

NOV 26 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

*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.

**PETITION FOR RECONSIDERATION AND
MEMORANDUM IN SUPPORT**

TABLE OF CONTENTS

TABLE OF AUTHORITIES4

PETITION FOR RECONSIDERATION.....5

MEMORANDUM IN SUPPORT5

I. Introduction.....5

II. Argument6

A. The 28-day rule does not apply, because the Land Board’s action in 2013 was not subject to judicial review.....6

B. Even if judicial review were available, the failure of affected parties to seek judicial review does not preclude the Land Board from entertaining a petition for declaratory ruling.8

C. In Idaho, a declaratory ruling may be forwards or backwards looking.9

D. A declaratory ruling is not limited to the mere identification of which statutes and rules apply.13

E. The Land Board is not precluded from applying law to facts, particularly when the material facts are not in dispute.13

(1) The *Decision* misidentifies the material facts.....13

(2) The key material fact is undisputed: the State retained something of considerable value.14

(3) Declaratory rulings are not limited to abstract questions of law.....15

F. Providing guidance in a declaratory ruling is an important step forward, even if it does not immediately void the transaction.16

G. Even if judicial review of the 2013 action were available and even if failure to seek review precluded SGNA from seeking a declaratory ruling, the Land Board is not precluded from initiating its own contested case to address the matter—which it has done.17

H. SGNA sought the initiation of a contested case.20

I. The ruling may be limited to Community Beach.20

J. SGNA’s *Petition for Declaratory Ruling* is not premised on constitutional issues beyond the scope of administrative proceedings.21

K. The fact that actions have occurred in reliance on the Land Board’s action in 2013 does not preclude the Land Board from recognizing and identifying error in the conveyance of Community Beach.23

REQUEST FOR ORAL ARGUMENT23
CONCLUSION23
CERTIFICATE OF SERVICE25

TABLE OF AUTHORITIES

Cases

Cobbley v. City of Challis, 143 Idaho 130, 139 P.3d 732 (2006).....9
Greater Boise Auditorium Dist. v. Frazier (“GBAD”), 159 Idaho 266, 360 P.3d 275
(2015)10
Idaho Retired Fire Fighters Ass’n v. Public Employee Retirement Bd.
(“Firefighters I”), 2017 WL 6949778 (Idaho Ind. Comm’n Dec. 29, 2017)11, 13, 23
Idaho Retired Firefighters Ass’n v. Public Employee Retirement Bd. (“Firefighters
II”), 165 Idaho 193, 443 P.3d 207 (2019) passim
Laughy v. ITD, 149 Idaho 867, 243 P.3d 1055 (2010)7
Podsaid v. Outfitters and Guides Licensing Bd., 159 Idaho 70, 356 P.3d 363 (2015).....7
Rangen, Inc. v. IDWR (“Rangen II”), 160 Idaho 119, 369 P.3d 897 (2016)22

Statutes

Idaho Code § 42-39087
Idaho Code § 5243(1)(a).....18
Idaho Code § 58-12217, 18, 20
Idaho Code § 58-30122
Idaho Code § 58-31315, 22
Idaho Code § 58-33222
Idaho Code § 6-26047
Idaho Code § 67-5201(3)(c)6, 7
Idaho Code § 67-5201(6).....18
Idaho Code § 67-5232 passim
Idaho Code § 67-5232(1).....22
Idaho Code § 67-5232(2).....17, 18
Idaho Code § 67-524018, 20
Idaho Code § 67-5243(3).....5, 20
Idaho Code § 67-525520

Other Authorities

Allen, *et al.*, *Idaho Land Use Handbook* (2019)9
Idaho Constitution, art. XV, § 722
Richard Henry Seamon, *Idaho Administrative Law: A Primer for Students and
Practitioners*, 51 Idaho L. Rev. 421 (2015)6

Regulations

IDAPA 04.11.01.005.0618
IDAPA 20.01.01.005.0718
IDAPA 20.01.01.230.01.c20
IDAPA 20.01.01.41018
IDAPA 20.01.01.720.02.a5

PETITION FOR RECONSIDERATION

Petitioner Sharlie-Grouse Neighborhood Association, Inc. (“SGNA”) submits this *Petition for Reconsideration and Memorandum in Support* (“*Petition for Reconsideration*”) in accordance with Idaho Code § 67-5243(3) and the Land Board’s rule, IDAPA 20.01.01.720.02.a. SGNA respectfully petitions the Hearing Officer for reconsideration of the *Order Dismissing Petition for Declaratory Ruling* (“*Order*”) and the *Recommended Decision and Order on Petition for Declaratory Ruling* (“*Decision*”) dated and served by mail on November 12, 2019 (collectively, “*Recommended Orders*”).

