affect water quality. While some objectors raised concerns about the water being impacted by human waste and trash, the public already has a right to recreate in and navigate through the waters in front of Community Beach. Therefore, there are potential issues regarding human waste and trash in the water regardless of the presence of the proposed dock.

23. I find that the justification for or benefit of the proposed dock is not outweighed by the Lake Values.

#### **PRELIMINARY ORDER**

For the foregoing reasons and based on the evidence in the record, I recommend that the Director of IDL approve Encroachment Permit Application No. L-65-S-683 and grant an encroachment permit, contingent upon WWBDA continuing to hold the required littoral rights. In addition, as long as the lease between PLCSOA and WWBDA remains in effect, no other

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individual or entity is qualified to make application for an encroachment permit for the  
Community Beach.

DATED this 27<sup>th</sup> day of April, 2017.

  
\_\_\_\_\_  
Andrew Smyth  
Hearing Coordinator

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In the Matter of Encroachment Permit Application L-65-S-683

Wagon Wheel Bay Dock Assoc.  
Docket No. PII-2017-PUB-50-001

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**MEMORANDUM FROM LEGAL COUNSEL TO DIRECTOR (IDAHO DEPARTMENT OF LANDS) WITH THE SUBJECT LINE "HANSBERGER-DEDICATION OF PLAT" DATED AUGUST 18, 1981**

05/05/95 16:32 12083424657  
MAY - 3 - 95 WED 13:42

RINGERT CLARK

001  
P. 05

STATE OF IDAHO - DEPARTMENT OF LANDS, Statehouse, Boise, Idaho 83720

**COPY**

MEMORANDUM

RECEIVED

TO: Director

DATE: August 18, 1981

MAY 5 1995

FROM: Legal Counsel Givens, Pursley & Huntley FILE NO.:

SUBJECT: Hansberger -- Dedication of Plat

QUESTION: Did the Board of Land Commissioners convey the access area in Payette Lake Subdivision to the public?

CONCLUSION: The trust responsibilities for the Board of Land Commissioners preclude the Board from divesting title to these trust lands by dedication even if the county has accepted the dedication. Thus, although the Board may sell tracts of endowment lands by subdivision pursuant to Idaho Code, §§8-317, the Board retains title to roads, alleys, and access ways within the subdivisions.

ISSUES: This question involves a review of the 1932 plat for Payette Lakes subdivision, the statutory and common law of dedication and acceptance of plats, and the trust responsibilities of the Board of Land Commissioners.

The issues to be resolved are:

- 1) Did the Board intend to dedicate the streets and access ways to the public?
- 2) Is an acceptance necessary for a valid dedication?
- 3) Did the county accept the dedication?
- 4) Can the Board lawfully dedicate title to endowment land to the public?

ANALYSIS: This review begins with an analysis of the subdivision plat for the Payette Lakes Subdivision on insane asylum endowment land located on the west side of Payette Lake. The Board of Land Commissioners recorded this plat in 1932. The plat contained the following language:

...said tract and premises to be designated as the Payette Lake Cottage Sites and (the State of Idaho) does by these presents donate and dedicate the streets, roads, alleys, commons and public grounds as shown on this plat to the use of the public forever.

Director  
August 18, 1981  
Page 2..

This language indicates an apparent intention by the Board to set aside the streets, roads, alleys, commons and public grounds within that subdivision for the use of the public forever. The county has not claimed title and responsibility for the roads and access areas. The county has performed only occasional, minimal maintenance on these roads, and it is doubtful that the county could establish a prescriptive right thereto, particularly against State endowment lands.

The majority rule is that acceptance is necessary for a valid dedication. In McQuillin Municipal Corporations, §33.43, it is stated:

It is elementary that ... (except where otherwise specified by statute) an acceptance of a proffered dedication is necessary, either by public user or formal act, because for obvious reasons a municipality is not bound to accept land dedicated for street, alley or other public use. Accordingly, the general rule is that to complete a common-law dedication, acceptance is required. In other words, by analogy with the rule prevailing in contract law, acceptance of an offer of dedication is necessary to make the dedication complete, because a dedication consists of an offer and an acceptance.

McQuillin Municipal Corporations, Section 10.31, 733, 734; Annotation, 11 ALR 2d 524, 574, Section 10 "Necessity of Acceptance".

