

BEFORE THE STATE BOARD OF LAND COMMISSIONERS

SHARLIE-GROUSE NEIGHBORHOOD)
ASSOCIATION, INC.,)
Petitioners,)
vs.)
IDAHO STATE BOARD OF LAND)
COMMISSIONERS,)
Respondent,)
and)
PAYETTE LAKES COTTAGE SITES OWNERS)
ASSOCIATION, INC., and WAGON WHEEL)
BAY DOCK ASSOCIATION, INC.,)
Intervenors.)
_____)

BEFORE

HEARING OFFICER: JIM JONES

Date: August 27, 2019 - 2:00 p.m.

Location: Idaho State Capitol Building, Room WW54
Boise, Idaho

REPORTED BY:

COLLEEN P. DOHERTY, CSR 345

Notary Public

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APPEARANCES:

For the Petitioner Sharlie-Grouse Neighborhood
Association, Inc.:

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For the Respondent Idaho State Board of Land
Commissioners:

OFFICE OF ATTORNEY GENERAL
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For the Intervenors Payette Lakes Cottage Sites Owners
Association:

MARK D. PERISON, P.A.
BY MS. TRICIA K. SOPER
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1 THE HEARING OFFICER: Well, ladies and
2 gentlemen, this is the time and place set for the
3 hearing of dispositive motions in the landlord case
4 Sharlie-Grouse Neighborhood Association on its
5 declaration for declaratory ruling. Each side will have
6 30 minutes to present its argument. And I think I
7 outlined that in the amended order. I would ask that
8 you make your argument from the podium, because we don't
9 have a live mic, I think on this side. And that way I
10 can look you straight in the eye, if I need to.

11 Would counsel identify themselves for the
12 record, please.

13 MR. MEYER: Your Honor, I'm Chris Meyer with
14 Givens Pursley on behalf of Sharlie-Grouse Neighborhood
15 Association.

16 THE HEARING OFFICER: Thank you. I'm not
17 Honorable anymore, just a Hearing Officer.

18 MS. VEGA: Joy Vega, deputy attorney general
19 for the respondent, Idaho State Board of Land
20 Commissioners.

21 HEARING OFFICER: Thank you.

22 MS. SOPER: Good afternoon. Tricia Soper for
23 the intervenors, Payette Lakes Cottage Sites Homeowners
24 Association, and Wagon Wheel Bay Dock Association.

25 THE HEARING OFFICER: Thank you. As a

1 preliminary matter, there was a motion to strike by the
2 intervenors. This is a fairly relaxed proceeding, and
3 I'm not really going to get into a lot of
4 technicalities. I know Mark Richey. He's a fine valuer
5 of real property, and so on. And I don't know Chris
6 Mothorpe. But I'm going to grant the motion to strike
7 those affidavits or declarations. It doesn't seem that
8 they add a lot. I think there is a question of the
9 value of the property, but that has been addressed by
10 some of the affiants and declarants of the various
11 parties, and it's not particularly relevant to our
12 proceeding here.

13 I'm not going to strike the declaration of
14 Zephaniah Johnson. I think it does add a little bit of
15 information. So with that having been done, it is,
16 first of all, for the petitioner to make argument, both
17 on behalf of its motion, and in opposition to the motion
18 of the other parties.

19 And again, you will have the full 30 minutes.
20 Have you decided to kind of what you want to do with
21 regard to the amount of time for your opening?

22 MR. MEYER: If it's permissible to you, I
23 would like to reserve eight minutes.

24 THE HEARING OFFICER: Eight minutes. And
25 Mr. Meyer had asked earlier if there was going to be any

1 lights, or vigorous action to stop anyone if they went
2 over their time. It's going to be pretty much on the
3 honor system, and my old wrist watch here. I'm not
4 going to be, you know, a martinet on it. So let's just
5 try to keep it within that framework. We'll expect
6 about 22 minutes from your opening, and then the Board,
7 and the intervenors will have an opportunity.

8 Have you divided up your time?

9 MS. VEGA: Yes, I will be arguing first on
10 behalf of the respondents. I timed myself at about 18
11 minutes when I'm speaking slowly. And then Ms. Soper as
12 indicated that that remaining time would be sufficient
13 for her.

14 THE HEARING OFFICER: Okay. Well, if I
15 notice, you are speaking appreciably faster. I might
16 give you a cautionary note.

17 Okay. Mr. Meyer, if you would give us your
18 opening, I would appreciate it.

19 MR. MEYER: Thank you, Mr. Hearing Officer.
20 As I said, I'm here on behalf of the Sharlie-Grouse
21 Neighborhood Association, or SGNA, which I will refer to
22 as SGNA. With us today are two SNGA members, both
23 Diane, Diane Bubach, who flew in today just to be with
24 us, and Diane Bagley, who came in from Arizona on her
25 way back to McCall. The Johnsons, who also own property

1 adjacent to the community beach are unable to be here.
2 They would be, but for the fact that they are chasing
3 salmon, and hopefully, in this season in Alaska at the
4 moment. Matt McGee is not with us here today, because
5 he has recently accepted a new position, I'm pleased to
6 report, with the general counsel for BSU.

7 So I will be here to represent SGNA. We have
8 a lot to tackle, and I would very much appreciate any
9 direction from the Hearing Officer, in terms of which
10 questions are most important to the Hearing Officer.
11 Unless you instruct me otherwise, I'll skip with the
12 oratory, jump straight to the merits, and then move
13 after that to some of the jurisdictional issues that
14 have been raised by the State and the intervenors.

15 THE HEARING OFFICER: Sounds good.

16 MR. MEYER: The Land Board concedes that it
17 has received nothing in value in exchange for the
18 quitclaim deeds. Thus, its only defense on the merits
19 is that the quitclaim deeds conveyed nothing, because
20 the State no longer owned any remnant of community beach
21 at the time of the conveyance.

22 The answer is that the State did not own
23 everything, but it owns something of considerable value.
24 The plats in 1924, and/or 1932 established a private
25 common law dedication of an easement for the use and

1 enjoyment of community beach. That easement is held in
2 common by all lot owners. Now, the deed that has been
3 recognized, and recited in quite a number of the recent
4 deeds, but that simply adds clarity, and is not
5 necessary to effectuate the common law dedication.