It is SGNA’s understanding that the filing of this *Petition for Reconsideration* has the effect of extending the deadline for filing exceptions to the *Recommended Orders* and that there will be a subsequent opportunity, if necessary, to file exceptions. If that is not the case, SGNA requests that this *Petition for Reconsideration* also be deemed to be the filing of exceptions with the agency head.

This *Petition for Reconsideration* employs the same shorthand acronyms and definitions employed in the prior briefing.

MEMORANDUM IN SUPPORT

I. INTRODUCTION

The Hearing Officer found that the Land Board has no jurisdiction to issue a declaratory ruling because SGNA failed to appeal the Land Board’s decision on October 15, 2013 to record an amended plat, CC&Rs, and the Quitclaim Deeds. This is incorrect for the following reasons:

1. The Land Board’s action on October 15, 2013 was not an “agency action” subject to judicial review under the IAPA.

2. Even if the 2013 action was judicially reviewable, failure to seek judicial review by affected parties does not preclude the Land Board from entertaining a petition for declaratory ruling. *I.e.*, Idaho Code § 67-5232 provides an alternative avenue for backward-looking relief.
3. The Land Board has mooted the jurisdictional question by initiating a contested case aimed at determining whether the conveyance of Community Beach complied with applicable law.

II. ARGUMENT

A. **The 28-day rule does not apply, because the Land Board's action in 2013 was not subject to judicial review.**

The question of whether the Land Board's decision on October 15, 2013 was subject to judicial review under the IAPA boils down to a single question. Was this action an "agency action" within the meaning of Idaho Code § 67-5201(3)(c)? Specifically, was it the "performance of, or failure to perform, any duty placed on it by law"?¹

This definition limits judicial review to ministerial actions—that is, actions that agencies are under a duty to perform. This is addressed in a recent article by an associate dean and professor of administrative law at the Idaho Law School. Richard Henry Seamon, *Idaho Administrative Law: A Primer for Students and Practitioners*, 51 Idaho L. Rev. 421 (2015). Professor Seamon explains that "[a]gency duties to act typically stem from statutes." Seamon at 451 & 451 n.156 (citing in a footnote a U.S. Supreme Court case dealing with Congress's power

¹ Section 67-5201(3)(c) describes one of three categories of "agency action," all of which are subject to judicial review. The *Decision* correctly concluded that the Land Board's 2013 action was neither a contested case nor a rulemaking.

to impose nondiscretionary duties”). He then offers two examples of such duties to act, both of which mandate agency action, leaving the agency no choice but to undertake the action.

The first is Idaho Code § 6-2604, which mandates that the Department of Health and Welfare “shall promulgate rules establishing the acceptable process and standards for the cleanup of clandestine drug laboratories.” He explains that the Department has no discretion in the matter. It must promulgate such rules.

The second involves injection wells. Idaho Code § 42-3908 mandates that the Idaho Department of Water Resources must issue a permit approving construction of an injection well once it determines that the well will not affect the rights of others. Professor Seamon uses these as examples of actions that are reviewable because the agency is under a non-discretionary obligation to take the action.

Other examples of judicially reviewable, non-discretionary actions are found in the caselaw.

The case of *Laughy v. ITD*, 149 Idaho 867, 243 P.3d 1055 (2010) (W. Jones, J.; J. Jones, J., dissenting) dealt with a statute mandating that ITD issue a manual on traffic control devices.

Another example is found in *Podsaid v. Outfitters and Guides Licensing Bd.*, 159 Idaho 70, 356 P.3d 363 (2015) (Burdick, C.J.). Here, the licensing board acted pursuant to a statute requiring the board to notify the applicant in writing of reasons for denial of a license. The Court found this ministerial duty fell within the meaning of agency action under section 67-5201(3)(c).