The Oklahoma Supreme Court has held that acceptance is necessary for a valid dedication. Oklahoma City v. State, 90 P.2d 1064 (Okla. 1939). The Oklahoma court's rationale was that an individual or entity may not impose upon a city and its taxpayers the duty and expense of maintenance until and unless accepted by the city. This court also adhered to the contractual analogy articulated in McQuillin and held that acceptance was necessary notwithstanding a statute providing that donations to the public as shown on a plat should be deemed conveyances. The court concluded that this statute could not compel the city's acceptance except upon evidence of a presumptive acceptance arising from public use of the property. Other courts have held that approval of a subdivision plat or map should not be construed as acceptance of the dedication by the city or county. Tuxedo Homes, Inc., v. Green, 258 Ala. 494, 63 So. 2d 812; Board of County Commissioners v. Sebring Realty Co., 63 So. 2d 256 (Fla.).

The Idaho Supreme Court, however, has adhered to the following rules:

Where the owner of land plats the same into lots, blocks, streets and alleys, and files such plat with the proper recorder of deeds and sells lots

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therein with reference to such plat, he and his grantees are estopped from revoking the dedication of such streets and alleys.

Boise City v. Hon, 14 Idaho 272, 94 Pac. 167 (1908); quoted in Hanson v. Proffer, 23 Idaho 705, 132 Pac. 573 (1913); in accord, Oregon Shortline R.R. Co. v. City of Caldwell, 39 Idaho 71, 226 Pac. 175 (1924); Smylie v. Pearsall, 93 Idaho, 188, 457 P. 2d. 427 (1969); Boise City v. Falls, 94 Idaho 840, 499 P. 2d. 326 (1972).

The leading case in support of this position is Boise City v. Hon, *supra*. The court in that case based its decision upon several factors including a legislative extension of the corporate limits of Boise City to include the "addition" (subdivision) which was held an implied acceptance of the dedicated streets by the city. The court also based its decision upon the above quoted language that where the grantor plats the lands, records the plat, and sells lots according to the plat, the dedication is final. In this decision the court focused only upon the rights of the purchaser. The numerous cases supporting the general rule that dedication is not complete without formal acceptance by the city by without use, emphasized protection of the city and its taxpayers from unwanted maintenance and liability from public dedications of streets and roads. The Idaho legislature has codified this general common-law rule in 1967, Idaho Code, §50-1313, requiring acceptance as a prerequisite to a valid dedication. The focus on protecting the city and its taxpayers was not discussed by the Idaho court in Boise City v. Hon, and in subsequent cases following that rule. One element of the Hon doctrine which would be consistent with the statute and the general rule is that the grantor, having intended to dedicate roads and streets to the public, is thereby estopped from challenging the dedication. Smylie v. Pearsall, *supra*. However, estoppel does not apply against the Board as trustee of endowment lands. See analysis below. In June, 1973, the Board amended the 1932 plat by vacating the access area between Lots 19 and 20. The Board acted with the Valley County Commissioners in pursuing the statutory vacation procedure. This action may be an implied acceptance by Valley County of the 1932 plat as amended. Nevertheless, the State cannot be divested of its endowment trust lands by implication in the absence of clear legal and constitutional authorization. Newton v. State Board of Land Commissioners, 37 Idaho 58, 219 Pac. 1053. Regardless of intent to dedicate and acceptance by the county, the critical issue is whether the Board could divest the trust of title by a dedication.

Applying these legal principles to the question at hand, the controlling factor must be the status of the lands as State insane asylum endowment lands. The Hon doctrine is distinguishable in that it did not concern endowment trust lands. Moreover, the doctrines of estoppel and statutes of limitation are not applicable against the State in its capacity as trustee over endowment trust lands. State v. Peterson, 61 Idaho 50, 97 P.2d. 603 (1939); State v. Fitzpatrick, 5

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Idaho 499, 51 P.2d. 112 (1897); United States v. Fenton, 27 F. Supp. 816 (D.C. Id., 1939); Hellerud v. Hauck, 52 Idaho 226, 13 P. 2d. 1099 (1932).