6 But here's what's important, Your Honor, is
7 that that dedication did not convey everything. The
8 State continues to own the underlying fee, including the
9 literal rights. The case that most clearly documents
10 that conclusion is the case of Ponderosa Home Site Lot
11 Owners versus Garfield Bay Resort, and if you'll recall
12 that was a unanimous decision on Justice Burdick, in
13 which you participated. That case is on all fours with
14 today's situation. The Ponderosa case involved, like
15 this one, a private common law dedication on the lake
16 access parcel. The court confirmed that both the common
17 law and statutory dedications convey only an easement,
18 that is the dominant estate, and the original owner
19 retains the underlying fee, that is the servient of the
20 state.

21 And moreover, the court held the original
22 owner, that is the entity, who filed the plat, a later
23 conveyance residual fee interest in the lake access
24 parcel, including the littoral rights to a third party.
25 Now, in Ponderosa, the residual fee was retained by the

1 developer of the subdivision, later third party, who
2 sought the littoral rights in order to construct a
3 marina. That sounds familiar to the situation that we
4 have here. Applying that Ponderosa precedent, we must
5 conclude that the State retains the fee and the literal
6 rights, subject, of course, to the easement held in
7 common by all lot owners; thus, the State has something
8 of value that it may convey to a third party.

9 Now, this seemingly obvious conclusion has,
10 indeed, been evident to the State and to the intervenors
11 all along, at least until this round of motions and
12 briefing. It's evident in seven manifestations. First,
13 IDL counsel prepared three legal memoranda, 1979, '81,
14 and '86, and they all concluded with respect to the
15 community beach and the roads, that the State, "retained
16 ownership thereof," and quote, "retained title thereto."

17 This item 2, the Land Board collected over
18 \$100,000 in rent from the Bagleys for their occupation
19 of a tiny sliver of community beach. Item 3, in those
20 Bagley leases, the landlord expressly reserved the
21 State's "fee title" ownership of community beach.

22 Item 4, in those leases, the Land Board also
23 expressly acknowledged, its right to sell the underlying
24 fee interest, and recognize that such a sale would be a
25 disposal pursuant to Idaho Code 58-313. Item 5, the

1 board stopped charging rent to the Bagleys after issuing
2 the quitclaim deeds allowing the homeowners' association
3 to do so instead. Item 6, on January 17, 2017, the Dock
4 Association's lawyer submitted a letter to IDL
5 explaining that the State retain ownership of the fee
6 and littoral rights, until those interests were conveyed
7 to the homeowners entity.

8 And I quote from that letter, "before the
9 State of Idaho divested itself of all common areas and
10 conveyed the same to PLCSOA in 2014, the State owned the
11 common areas, including common area beaches and their
12 accompanying littoral rights."

13 Item 7, IDL issued the encroachment permit to
14 the Dock Association, "contingent upon WWBDA continuing
15 to hold the required littoral rights." Now, to be
16 clear, the only way the Dock Association could have held
17 those littoral rights is through the quitclaim deeds.
18 So clearly the Land Board must have believed that the
19 quitclaim deeds conveyed something, which in turn was
20 leased to the Dock Association.

21 Given all this, the suggestion that the
22 quitclaim deeds were empty conveyance, or a conveyance
23 of something of no value is contrary to the law, and
24 contrary to the positions that, "the State and the
25 intervenors" have consistently taken prior to the filing

1 of the dispositive motions.

2 HEARING OFFICER: And I take it that the
3 purpose of your proceeding is to invalidate those deeds
4 on constitutional grounds?

5 MR. MEYER: That is certainly the ultimate
6 purpose. The State has raised, I think, a legitimate
7 question, as to whether in this proceeding, you, through
8 your recommended order, and ultimately the Land Board,
9 has the power to, in fact, invalidate them, as opposed
10 to something more limited, which would be to issue a
11 declaratory ruling opining that they were improperly
12 granted.

13 And I think the State has raised a legitimate
14 concern as to the scope of the authority of the Land
15 Board to actually quiet title, if you will. And so I
16 think it is reasonable to assume that there may need to
17 be some sort of a follow-up action. But that could be
18 set into play by a declaratory ruling recommended by
19 you, and issued by the Land Board, that would then
20 enable the parties to begin to sort these things
21 through.

22 THE HEARING OFFICER: What would that
23 declaratory ruling say?

24 MR. MEYER: I would suggest -- it's so hard
25 for me not to say, "Your Honor," it's ingrained in me.

1 THE HEARING OFFICER: No problem.

2 MR. MEYER: But I would suggest, Your Honor,
3 that the declaratory ruling should recite how the law
4 applies to these past transactions, and conclude that
5 the State owned something, and that it was therefore
6 obligated to convey that only by way of a public
7 auction, which did not occur.

8 THE HEARING OFFICER: So now you say, the law.
9 Are you talking about statutes, or the constitution, or
10 both?

11 MR. MEYER: I'm speaking of both, Your Honor.
12 We ordinarily talk about this in constitutional terms,
13 because that's where this comes from. But those
14 provisions are reflected, as well in the statute, under
15 which IDL operates. And so the suggestion has been made
16 that the particular statute here only speaks to statutes
17 and rules. It seems to me that's a narrow, but
18 admittedly a littoral interpretation of what the statute
19 says. But even if that's true, the decision could be
20 made on the basis of the statute alone.

21 THE HEARING OFFICER: I'm wondering, it was
22 known leading up to this meeting in October of 2013,
23 that there was going to be some disposition of the
24 streets and common areas. And at that board meeting,
25 the board decided that they were going to carry through.

1 And I think that a representative of your client
2 attended the meeting, Mr. Gustavsen. And I'm curious as
3 to why there was not a request for review filed in
4 district court?

5 MR. MEYER: Well, Your Honor, I can't get into
6 the mind of counsel at that time. And in retrospect,
7 perhaps he would have done something differently. But
8 we have really two responses to that concern. One is, I
9 don't think that as a matter of law, the action was
10 subject to judicial review.

11 THE HEARING OFFICER: Was it an agency action?

12 MR. MEYER: No, Your Honor, I don't think it
13 was a final agency action within the definition of APA.
14 That --

15 THE HEARING OFFICER: Well, I think that gets
16 kind of to the crux of the situation, at least from a
17 procedural standpoint. And I see an agency action as an
18 agency's performance of, or failure to perform any duty
19 placed on it by law; is that correct?