In other words, when the Legislature instructs an agency to do a particular thing without any choice or discretion in the matter—*e.g.*, it must issue regulations, issue a permit, issue a manual, send a letter—that action or failure to act is judicially reviewable. Of course, the agency

has discretion as to what to put in the regulations, permit, manual, or letter. The thing that makes the action reviewable is that the agency has a non-discretionary duty to take the action.

The Land Board's decision on October 15, 2013 was nothing like that. The Land Board was under no obligation to record or convey anything. Hence, its decision to proceed with the conveyance of Community Beach was not subject to judicial review.

The *Decision* failed to recognize that the Land Board's decision to record CC&Rs, a revised plat, and the Quitclaim Deeds was not a mandatory or ministerial duty. Instead, the *Decision* concludes that the October 15, 2013 action was an agency action because "SGNA contends that in deciding how to dispose of Community Beach, the Land Board failed to perform its lawful duties." *Decision* at 5. This misses a technical but important point.

Yes, of course, the Land Board was under a duty of law to hold a public auction if, in its discretion, it decided to record CC&Rs calling for the conveyance of Community Beach. But, unlike the four examples above, the Land Board was under no compulsion to take any action at all. It was well within the Land Board's discretion to retain its residual fee interest. The action that one would appeal, if one could, was the 2013 decision to convey. (The grounds for the challenge include the failure to hold an auction. But the decision that would be challenged is the decision to record the CC&Rs and issue the deeds.) Because the decision to convey or not to convey was discretionary, it does not qualify as "agency action." Hence, it was not reviewable.

B. Even if judicial review were available, the failure of affected parties to seek judicial review does not preclude the Land Board from entertaining a petition for declaratory ruling.

Even if the Land Board's 2013 action was judicially reviewable, the failure of affected parties to seek judicial review does not preclude the Land Board from entertaining a petition for a declaratory ruling. In other words, judicial review is not the exclusive means of questioning

the legality of the conveyances. To put it differently, the Land Board is not forever precluded from providing guidance on applicable law as to past actions (particularly where important mistakes have been made) by virtue of the 28-day appeal rule under IAPA.

The *Decision* relies on *Cobbley v. City of Challis*, 143 Idaho 130, 139 P.3d 732 (2006) (J. Jones, J.). *Cobbley* stands for the proposition that when judicial review is provided by statute, it is the exclusive means of bringing a judicial challenge to a state agency or local governmental entity. As a general principle, that is true. Indeed, there are multiple decisions so holding. *See*, Allen, *et al.*, *Idaho Land Use Handbook*, § 21(M)(1) (2019) (available at www.givenspursley.com) (“The general rule is that collateral attacks are not allowed where judicial review is available under LLUPA.”).

But none of these cases deal with the situation presented here—where a separate statute, Idaho Code § 67-5232, expressly authorizes a separate agency proceeding for a declaratory ruling. Indeed, there is no Idaho authority for the proposition that the availability of judicial review under the IAPA jurisdictionally prohibits agencies from issuing declaratory rulings.

This conclusion is reinforced by the decisions in the Tamarack Bay lease and *Idaho Retired Firefighters Ass’n v. Public Employee Retirement Bd.* (“*Firefighters IP*”), 165 Idaho 193, 443 P.3d 207 (2019) (Stegner, J.), both of which are discussed below. In neither case did the failure of affected parties to seek judicial review prevent *post hoc* evaluation by the agency of the legal propriety of its own action.

C. In Idaho, a declaratory ruling may be forwards or backwards looking.

To be sure, other states, applying varying versions of their own statutes, have held that declaratory rulings are forward looking only and, hence, not available to challenge an action

decided in a contested case subject to judicial review.² But Idaho is not like other states. Idaho decisions reflect a heightened concern that governmental entities adhere to the rule of law.³

The precedent in Idaho is limited but clear. Agency declaratory rulings are not limited to the future-looking guidance. Idaho agencies may use declaratory rulings to address and, where appropriate, declare past agency actions to be unlawful.