The Idaho Supreme Court has categorized the trust responsibilities of the Board of Land Commissioners and the Department of Lands as a trust of the highest and most sacred order. State v. Paterson, supra. Endowment trust lands can only be acquired by sale at public auction to the highest bidder, Idaho Constitution, art. 9, §8; Admission Bill, §5; Idaho Code, §58-313, 331, 332. In Newton v. State Board of Land Commissioners, supra, the court reaffirmed that the State has only limited powers concerning its trust land. The court declared:

It must be understood, however, that this power with regard to a final disposition of the lands granted to the State, title to which has become completely vested and indefeasible in the State, is not a power to divest the State of its title, nor does it permit the State to be divested of its title except in the manner and upon the terms imposed by the grant and the Constitution, and neither the legislature nor the State Board of Land Commissioners operating under its direction can authorize anything contrary to the terms of those instruments.

37 Idaho 58, 71.

Similarly, the Idaho Supreme Court has held that the State could not relinquish trust lands to the United States contrary to State law. Balderston v. Brady, 17 Idaho 567, 107 Pac. 493; in accord, Burguet v. Del Curto, 163 P.2d. 257 (New Mexico) citing with approval Newton v. State Board of Land Commissioners and Balderston v. Brady, supra. In light of this controlling trust responsibility, a question arises whether the State through the Board of Land Commissioners has the power to divest itself of roads, streets, and access ways by recording a dedication to the public.

Given the dedicatory language in the 1932 plat, the Board's intent to dedicate the tracts to the public is apparent. The Board has statutory authority to sell state land in legal subdivisions or in tracts of less than legal subdivisions. Idaho Code §58-317. A requisite for such sales is:

showing to the satisfaction of the Board that said subdivisions will be more salable or will sell at a better price than when undivided or that public convenience will be served thereby.

The next question is whether the county accepted the dedication.

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Since the cases under the Hon rule did not concern endowment trust lands, they are not controlling in this case.

The Colorado Court of Appeals considered a very similar case in which the Board of Land Commissioners in 1920 purportedly dedicated roads and streets within a subdivision to the public forever. The Colorado court ruled that the Board retained title to the streets and roads notwithstanding the purported dedication. The court held that the Board could not dedicate land to be used as a public roadway merely by showing the roadway on an original subdivision plat. The court also held that the Colorado Constitution, art. 9, §10 which is nearly identical to Idaho's Constitution, art. 9, §8, and which sets forth the endowment principle, precluded the Board from divesting title to such roads by dedication. The court stated:

Were the Board deemed to have the power to offer land for dedication, such land could be taken by adverse possession upon the failure by the Government body to whom the offer was made to accept the dedication. (citation omitted.) Adverse possession, however, would grant privileges to persons who had settled upon the public land and would thereby preclude the Board from selling or otherwise disposing of the property in a manner in which would secure the maximum possible amount for the property. Therefore, if the Board had the power to dedicate roadways in the manner claimed, the above quoted constitutional provision would be violated. This is not permissible.

Tuttle v. County Commissioners of Grand County, 613 P.2d. 641, 642 (Colo. App. 1980).

This conclusion is pertinent to the instant question. It is not clear whether the county formally accepted the dedication. If the purported dedication by the Board was valid, the streets and access way would be subject to adverse possession, which is not permissible under Idaho law. Hellerud v. Hauck, *supra*.

The above analysis leads to the conclusion that the trust responsibilities for the Board of Land Commissioners preclude the Board from divesting title to these trust lands by dedication even if the county has accepted the dedication. Thus, although the Board may sell tracts of endowment lands by subdivision pursuant to Idaho Code, §58-317, the Board retains title to roads, alleys, and access ways within the subdivisions. This conclusion is consistent with the constitutional requirements that trust lands be sold only at public auction to the highest bidder, and that trust lands are not subject to acquisition by adverse possession or subject to the doctrines of estoppel or statutes of limitation. The Legal Guideline of January 16, 1980, was issued

Exhibit I

**MEMORANDUM FROM BOB DECKER, DEPUTY ATTORNEY GENERAL,  
TO BILL PETZAK, AREA SUPERVISOR, PAYETTE LAKES, WITH THE  
SUBJECT LINE "DEDICATED STREETS, ROADS, ETC. ON LANDS  
ADJACENT TO PAYETTE LAKE, DATED JANUARY 21, 1987**

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STATE OF IDAHO - DEPARTMENT OF LANDS, Statehouse, Boise, Idaho 83720 P - 02

MEMORANDUM

TO: Bill Petzak  
Area Supervisor, Payette Lakes DATE: 1/21/87

FROM: Bob Becker *[Signature]*  
Deputy Attorney General FILE NO.:

SUBJECT: Dedicated Streets, Roads, etc. on Lands Adjacent to  
Payette Lake

At your request, I have prepared this memo which you may share with the Valley County Commissioners. It represents a factual and legal summary of the matter.