20 MR. MEYER: That is correct, Your Honor. That
21 is the third of the three things, the first being in
22 order, and the second being the rule. But it's clearly
23 the third one that we are talking about here, because
24 we --

25 THE HEARING OFFICER: Right, there was no

1 order.

2 MR. MEYER: That's correct, Your Honor.

3 THE HEARING OFFICER: Right?

4 MR. MEYER: So my contention is that the
5 action that was contemplated at that time by the Land
6 Board was a discretionary action. Whereas, when the
7 statute speaks of failure to perform a duty placed on it
8 by law, it is essentially speaking to a
9 non-discretionary action. There are four examples that
10 come to mind here.

11 And two of them are provided in a law review
12 article about Professor Seaman's, who wrote a
13 comprehensive law review article on that subject. And
14 he gave two examples, one of them dealt with injection
15 wells. The statute says, that the Department of Water
16 Resources shall issue a permit when certain things
17 occur. His second example had to do with a drug
18 laboratories, where the statute says, that the
19 Department of Health and Welfare shall promulgate rules
20 is an example that is offered in the Lackey versus ITD
21 case, where they speak to a statute mandating that ITD
22 issue a manual on traffic-control devices. There is
23 another example dealing with a mandate to issue, or a
24 mandate to communicate with an applicant for an
25 outfitters license.

1 I think each of these are good examples of
2 things that the agency is compelled to do. In this
3 case, the Land Board was not compelled to convey
4 anything. The land board could have decided to retain
5 community beach. It could have decided to retain all
6 the cottage sites, for that matter, that it still owned.
7 So its decision to proceed with platting, with CC&Rs,
8 and ultimately with quitclaim deeds was a discretionary
9 decision, that I would suggest was not subject to
10 judicial review.

11 THE HEARING OFFICER: As I understand it, you
12 are not concerned about the streets, just community
13 beach?

14 MR. MEYER: That is correct, Your Honor. We
15 haven't raised any concern. It is one thing to debate
16 that, it's fascinating. But it is no practical
17 consequence, because nothing bad is happening with
18 respect to the streets. Something bad is happening with
19 respect to community beach from my client's perspective.

20 THE HEARING OFFICER: Is there any precedent
21 from the court that treats streets any different than
22 something like community beach, which is a community
23 amenity for the subdivision?

24 MR. MEYER: Yes, Your Honor, there is. There
25 is a case dealing with -- I'm trying to find my notes to

1 find the name of that case. But there is a case that is
2 in the materials, describing how the -- oh, I think it's
3 the Neider case, N-e-i-d-e-r, if I recall correctly.
4 That says that the adjacent property owners own to the
5 center of the street on the underlying fee --

6 THE HEARING OFFICER: That's kind of what I
7 was getting at.

8 MR. MEYER: -- as to the center line.

9 HEARING OFFICER: So how does that
10 differentiate? I mean, you obviously can't apply that
11 to a community beach, which is, you know, akin to
12 another lot?

13 MR. MEYER: Yes, I think the only way to apply
14 that, because that is based on the statute that applies
15 to streets and other certain other things, that
16 community beach is not. The only way to apply that
17 would be to say, the community beach is essentially an
18 extension of the street. It is an access, and the
19 street comes down, and then it just serves as a street
20 continuing on down.

21 But the interesting thing, Your Honor, is if
22 that were accurate, that would mean that two of the
23 members of SGNA own community beach down to -- one could
24 settle through that. The mic went off, but I guess I'm
25 okay. And so, I mean, that's a very interesting

1 outcome, and it's one that could certainly be welcome to
2 it by SGNA in those two members. I think that's
3 probably asking for too much, although we would all be
4 delighted, and we could all go home now, if that was the
5 ruling in this case.

6 THE HEARING OFFICER: One other thing, before
7 you get finished. I'm curious as to when, and how a
8 contested case was initiated? I think you had mentioned
9 in your briefing, that it was when the Board issued its
10 order appointing me as the Hearing Officer?

11 MR. MEYER: Yes, Your Honor. I would suggest
12 that it may have actually been initiated a little
13 earlier than that, when an answer was filed by the Land
14 Board. And the reason that I suggest that, is I think
15 the petition for a declaratory ruling is something that
16 is analogous, if I may suggest, to a petition for
17 reconsideration.

18 In other words, the petitioner says, Your
19 Honor, or whoever it's addressed to, please do
20 something. It's in the nature of a "mother may I?" And
21 the Land Board, or the court, whoever it may be, is not
22 obligated to initiate the proceeding. That is, they
23 don't need to, in fact, reconsider the matter, nor do
24 they need to initiate a proceeding that would ultimately
25 lead to a declaratory ruling. They could have simply

1 sent an email, saying, "no thank you."

2 So when they formally responded with an answer
3 that set out various defenses, four defenses,
4 affirmative defenses, by the way, none of which included
5 any suggestion that this was an improper forum of
6 resolving the question, it seems to me that that
7 initiated a contested case. If that didn't, it
8 certainly was initiated when the Land Board met, and
9 voted unanimously to assign you to hear the case.

10 And then ultimately, they issued an order that
11 made that even further clearer. And the Land Board's
12 decision specifically instructed you to issue a
13 recommended order. And the definition of a contested
14 case is any proceeding that results in an order. So it
15 seems to me inescapable that a contested case was
16 initiated.

17 THE HEARING OFFICER: Is there any statute of
18 limitations that applies to a request for a declaratory
19 ruling?

20 MR. MEYER: No, Your Honor.

21 THE HEARING OFFICER: So it could be asked for
22 at any time, and it would set, you know, the clock going
23 from there?

24 MR. MEYER: It could. It's important to
25 underscore, and the State has suggested, oh, my

1 goodness. The flood gates will be opened if we allow
2 declaratory rulings in a situation like this, in
3 particular, where no judicial review was sought. Aside
4 from the fact that we've never seen any flood of
5 requests for declaratory rulings. They are virtually
6 nonexistent in this state, other than the firefighters
7 case, which is very, very important.

8 But other than that, I think the key
9 reassurance we have, goes back to the "mother may I?"
10 There is no obligation on behalf of the agency to act on
11 a petition for a declaratory ruling. In other words, if
12 the agency says, you know, we've thought about this very
13 clearly. We've studied it. We've done plenty on this
14 subject. We're not going to issue a declaratory ruling.
15 That is the end of it, and that is not judicially
16 reviewable. If they initiated a contested case, though,
17 that will lead to an order that is judicially
18 reviewable. And I think that's the situation we have
19 here.