This is the definitive ruling of *Firefighters II*. The case involved the calculation of COLA benefits (cost of living adjustments) in 2009. The COLA is set by the Public Employee Retirement Board (“PERB”), the governing board of the Public Employee Retirement System of Idaho (“PERSI”). PERSI, in turn, is overseen by the Idaho Industrial Commission (“Commission”).

In 2015, six years after the COLA was put into effect by PERB, the Firefighters filed a petition for a declaratory ruling pursuant to Idaho Code § 67-5232 seeking a backwards-looking determination that the COLA was unlawful. This was combined with a set of claims for backwards-looking financial relief in the event the COLA was re-set.

² As discussed extensively in prior briefing, even if out-of-state precedent were adhered to, that precedent is readily distinguishable. Those cases reject end-runs involving collateral attacks on decisions in contested cases that took evidence and fully grappled with the issue at hand. Here, there was no contested case, and the Land Board never took evidence or grappled with the question of whether a public auction was required, other than a passing colloquy between a board member and the Land Board’s counsel.

The *Decision* wisely did not rely on that out-of-state precedent. Accordingly, SGNA will not say more on the subject in this petition.

³ Though not on point to the legal issues presented here, the decision in *Greater Boise Auditorium Dist. v. Frazier* (“*GBAD*”), 159 Idaho 266, 360 P.3d 275 (2015) (W. Jones) provides a lesson in how Idaho strictly applies constitutional limitations on public debt, rejecting the more liberal approach employed in the vast majority of other states with similar constitutional provisions. This is but one example of Idaho’s firm independence and willingness to depart from out-of-state precedent when it comes to governmental accountability.

The Firefighters initially filed their petition with the Commission, which ruled that it should have been filed directly with the lower agency. Accordingly, later in 2015, the Firefighters re-filed their petition with PERB. The Idaho Supreme Court determined that using a declaratory ruling to undo a COLA that had been in place for years was proper, specifically citing to the statute:

The Association and the Individual Claimants properly filed both the declaratory judgment request and any potential claims for benefits under the FRF [Firemen's Retirement Fund] with the Board [PERB]. I.C. § 67-5233 (claimants "may petition an agency for a declaratory ruling as to the applicability of any statute")

Firefighters II at *3.⁴

PERB issued a declaratory ruling, but not the one the Firefighters were hoping for. The Firefighters appealed PERB's declaratory ruling to the Commission. That turned out to be a procedural mistake.

The Commission affirmed PERB's declaratory ruling. *Idaho Retired Fire Fighters Ass'n v. Public Employee Retirement Bd.* ("*Firefighters I*"), 2017 WL 6949778 (Idaho Ind. Comm'n Dec. 29, 2017). The Firefighters appealed that decision directly to the Idaho Supreme Court.

The Court, *sua sponte*, vacated the Commission's affirmance of the declaratory ruling, holding that the Commission had no jurisdiction to review PERB's declaratory ruling. Instead, the Court said, the Firefighters should have appealed PERB's declaratory ruling directly to district court. Given the procedural complexity, the Court went out of its way to excuse the Firefighters from the 28-day appeal deadline for appealing PERB's ruling. *Firefighters II* at *6.

⁴ The *Firefighters II* decision uses the terms "declaratory ruling," "declaratory relief," and "declaratory judgment" interchangeably. All refer to declaratory rulings under Idaho Code § 67-5232.

Thus, the outcome of the case is to affirm, as a matter of procedure and jurisdiction, the Firefighters' use of a petition for declaratory ruling to unwind an agency action with significant financial relief implications.⁵

Notably, the Firefighters did not seek judicial review of PERB's action in 2009 approving the new COLA.⁶ Although the Idaho Supreme Court went out of its way, *sua sponte*, to examine jurisdictional issues, it made no mention of the IAPA or the 28-day deadline for appeal. This lends support to SGNA's contention that failure to seek judicial review does not preclude use of a subsequent declaratory ruling.