FACTUAL SUMMARY

In 1932 and 1948 the State Board of Land Commissioners approved and recorded subdivision plats on insane asylum endowment lands on the west side of big Payette Lake near McCall, Idaho. These subdivisions consist of Payette Lake Cottage Sites, Pine Crest Addition and the Cedar Knoll Addition. Both plats included a dedication of streets and alleys to the public. Further the 1932 plats dedicated commons and public grounds to the public. Included in these dedicated areas are numerous access ways leading down to the beach of Payette Lake.

There is no record anywhere in the minutes of the Valley County Commissioners that they formally accepted these dedications. Furthermore, department staff have informed me that there has been almost no maintenance conducted by the county since these dedications were effected. Apparently the county has been almost entirely consistent in its denial of any claim to these dedicated areas. The only aberration in the county's position that I am aware of occurred in 1947 when the county approved a petition to close and abandon a section of a dedicated road. The petition was filed by an adjacent private landowner who had purchased the property from the state.

Presently, we have several different situations involving these dedicated areas. First, we have these dedicated roads, streets, etc. in areas where the state no longer has any adjacent ownership interests. In other areas, however, the state still has numerous leased lots adjacent to these dedicated streets, roads and access ways.

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#### ANALYSIS

I have thoroughly reviewed Mark Ridloch's earlier research on this question, particularly his memo of August 18, 1981, and agree for the most part with his analysis. I will not reiterate what he has stated there other than to make comments about the two major legal arguments that point towards retained ownership of these dedicated areas with the state.

First of all, the trust responsibilities of the State Board of Land Commissioners precluded the board from dedicating and thereby divesting title to these access ways. This rule was laid down in a case out of Colorado involving facts very similar to the situation here. In Tuttle v. County Commissioners of Grand County, 44 Colo. App. 334, 613 P.2d 641 (1980), the Colorado Court of Appeals held that the Colorado Board of Land Commissioners could not dedicate streets and roads within a subdivision to the public. The court stated that the Board retained title to these areas. The Colorado court considered constitutional language very similar to article 9, section 8 of the Idaho Constitution, which governs the activities at issue here. My legal research of this matter revealed no other cases prior to or after Tuttle that are on point.

Based on Tuttle then, the Land Board could not convey title to these roads, streets and access ways by dedication but rather retained title thereto. Only if the Land Board divests title to an entire platted subdivision could it be argued that it is permissible to dedicate roads, streets and access ways. In that case, I would argue that the board could permissably dedicate certain areas to the public since such a dedication would certainly enhance the value of the lots. Further, if the board divested title to all the lots within the subdivision, there would be no reason whatsoever for the board to retain ownership to narrow strips for roads, streets, etc. The fair market value of these dedicated areas would certainly have been reflected in the enhanced value of the lots which were sold.

However, in the case at hand, the state still has ownership to numerous parcels adjacent to and served by these dedicated areas. Therefore, I believe that the rule in Tuttle applies.

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The second main argument for state ownership is the majority rule that acceptance of a dedication is necessary for a valid dedication. Riddoch pretty well laid this out in his memo of August 18, 1981, and I won't repeat it all here. As he stated there, acceptance can be manifested either by a formal act such as a motion made at a county commissioners' meeting or by actual maintenance and use of the dedicated areas. As stated earlier, the department can find no evidence that Valley County formally accepted the dedication, and the county has not conducted regular maintenance of the streets, roads and access ways. In fact, the county has conducted virtually no maintenance whatsoever outside of some minor snow removal and some minor repair work; furthermore, the county has consistently taken the position that it does not own the access areas. Therefore, the Land Board has a very good argument that it retained ownership of these access areas.

#### CONCLUSION

Based on the above analysis, it is my opinion that the Land Board does in fact own the areas that were ostensibly dedicated to the county. To clear up any cloud to the state's title though, I would recommend that the department approach the county and ask for a disclaimer to any and all access areas that we have an ownership interest in at this time.

RJB/pks