20 THE HEARING OFFICER: I don't want to disturb
21 your argument, but you are at about 20 minutes.

22 MR. MEYER: Well, Your Honor, perhaps I ought
23 to sit down now. And I guess the only slack I would ask
24 you to cut me, is to be able to be responsive in that
25 remaining ten minutes, even if there is some point that

1 I haven't fully initiated during this first 20.

2 THE HEARING OFFICER: Well, we won't be cruel
3 here.

4 MR. MEYER: Thank you, Your Honor.

5 THE HEARING OFFICER: Ms. Vega?

6 MS. VEGA: Thank you, Mr. Hearing Officer, for
7 this opportunity to speak with you. The respondent, the
8 State Board of Land Commissioners disputes the matter
9 before you. And based on the undisputed material facts,
10 and the cited precedent ever heard, the respondent has
11 shown that the petition declaratory ruling should be
12 dismissed in its entirety, because there is an absence
13 of subject matter jurisdiction over the claims asserted;
14 and therefore, the relief requested by the petitioner,
15 Sharlie-Grouse Neighborhood Association.

16 Indeed, it is essential that this
17 administrative tribunal assures its jurisdiction before
18 proceeding to the merits of the petitioner's claim. The
19 Idaho Supreme Court has repeatedly held that an
20 administrative order may generally be collaterally
21 attacked when the issuing agency lacks jurisdiction over
22 the matter considered. That specific quote was from
23 Idaho Power Company versus Idaho Public Utilities
24 Commission at 639 P2nd 442 from 1981. However, the very
25 recent decision of the Idaho Supreme Court and the Idaho

1 Retired Firefighters Association versus PERSI, or the
2 PERSI Board, issued just last month at 443 P3rd 207165
3 Idaho 193 is also I think instructive. And while the
4 facts and circumstances before the Supreme Court in that
5 case were not on point, the statutes add that they were
6 looking at for the authority, the jurisdictional
7 authority of the Industrial Commission was different
8 from the jurisdictional authorities of the Land Board.

9 However, the sole question presented on appeal
10 was, does the Industrial Commission have jurisdiction to
11 review the request for declaratory relief on appeal from
12 a decision of the Public Employee Retirement Board. And
13 after looking at the law, and looking at the currently,
14 so is PERSI acting in the current presentation, the
15 current actions of the board? The Idaho Supreme Court
16 held that the proper jurisdiction on that declaratory
17 ruling was with the district courts, and not with the
18 commission; and therefore, the commission's order was
19 deemed void.

20 If you haven't looked at that, I think I would
21 encourage you to the read through that, that recent
22 decision.

23 THE HEARING OFFICER: I believe that was in
24 the materials that were filed.

25 MS. VEGA: It was. It was. And the

1 respondent has thoroughly briefed the reasons why this
2 tribunal would exceed its limited jurisdiction if it
3 issues a declaratory ruling adjudicating the
4 constitutionality of a final agency action made by the
5 Land Board on October 15, 2013. First, declaratory
6 rulings are simply not intended to allow review of past
7 agency action that should have been challenged for
8 judicial review.

9 This matter comes before you on a petition for
10 declaratory ruling pursuant to Idaho Code 67-5232, as
11 well as IDAPA 20.01.01.400, which allow any person to
12 petition an agency for a declaratory ruling as to the
13 applicability of a statutory provision, or any rule
14 administered by an agency. The purpose of the
15 declaratory ruling mechanism is for an agency to give an
16 advisory opinion on how it would apply a specific
17 statute or administrative rule to a particular set of
18 factual circumstances. This limited purpose is
19 supported by the claimant language of the Idaho Code,
20 and is also consistent with how other states have
21 applied this administrative procedure.

22 Specifically and different from Idaho Code
23 67-5232 is Idaho Code, Section 67-5279(2)(a), which
24 empowers the courts to review agency actions in order to
25 determine whether the action was in violation of

1 constitutional or statutory provisions. Similarly,
2 Idaho Code, Section 67-5278, authorizes the courts to
3 issue declaratory judgment to determine both the
4 validity or applicability of the agency rule.

5 The Idaho Legislature could have vested
6 authority in the agencies to review the validity of that
7 agency's past action, but the legislature did not do
8 that. Instead the authority for review of an agency
9 action is vested solely in the courts.

10 THE HEARING OFFICER: Well, it seems to me
11 that what the petitioner's are contending is that
12 Section 58-122, which says that you can't consider the
13 Board's exercise of its duties to dispose of public
14 lands, except if the board allows it. Is that what the
15 board did here?

16 MS. VEGA: I'm not certain that I'm totally
17 following your question.

18 THE HEARING OFFICER: It says that when the
19 State Board of Land Commissioners is exercising its
20 duties and authorities concerning the direction,
21 control, or disposition of the public lands, such action
22 shall not be considered to be contested cases, unless
23 the board in its discretion determines that a contested
24 case hearing would be of assistance to the board.

25 As I kind of gather it, the petitioner's are

1 saying, that's what happened here. The board decided to
2 initiate a contested case, I think, by the appointment
3 order, or by the answer, or whatever. And therefore,
4 it's proper to consider the declaratory ruling motion as
5 an initiation of a contested case.

6 MS. VEGA: Yes.

7 THE HEARING OFFICER: I'm hoping I got that
8 right.

9 MR. MEYER: Correct, Your Honor.

10 MS. VEGA: I would agree with that, that in
11 summary of what the petitioner is asking, and your
12 quotation of Idaho 58-122 was correctly read. And this
13 Statute 58-122 was relied on by the respondent as a
14 legal authority as to why, in fact, no contested case
15 has been initiated. Nowhere in the record, except for
16 where the petitioner's put it, is the phrase "contested
17 case" used by the respondent. And there has certainly
18 been no affirmative acknowledgment, or a request for the
19 initiation of a contested case by the respondent, Land
20 Board.

21 Within the respondent's briefing are a number
22 of sister state court opinions, from Hawaii, Vermont,
23 New York, and Iowa, all talking about how the purpose of
24 declaratory rulings is looking at previous agents is not
25 to look at previous agency actions, but it's an

1 administrative mechanism for forward looking and
2 perspective questions.