⁵ As noted in *SGNA's Reply Brief on its Motion for Summary Judgment* at 26-27, there should be no doubt about the backward-looking nature of the relief sought here. The Idaho Supreme Court expressly noted that the declaratory ruling was the first step in satisfying financial "claims" by the Firefighters. *Firefighters II* at *3. Claims for benefits are inherently backwards looking. One does not need to file a claim to get the benefit of a forward-looking recalculation of the COLA; one would simply wait to see the new COLA reflected in the forthcoming retirement checks. The Court went on to recognize that if and when a declaratory ruling favorable to the Firefighters issued, there would be backwards-looking repercussions from that ruling:

Here, the gravamen of the petition is to secure a declaratory ruling. The entire petition's language is devoted to the legal determination of how to calculate the annual COLA. Any potential request for monetary benefits from the Individual Claimants was solely predicated on the outcome of the declaratory ruling. . . . [A]ny claims in this context are contingent on the declaratory judgment

. . . .
Firefighters II at *5.

Any doubt that the petition for declaratory ruling sought backward-looking relief is eliminated by examination of the petition itself (which was included in the record before the Idaho Supreme Court). See paragraph 24 of the petition and the prayer for relief ("an order directing payment of back benefits pursuant to the recalculated COLAs"). Exhibit B to *Declaration of Christopher H. Meyer* at pages 10-19. Also see the email from the Firefighters' counsel confirming that the purpose of the petition was to obtain back benefits. Exhibit C to *Declaration of Christopher H. Meyer* at page 20.

⁶ Likewise, none of the neighbors affected by the Land Board's illegal lease at Tamarack Bay sought judicial review. See footnote 9 on page 16 below. But that did not preclude the Land Board from addressing "that there were some mistakes made in the processes employed." Land Board Minutes at 8.

Simply put, *Firefighters II* is on all fours with the jurisdictional issue presented here. It cannot be reconciled with the proposed *Decision*.

D. A declaratory ruling is not limited to the mere identification of which statutes and rules apply.

The *Decision* suggests that a declaratory ruling would be pointless because it could do no more than declare whether particular statutes apply to the conveyance of Community Beach. “A declaratory ruling would only result in a determination that a certain statute or rule might apply, but would not result in a determination of the outcome that the statute or rule would dictate.” *Decision* at 10.

This limitation would render Idaho Code § 67-5232 virtually useless in most cases. Such a limited reading of the statute’s scope cannot be reconciled with the *Firefighters* case discussed above. The *Firefighters* were not asking whether a statute applied. Everyone knew which statutes applied. They were asking how the statute would be applied to the facts of that case, and whether its application rendered the COLA unlawful.

E. The Land Board is not precluded from applying law to facts, particularly when the material facts are not in dispute.

The *Decision* states “this case would require resolution of substantial factual disputes which are inappropriate for determination in a declaratory proceeding.” *Decision* at 9. This is incorrect for the three reasons discussed below.

(1) The *Decision* misidentifies the material facts.

The *Decision* misidentified the factual issue. It says: “The principal issue in this matter is whether the Land Board received full market value for the roads and common areas that it dedicated and/or deeded to lot owners between 1924 and October 15, 2013.” *Decision* at 9. That is incorrect.

SGNA has never suggested that the common law dedications of roads and other community property nine decades ago were invalid. Obviously, they added value to the State's land, and enabled the State to benefit thereby in subsequent sales and leases. That is not what this case is about. This case is about the residual fee interest retained by the State.

(2) The key material fact is undisputed: the State retained something of considerable value.

The *Decision* states that the easements conveyed by plat in 1924 and 1932 “would likely have a substantial impact on the market value of the [residual fee in the] Community Beach property. Resolution of such factual issues is well beyond the scope of either an administrative or judicial declaratory proceeding.” *Decision* at 9.

In fact, there is no need to determine the market value of the retained fee. All that is necessary to determine is that the retained fee had non-insignificant value. That is the only material fact, and it is undisputed that the retained fee in Community Beach had real value. (As noted below, the retained fee in the roads had inconsequential value.)

Specifically, no one disputes the following:

- (1) The Land Board charged about \$100,000 in rent to the Bagleys prior to the *Quitclaim Deeds*. After the *Quitclaim Deeds*, the PLCSOA receives that rent money.
- (2) The Department of Lands issued a new dock permit “contingent upon WWBDA continuing to hold the required littoral rights.”⁷ By Intervenors’ own admission,⁸

⁷ *In the Matter of Encroachment Permit Application No. L-95-S-683*, State Board of Land Commissioners, at p. 2 (Final Order, Apr. 28, 2017) (reproduced in Exhibit F to *Declaration of Christopher H. Meyer* at page 32. The reference to Application No. L-95-S-683 appears to be in error in the Final Order. The Preliminary Order and other documents refer to Application No. L-65-S-683.

⁸ See cover letter for encroachment permit application, from Tricia K. Soper to Idaho Department of Lands (“*Soper Letter*”) at 2 (Jan. 17, 2017) (Exhibit A to *Declaration of Christopher H. Meyer* at page 6) (explaining that, but for the *Quitclaim Deeds*, WWBDA had no littoral rights and no ability to obtain an encroachment permit).

WWBDA leases those littoral rights from PLCSOA which, in turn, obtained them from the State via the *Quitclaim Deeds*.

There is no need to quantify the market value of the retained fee. The undisputed facts show that the State had something of considerable value, which it gave away for nothing in violation of Idaho Code § 58-313 and other applicable law.

Nor is there any need to explore the absurd contention that the conveyance of the residual fee in Community Beach to PLCSOA somehow created value for the State.

First, no such evidence has been offered.

Second, this misses the point that the conveyance that increased property values was the lawful common law dedications of Community Beach and the roads in 1924 and 1932. The addition of the residual fee did nothing to increase anyone's deeded property values. Landowners have enjoyed the right to drive on the roads and use Community Beach for decades; the *Quitclaim Deeds* did not enhance those rights. And even if they did, they did so after the deeded lots had been conveyed, thereby bringing no additional value to the State. Yes, something of value was disposed of. But the value did not go to the property owners. It went to the PLCSOA (which now leases the littoral rights to WWBDA and leases fee land to the Bagleys). The conveyance of Community Beach benefited PLCSOA financially but did nothing to benefit the beneficiaries of the trust. To the contrary, it deprives the State of that benefit, in plain violation of law.

(3) Declaratory rulings are not limited to abstract questions of law.

Even if the Land Board were called upon to resolve factual questions and to apply law to those facts, that is what is supposed to happen in a declaratory ruling.

This was evident in the *Firefighters II* case. The Firefighters did not petition PERB because they wondered which statute applies to the COLA. They sought, and received, a ruling

saying how the statute applies to a complex set of facts concerning which Firefighters' salaries should be included in the calculation.

F. Providing guidance in a declaratory ruling is an important step forward, even if it does not immediately void the transaction.

The *Decision* states that “[o]nly a court of law could invalidate the quitclaim deeds.” *Decision* at 8. No one, including SGNA, contests this. “The Land Board has made plausible arguments that it lacks the power to void the *Quitclaim Deeds* and that some subsequent action (either judicial or negotiated) may be required.” *SGNA’s Reply Brief on Motion for Summary Judgment* at 27. But that does not render pointless the declaratory ruling sought by SGNA.

SGNA seeks a ruling that the Land Board’s 2014 conveyance of its residual interest in Community Beach violated requirements respecting public auctions. Such a ruling by the Land Board would matter. It would set in motion an opportunity for the Land Board and the affected parties to explore creative means of addressing each other’s concerns.⁹ At the end of the day, there might be a voluntary re-conveyance back to the Land Board followed by a public auction of the fee interest in Community Beach. This might be accompanied by mitigation or other

⁹ A pertinent example of this common sense approach to working things out is found in the recent decision by the Land Board regarding the event center at Tamarack Bay. The Land Board voted unanimously to rescind a lease issued without public auction on the basis that it “failed to comply with constitutionally and legally required processes.” The Attorney General moved that the Land Board should “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 noted that also of importance is that the persons who were the lessees under this lease, in a sense were led down the primrose path, and the Board has an obligation to make them whole within the confines of the law.” Land Board Minutes at 8-9 (Apr. 16, 2019) (Commercial Recreation Lease No. M500031) (reproduced in Exhibit D to *Declaration of Christopher H. Meyer*).

remedies.¹⁰ If the parties and the Land Board were unable to work out an accommodation, any of them, including the Land Board itself, could pursue other legal remedies with the benefit and persuasive force of the declaratory ruling behind them.