3 While each court opinion cited in our briefing
4 contains persuasive reasoning, I particularly appreciate
5 the Vermont Supreme Court's holding and petition of DA
6 Associates. Where it plainly stated, "The purpose of
7 such rulings is to declare the rights of the parties in
8 the first instance, not whether rights already acted
9 upon at the agency level have been properly determined.
10 Declaratory rulings are not appellate in nature, and
11 cannot be resorted to as a substitute for, or in lieu of
12 proper appellate remedies." Which is exactly what the
13 petitioner is doing in this matter before you. The
14 petitioner's --

15 THE HEARING OFFICER: Have you seen any cases
16 that deal with when you can file a declaratory ruling?
17 I mean, if the question is looming out there, do you
18 have an unlimited period of time in which to ask for a
19 hearing, or is there anything that indicates when you
20 can get one?

21 MS. VEGA: I have not seen any authority
22 particularly on point to that specific question. Given
23 that the purpose of declaratory ruling is to help a
24 person, or a party that's thinking about doing
25 something, thinking about taking an action, that's

1 regulated by an agency. It seems that given that scope,
2 and that purpose of the declaratory ruling, that a
3 petition for such ruling should be made prior to that
4 action being taken. Once an action is taken, and a
5 final agency decision is made, then the only recourse,
6 the only next step available to that party, would be for
7 judicial review, if they don't like the decision of the
8 agency.

9 For example, in encroachment permit cases,
10 when someone is wanting a dock, they must first file an
11 application for that dock. The Department of Lands is
12 charged with administering, reviewing, approving that
13 application. If it doesn't meet all the regulations, or
14 if it's contested by neighbors, then there is a
15 mechanism in those rules for a contested case to be
16 initiated.

17 We don't have that here, and that's not what
18 happened here. Here, everybody knew what the Land Board
19 was doing. It had been of public record since the
20 1980s, that actions were being taken to dispose of the
21 different cottage sites. And come 2011, culminating in
22 2014, we have several public meetings, where discussion
23 about the transfer of the roads and common areas, which
24 were treated consistently, they were treated as one
25 package, that those would be transferred to a bigger

1 homeowners' association.

2 HEARING OFFICER: And I take it that the board
3 wanted to convey something or dispose of something?

4 MS. VEGA: Well, that's probably the question,
5 right? What was there to convey? What was conveyed?

6 THE HEARING OFFICER: Well, the thing that
7 bothers me a little bit, is that the Bagleys had been
8 operating under a lease for a number of years, and they
9 paid somewhere around \$100,000. Certainly they wouldn't
10 have paid it, presumably they wouldn't have, unless the
11 State had something to lease to them.

12 MS. VEGA: I cannot stand here before you
13 today, and say that the State did not have anything to
14 convey. The question, what was there to convey? I
15 think that was ultimately determined by the use of a
16 quitclaim deed. There was no warranties of title.
17 There was no affirmative statements of what was owned,
18 or what was not owned by the State in 2014 and 2015 when
19 those quitclaim deeds were issued to the PLCSOA. The
20 Land Board said, we transfer whatever we have to the
21 PLCSOA through this quitclaim deed, through this amended
22 quitclaim deed.

23 THE HEARING OFFICER: That's one of the
24 difficulties with the quitclaim deed, you don't know
25 what the purpose of it is, you know, unless you conduct

1 an evidentiary hearing. It can be, well, I may have an
2 interest in this, but I'm not going to contest it. I'm
3 just going to give whatever interest I have. But on the
4 other hand, a lot of people use them to convey fee title
5 to real property.

6 And I'm not entirely certain that I know
7 exactly what the State conveyed, what the Board conveyed
8 with those deeds. But they conveyed something, and it
9 had some value. And I guess the petitioner says, well,
10 because there was some value in what was conveyed, there
11 should have been a public auction. What's your response
12 to that?

13 MS. VEGA: Value is interesting. It could
14 also be argued, that there was a loss of value to the
15 Land Board, and to the specific endowment beneficiary
16 for the Land Board to maintain whatever it owned, and
17 assumed, or continued to claim ownership and management
18 of these common areas to the detriment, and at the
19 expense and costs of the endowment beneficiary. So
20 frankly, there is an absence of what the value is, or
21 was in 2014 for these common areas. There is an absence
22 of evidence of that in the record.

23 THE HEARING OFFICER: Could State Hospital
24 South file a proceeding against the Land Board, saying
25 it had breached its fiduciary duty by conveying those

1 streets and common areas without getting adequate
2 compensation?

3 MS. VEGA: State Hospital South as the
4 endowment beneficiary would be the best plaintiff, or
5 the best party to challenge the Land Board's decision in
6 this case. It's certainly not the petitioner's.

7 You know, and I just want to the speak to your
8 comment about the lease to the Bagleys. And
9 unfortunately, I don't have the citation to the Idaho
10 Code memorized in my head. However, had they occupied
11 that state land, whatever interest was owed, had they
12 occupied that state land without a lease, then they
13 would be deemed, per se, trespassers, potentially liable
14 for treble damages over the course of their occupation.
15 So it was in the interest of the Bagleys, who had built
16 on part of their home on to state endowment lands, that
17 they have a lease for those lands.

18 The undisputed record shows that the final
19 agency action was a unanimous vote of the Land Board on
20 October 15, 2013. That vote was to approve the
21 recommendation of the Idaho Department of Lands to adopt
22 the CC&Rs for the southwest Payette cottage sites, which
23 would result in the transfer of ownership of the common
24 areas to the Payette Lakes Cottage Sites Owners
25 Association.

1 Sharlie-Grouse Neighborhood Association, Inc.,
2 the same party that is the petitioner before you, was
3 represented by legal counsel. They fully participated
4 in that October 15th meeting. They heard the Land
5 Board's counsel answer the question, the very simple
6 question, can the roads and common areas be deeded to
7 the PLCSOA without an auction specific to those common
8 areas. And they heard generally the same opinion that
9 the Land Board has received since 1979, that the
10 subdivided lots to access would have minimal or no
11 value.

12 Therefore, by an owners association taking
13 title to the common areas for management of the whole
14 community, and assurance of continuing ingress and
15 egress and access to the common areas, that the
16 endowment beneficiary had been, and would be compensated
17 through the increased value and sales of the individual
18 subdivided lots, which had been, and have been sold at
19 public auction.