This is the common sense power that the Legislature has given to agencies under the IAPA. It enables agencies, on their own, to step up and acknowledge that a mistake was made. This is a good thing. This is the Idaho way. It is far better that allowing agencies to shield their errors forever behind a 28-day rule.

G. Even if judicial review of the 2013 action were available and even if failure to seek review precluded SGNA from seeking a declaratory ruling, the Land Board is not precluded from initiating its own contested case to address the matter—which it has done.

In prior briefing, SGNA urged that, whatever jurisdictional limitations might apply to a petitioner, the Land Board has authority to initiate a contested case to examine the lawfulness of the Community Beach conveyance. Idaho Code § 67-5232(2) provides: “A petition for declaratory ruling does not preclude an agency from initiating a contested case in the matter.”

SGNA contends that the Land Board initiated a contested case via:

- (1) the Land Board’s decision on July 17, 2018 to appoint a hearing officer and instruct that officer to issue a recommended order (Land Board Minutes of July 17, 2018 at 10), and/or
- (2) the *Notice of Appointment of Hearing Officer* (“*Notice*”) by the Director of the Department of Lands on authority delegated by the Land Board.

The *Decision* acknowledges that the *Notice* was issued pursuant to Idaho Code § 58-122, which deals with contested cases. The *Decision* also notes that section 58-122 provides that when the Land Board is exercising duties related to public lands, “such actions shall not be

¹⁰ As SGNA has noted in prior briefing, WWBDA may be entitled to compensation (by the Land Board or, perhaps, by the successful bidder in a future auction) for the value of the dock it has installed.

considered to be contested cases . . . , unless the board, in its discretion, determines that a contested case hearing would be of assistance to the board in the exercise of its duties and authorities.”

The quoted provision in section 58-122 explains why the Land Board’s action on October 15, 2013 was not a contested case. But it does not mean that today’s proceeding is not a contested case.

The *Decision* concludes that “there is no indication that it made a discretionary determination to initiate a contested case.” *Decision* at 7. The *Decision* continues: “Where the hearing officer is appointed under the proviso, there should be a clear written statement by the Land Board that it intends to have the hearing officer conduct a contested case, along with a delineation of the scope of the contested case.” *Decision* at 7.

Nothing in sections 67-5232(2) or 58-122 requires such a recitation. Nor do they require the Land Board to recite the magic words “contested case” in order to open a contested case.

The fact is the Land Board initiated this proceeding expressly pursuant to section 58-122 which deals with contested cases. More pointedly, the Land Board instructed the Hearing Officer to issue a recommended order. A recommended order may only be issued in a contested case.¹¹ Moreover, the *Notice* states that it is issued pursuant to IDAPA 20.01.01.410, which

¹¹ A recommended order leads to a final order. Idaho Code § 5243(1)(a). The IAPA defines contested case as “a proceeding which results in the issuance of an order.” Idaho Code § 67-5201(6). See also Idaho Code § 67-5240 (“A proceeding by an agency [excepting two agencies] that may result in the issuance of an order is a contested case”). This definition is repeated in various agency rules, e.g., IDAPA 04.11.01.005.06 (applicable to the Attorney General and all agencies that do not adopt their own rules). Consistent with all this, the rules of the Idaho State Board of Land Commissioners define contested case as “[a] proceeding which results in the issuance of an order.” IDAPA 20.01.01.005.07.

provides: “A hearing officer is a person other than the agency head appointed to hear contested cases on behalf of the agency.”

If the Land Board was of the opinion that it had no jurisdiction to issue a declaratory ruling, there was no need to appoint a hearing officer. It could simply have declined the *Petition for Declaratory Ruling* out of hand (or even ignored it). Initiating a proceeding in response to such a petition is purely discretionary.¹²

Instead of declining to consider the petition, the Land Board initiated a contested case, appointed the Hearing Officer, and placed no limits on the scope of his undertaking. The *Notice* instructed the Hearing Officer “to conduct a hearing in the above-captioned matter and to decide all procedural and pre-hearing matters.” In other words, he was expected to get to the bottom of SGNA’s allegations.

Again, the Land Board didn’t need to do this. It could have blown off the petition. But it had the guts to take on the issue in a contested case.