20 In addition to this being sound legal counsel,
21 and the Land Board making an educated decision based on
22 this legal counsel, this reasoning and facts of record
23 go to the merits of the petitioner's claim today, and
24 demonstrate that the Land Board did comply with its
25 constitutionalized statutory authorities to manage and

1 dispose of endowment lands for the long-term fiduciary
2 benefit of the endowment beneficiary.

3 After hearing the Land Board's vote, the
4 exclusive option for review of that final agency action
5 was to file for judicial review within 28 days of that
6 action. The overwhelming weight of authority prohibits
7 the petitioner's from now challenging the Land Board's
8 2013 action. And the authority is in the briefing. I
9 don't want to belabor that point, or take time by
10 reviewing that.

11 THE HEARING OFFICER: I've observed that if
12 you are speaking at your normal rate, you are about at
13 18 minutes now.

14 MS. VEGA: Okay. Thank you. Would you like
15 me to speak to your question about the definition of
16 "final agency action," whether that 2013 vote was an
17 agency action? We've briefed it. It's in the record
18 before you.

19 THE HEARING OFFICER: I think I've got enough
20 on it.

21 MS. VEGA: Thank you. In conclusion, the
22 Sharlie-Grouse Neighborhood Association had an
23 opportunity to challenge the Land Board's 2013 decision
24 to quitclaim the roads and common areas to the PLCSOA,
25 and it failed to file for judicial review of that final

1 agency action. The current petition for declaratory
2 ruling is not a correct mechanism for the petitioner to
3 challenge that final agency action.

4 If this tribunal maintains subject matter
5 jurisdiction over the petitioner's claims, and allows
6 the petition to move forward on the merits, the
7 authority vested in the judiciary, and the strict
8 jurisdictional deadline for judicial review of the final
9 agency action would be rendered meaningless.

10 The respondent requests that the Hearing
11 Officer submit a recommended order finding an absence of
12 subject matter jurisdiction and dismissing the petition.
13 And I would note that whatever your recommended order,
14 and whatever the final decision of the State Board of
15 Land Commissioners is, there will be an opportunity for
16 judicial review. However, the merits of the petition
17 must only be considered and ruled on after confirmation
18 of the Land Board's subject matter jurisdiction. Thank
19 you.

20 THE HEARING OFFICER: Thank you.

21 Ms. Soper, you've got about ten minutes.

22 MS. SOPER: Good afternoon, Mr. Hearing
23 Officer. As I've stated before, I represent the
24 intervenors. We have basically accepted and adopted the
25 Land Board's briefing regarding subject matter

1 jurisdiction. So we have constrained our briefing and
2 our arguments to the standing argument, and other
3 equitable arguments. And we truly believe that subject
4 matter jurisdiction is dispositive here. That you don't
5 even need to reach the standing issue if you don't need
6 to get there, because we do feel like subject matter
7 jurisdiction is lacking here.

8 But if you do reach the standing issue, I
9 think it's very important to kind of look at the
10 evolution of this case. We briefed extensively the
11 elements that are required for standing, and I am not
12 going to belabor that here. But the two issues that
13 have been addressed most strongly, and most extensively
14 are the elements of injury and redressability.

15 And Sharlie-Grouse has spent a lot of time,
16 and energy, and money on trying to establish this
17 injury. And if you look at the declarations, two of
18 which were stricken, but two of which remain. The
19 injury that is claimed by the petitioner's is the
20 damages they claim that have resulted from installation
21 of the dock. They haven't claimed that the injury is
22 actually the conveyance of the common areas and the
23 roads. It's really this installation of the dock, and
24 that happened four years after the conveyance of those
25 common areas. And so by their own actions, they've sort

1 of seated that argument, that there has been an injury
2 based on the conveyance, themselves, their own inaction,
3 their own silence seated that issue.

4 So four years later, five years later, six
5 years later, you know, property values have supposedly
6 declined. That's not a result of the conveyance.
7 That's the result of the installation of the dock. And
8 those are too tangential to give the petitioners a
9 platform six years later to protest it. I do think
10 it's --

11 THE HEARING OFFICER: Well, doesn't the drag,
12 though, really go back to the fact, that they lost the
13 opportunity to contest the installation of the docks,
14 because of the decision to transfer ownership out of the
15 board and into the LLC?

16 MS. SOPER: That is certainly what they are
17 arguing, Your Honor, however they sat silent for four
18 years. So my argument would be, if this was
19 unconstitutional when it happened, then it's not just
20 unconstitutional four years later, five years later, six
21 years later. And I think to that point, Mr. Meyer's
22 argument is very telling, because he responded in
23 response to your question, when you said, is there any
24 sort of statute of limitations for something like this?
25 And he said, well, nothing bad is happening with regard

1 to the roads. Something bad is happening with regard to
2 the dock.

3 And so I guess that's the time limit. When
4 something bad happens, we get to then look back and say,
5 oh, this was unconstitutional. And I don't think that's
6 the right result. I can't imagine that being the right
7 result. Because here we are, six years later. What
8 happens if 20 years out from this conveyance, the dock
9 was installed? At what point, does it become barred?
10 Well, it becomes barred, as Ms. Vega pointed out, 28
11 days after the final agency action. Their remedy was in
12 2013. Their remedy is not six years later.

13 And I do think it is important to review the
14 injury element. But it's also more important to look at
15 the redressability element. And that speaks directly to
16 the authority to this tribunal. So to take a step back,
17 we're in this kind of bizarre posture, where we're
18 asking for a ruling from the Land Board, against the
19 Land Board. We're directing the Land Board to do
20 something, and looking retroactively backward for six
21 years. It's absolutely an appellate posture that we're
22 in. We're asking the Land Board to sit in judgment on
23 the Land Board from six years prior. And that doesn't
24 seem at all what the declaratory relief statute would
25 have contemplated, but it does show you just kind of the

1 futility here.

2 So to that point, the evolution of what the
3 petitioner's are seeking really points out this moving
4 target for the relief they are seeking. In the
5 petition, they ask for very big things. They ask that
6 the quitclaim deeds became void and invalid. And they
7 ask that the Land Board declare that the title to those
8 common areas and roads was vested in the Land Board.
9 These are big things that they were asking for. And
10 when it became apparent that maybe that was maybe not
11 something the Land Board could do, it sort of morphed
12 into something else.

13 And if you read through the briefing, SGNA
14 will say things like, well, it doesn't really matter if
15 this tribunal can grant us what we're asking for,
16 because we're setting into motion a chain of events.
17 And that's not what the redressability requirement says,
18 that's not what standing requires. The standing
19 analysis requires this tribunal to be able to grant the
20 relief requested that will ultimately remedy the
21 problem. And we are so far out from any sort of relief
22 in this tribunal that could address Wagon Wheel Bay
23 Dock, but it's just impossible to redress in this
24 situation.

25 Their remedy, of course, was in 2013 before

1 the district court. But as Ms. Vega pointed out, this
2 order will be reviewable, and I think that's the
3 ultimate goal here. This is step one to get back before
4 the district court on judicial review, and ultimately
5 somehow have the district court try to undo something
6 that was done in 2013.

7 I think the reason that we have the 28 day
8 very tight limitation on judicial review is important in
9 terms of real world consequences. That deadline is
10 tight, because final agency actions have consequences.
11 In this case land was ostensibly conveyed. People
12 purchased cottage sites higher than they would have if
13 that value of the common areas was not captured in the
14 price of the common sites. We have leases that have
15 been granted, encroachment rents that have been granted,
16 a dock that has been built.

17 And six years out, trying to upend all of
18 that, because now we've decided that despite all our
19 efforts beforehand, judicial review, a second lawsuit,
20 administrative proceedings before the City of McCall and
21 Valley County, all of those didn't work. So all of a
22 sudden, we're going to make the constitutional argument.
23 The constitutional argument was in 2013, and they've
24 lost that chance.

25 THE HEARING OFFICER: What do you say with

1 regard to the contention that a contested case has been
2 initiated in this proceeding?

3 MS. SOPER: I would refer back to 58-122, to
4 me what that statute says, the Land Board has to take
5 some affirmative action to take this on as a contested
6 case, to actually initiate. That sounds like an
7 affirmative action to me. It doesn't sound like an
8 acquiescence to me. It sounds like --

9 THE HEARING OFFICER: Something like an order
10 saying, a contested case is initiated?

11 MS. SOPER: Correct. And something like the
12 order appointing the Hearing Officer, for example, might
13 have included something like that. That the Hearing
14 Officer is, you know, in charge of a contested case,
15 something like that.

16 THE HEARING OFFICER: The appointment order
17 said that the Hearing Officer shall make a recommended
18 order. Does that have any bearing on it?

19 MS. SOPER: I don't, because again, I think
20 that's an affirmative action that has to be taken for
21 that contested matter. And ultimately, I just don't
22 know that it matters, because I think the authority of
23 the tribunal stems from 67-5232, which gives the
24 tribunal the authority to, I think the argument, that it
25 looks prospectively is the most logical argument. And I

1 certainly think that any agency shall not be given
2 authority to look at itself in the appellate capacity,
3 to look backwards in time and decide, okay, six years
4 ago we made a mistake. Well, final agency actions
5 results in lots of consequences. And trying to undo
6 them makes no sense under a statute that looks
7 prospectively. I just can't imagine that being the
8 right result here.

9 I do think this is simply an attempt to get
10 back into district court. I think based on SGNA's
11 previous actions, they were not hesitant to take any
12 sort of form of action, whether it is judicial review,
13 or other litigation, administration action. If they
14 felt like they had a reasonable and valid cause of
15 action in the district court, you better believe that
16 they would be there right now.

17 So this is sort of a back door. Let's get
18 into district court on judicial review through the back
19 door, which we should have taken the front door back in
20 2013. So if you determine that there is subject matter
21 jurisdiction here, and you are inclined to look toward
22 to the merits, I would ask you to look at the standing
23 issue, and I do believe that issue would be dispositive.
24 We're asking that you recommend an order for dismissal
25 of the petition.

1 THE HEARING OFFICER: Okay. Well, thank you.

2 MS. SOPER: Thank you.

3 THE HEARING OFFICER: Mr. Meyer?

4 MR. MEYER: Thank you, Your Honor. SGNA is
5 not hoping to end up in district court. The State has
6 suggested that, goodness, we could have just filed,
7 initiated a lawsuit seeking a declaratory ruling in
8 district court, a declaratory order. And we could have,
9 but we didn't think that was the right thing to do.

10 We think it's more appropriate to engage the
11 agency, and to allow the agency to take a hard look at
12 what it did. To call the parties together, and to see
13 if we can't be cooperative, and thoughtful, and creative
14 in resolving a solution. Call me naive, if you wish.
15 But I am genuinely optimistic, that if we have a
16 meaningful ruling from the Land Board on this matter,
17 that the parties will be able to put their thinking caps
18 on, and will be able to resolve something that will
19 effectively enable this to move forward. It might
20 involve moving the dock somewhere else. It might
21 involve compensation. It might involve making people
22 pull in one way or the other.

23 To me, that's the Tamarack Bay model. The
24 Tamarack Bay was the very recent action by the Land
25 Board, in which they in response to concerns raised by

1 other members of the community, invalidated a lease that
2 they recognized, in retrospect violated their
3 constitutional obligations. That ought to be the model
4 for what happens here. In fact, I thought that's what
5 the direction we were moving in when the Land Board
6 first voted unanimously to engage in this process. And
7 why it is there has been an about face, is a mystery,
8 and a disappointing one to me.

9 Let's turn to that contested case issue.
10 We've heard from counsel for the Land Board, as well as
11 counsel for the intervenors, that, well, gosh, if there
12 had just been an order that had the words "contested
13 case" in it, that certainly would have done the job to
14 initiate a contested case.

15 Well, for goodness sake. What do we have
16 here? We had an order that specifically addressed Idaho
17 Code 58-122. What's the heading, the title of that
18 statutory provision; contested cases - procedures?
19 This, obviously, when they cite that, they are talking
20 about a contested case. And I think that you are very
21 accurate, Your Honor, in pointing to the particular
22 sentence in it, that explains ordinarily the Land Board,
23 it doesn't proceed by contested cases, except in
24 situations, where the Land Board in its discretion
25 determines that a contested case hearing would be of

1 assistance to the Board, which is exactly what happened
2 here.

3 Now, we also here, well, they still didn't
4 quite say, "contested case." Well, what else did they
5 say in the order? They said in Rule 410. What does 410
6 deal with; contested cases? And they also cited Rule
7 402, which says that it will result in issuance of an
8 order. And we know by definition, a contested case is
9 anything that results in the issuance of an order. So I
10 suggest it's a bit disingenuous to say, that the Land
11 Board didn't initiate a contested case here.

12 Let me turn now to the firefighters case here.
13 You know, and I hesitate to suggest that counsel for the
14 State would mislead the Hearing Officer, but I don't
15 know how else to describe what they said in their brief,
16 and what they said in oral argument a moment ago. Their
17 description of the firefighters case is contrary to what
18 the Idaho Supreme Court case said. That case involved
19 some very complicated procedural issues. It had to do
20 with whether they filed their petition for declaratory
21 ruling with the right entity, because there were two
22 levels of that board, and they apparently filed it with
23 the wrong one.

24 But the decision was crystal clear that it was
25 an appropriate mechanism. An appropriate mechanism to

1 resolve what? Contrary to what the State has told you,
2 which is not true, Your Honor, that case dealt with a
3 backwards looking examination of an action that had
4 occurred some years ago, the establishment of COLA, a
5 cost of living allowance, which for many years had been
6 failing to provide adequate amounts of money to
7 firefighters according to the petitioners.

8 And the Idaho Supreme Court said, this is an
9 appropriate mechanism. We didn't do it right
10 procedurally, but they allowed them to go back and fix
11 it. And they specifically said, we will ensure that you
12 have, waive certain deadlines, and so on, and you can
13 ultimately fix it and proceed. And ultimately get, it
14 may be a thumbs up, or it may be a thumbs down, but you
15 will get a ruling on as to the backwards application.

16 And if you prevail on that, firefighters, you
17 may then proceed with a part of your case that involves
18 claims. What are claims? Those are backward looking
19 payments made to them based on the fact that the earlier
20 COLA was incorrectly calculated. That's similar to what
21 we have here. We need a declaratory ruling, so that we
22 can set into motion a process to figure out how to sort
23 this out.

24 Let me turn now briefly to one of the other
25 arguments that was made by the State in its brief, where

1 it identified 21 deeds that were filed, or issued
2 between, oh, I think, 1987 and 2004. And in those 21
3 deeds, those 21 deeds purport to establish a future
4 interest. That is basically a promise to convey a
5 residual fee, an acknowledgment that there is a residual
6 fee held by the State, and to convey it to all of the
7 lot owners.

8 Well, I would suggest that if that is
9 effective, it raises the same constitutional concerns as
10 the others. Because even if you can argue that those
11 purchasers may have paid an elevated price and benefited
12 by that, there are over 200 lots here. Those were only
13 21 deeds. And what happened to all the value for the
14 others? And it appears to me that the State also
15 doesn't believe that it is bound by that, or that that
16 is controlling. Because the quitclaim deed that they
17 initiated, and the CC&Rs that they filed are
18 inconsistent with that. It's one thing to say, we will
19 give the underlying fee to all of the property owners to
20 hold in common, which gives each of them a veto power
21 over the use of that underlying fee and the littoral
22 rights. It is quite different to convey it to a
23 homeowners' association, which by the way, does not
24 represent all of the lot owners. It represents a small
25 fraction of the owners.

1 The homeowners' association represents only
2 the lessees. That is not landowners, but lessees. And
3 lot owners may opt into that, or at least have an
4 opportunity to opt in, if they pay their annual dues,
5 very few of them did. So it's a minority entity. And
6 it is not the same, because it has the ability to
7 override the wishes of non-members and of the minority
8 of the members. So it is entirely contrary.

9 If those 21 deeds were effective, by the way,
10 then SGNA members, and everybody else would have a veto
11 power over what ultimately became the conveyance of the
12 littoral rights. So if it was effective, we could live
13 with that, too. But I think that is subject to the same
14 problems as the others.

15 You had asked if the Hospital South could
16 raise an issue here? They could, and I think there is a
17 reference in the affidavit by Zephaniah Johnson that
18 they reached out to them, and suggested that they do
19 that. And the response was, we're not inclined to bite
20 the hand that feeds us. And that's the reason, why when
21 we have important constitutional principles, that we
22 allow people to get to the bottom of them. People, that
23 in this case, have an interest.

24 And, Your Honor, I'm ready to see the red
25 flag. I've probably gone beyond.

1 THE HEARING OFFICER: Oh, it's probably there.
2 If you've got another point, you know, I can let you
3 wind it up.

4 MR. MEYER: Well, I will endeavor to wind it
5 up. I think Tamarack Bay is the key. That's the model
6 that we ought to follow on. And as for the issue of
7 standing, it is perplexing to me why, after having all
8 the briefing on standing, explaining that standing does
9 not apply in administrative cases, and in any event is
10 waivable in cases that involve important constitutional
11 questions, none of that has been addressed by the
12 intervenors. The State, itself, has conceded that there
13 is standing here, based on the statute that is involved.

14 I would love to talk further. I would love to
15 write another law review article on this, but I think my
16 time is up.

17 THE HEARING OFFICER: Okay. Well, thank you,
18 Mr. Meyer.

19 MR. MEYER: Thank you, Your Honor.

20 HEARING OFFICER: Well, thank you for the
21 attorneys representing the parties. I appreciate it. I
22 think this has been helpful. I will take this under
23 advisement, and try to get a ruling out, or a
24 recommended order out in due time. Thank you.

25 MR. MEYER: Thank you, Your Honor.

1 MS. VEGA: Thank you.

2 THE REPORTER: Do you want a copy of the
3 transcript?

4 MR. MEYER: Yes.

5 MS. VEGA: No.

6 (Proceeding concluded at 3:06 p.m.)

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REPORTER'S CERTIFICATE

I, COLLEEN P. DOHERTY, CSR No. 345, Certified
Shorthand Reporter, certify:

That the foregoing proceedings were taken
before me at the time and place therein set forth, at
which time the witness was put under oath by me;

That the testimony and all objections made were
recorded stenographically by me and transcribed by me or
under my direction;

That the foregoing is a true and correct record
of all testimony given, to the best of my ability;

I further certify that I am not a relative or
employee of any attorney or party, nor am I financially
interested in the action.

IN WITNESS WHEREOF, I set my hand and seal this
6th day of September, 2019.



COLLEEN P. DOHERTY, CSR 345

Notary Public

P.O. Box 2636

Boise, Idaho 83701-2636

My commission expires September 7, 2023.

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