The fact that the Land Board intended to initiate a contested case is evident in its response to the petition. Both the Land Board and Intervenors raised affirmative defenses, but neither contended that this was not a contested case or that jurisdiction was lacking because SGNA failed to seek judicial review. The jurisdictional issue appeared for the first time in the Land Board’s motion for summary judgment, which is hard to square with the idea that the Land Board had not contended from the outset to initiate a contested case.

In any event, it cannot be denied that the proceeding was concluded by issuance of an order, which may only be issued in a contested case. Moreover, the *Order Dismissing Petition*

¹² This is the reason there is no slippery slope. No agency can be forced to spend time addressing a petition for declaratory ruling which it views as stale or redundant.

for Declaratory Ruling cites Idaho Code § 67-5243(3). That section lies within the portion of the IAPA that addresses contested cases, Idaho Code §§ 67-5240 to 67-5255.

However we got here, we are in a contested case now. That contested case was launched by the Land Board's *Notice*. This should moot the discussion of jurisdiction.

H. SGNA sought the initiation of a contested case.

The *Decision* states that SGNA did not seek the initiation of a contested case. *Decision* at 10. That is incorrect. The filing of the *Petition for Declaratory Ruling* was, by definition, a request to initiate a contested case. This is evident in IDL's rules, which define a "petition" as "[t]he initiation of a contested case not an application, claim or complaint or otherwise taking action that will lead to the issuance of an order or rule." IDAPA 20.01.01.230.01.c. The Land Board could have declined to take up SGNA's *Petition for Declaratory Order*. By appointing a Hearing Officer and instructing the Hearing Officer to issue a recommended order, the Land Board initiated a contested case. This fits squarely within the exception to the Land Board's general rule (in Idaho Code § 58-122) that it does not act by way of contested cases.

I. The ruling may be limited to Community Beach.

SGNA has made clear that it seeks guidance from the Land Board only with respect to the unlawful conveyance of Community Beach, and does not challenge the conveyance of roads to the PLCSOA. The reason is simple. The Land Board lawfully conveyed easements to both the roads and Community Beach by common law dedication in 1924 and/or 1932. Thus, homeowners and tenants have had the full benefit of use of the roads and Community Beach for many decades. The 2014 *Quitclaim Deeds* did not and could not affect those underlying, previously conveyed easements.

The Land Board's residual fee interest in the roads is inconsequential and valueless. Conveyance of that interest to the PLCSOA was a housekeeping matter that facilitated management of the roads without diminishing anyone's property value or depriving the State of any valuable interest. For that reason, conveyance of the residual fee interest in the roads required no public auction.

In contrast, the residual fee interest held by the Land Board in Community Beach is significant. The owner of that fee controls the littoral rights. And, of course, that fee interest enabled the owner to charge over \$100,000 in rent to the Bagleys for their encroachment. Indeed, it still generates rent money, which now illegally goes to PLCSOA rather than to the State.

The *Decision* implies that these two matters (roads and beach) cannot be separated.¹³ That should be corrected. They are as different as night and day. One can be unwound without undoing the other. SGNA appropriately limited the guidance it sought to the lawfulness of the beach conveyance.

J. SGNA's *Petition for Declaratory Ruling* is not premised on constitutional issues beyond the scope of administrative proceedings.

The *Decision* states that SGNA's Petition for Declaratory Ruling presents constitutional issues beyond the scope of an administrative action. *Decision* at 9. That is not a proper basis for finding that the Land Board lacks jurisdiction here.

First, the limitation on agencies addressing constitutional issues ordinarily arises in the context of allegations that the agency's law or regulations violate the Constitution. Agencies are

¹³ "SGNA claims that it only seeks relief with respect to Community Beach, but it has repeatedly claimed that both quitclaim deeds must be voided, which would affect all roads and common areas in the entire Subdivision." *Decision* at 8.

expect to apply the law as enacted. It is inappropriate for a mere agency to rule on the constitutionality of the controlling statutes and rules. That is a matter for the courts. But no one is challenging the constitutionality of anything here. SGNA is simply seeking a declaratory ruling that applies the law on the books to the situation at hand.

There is no rule against administrative agencies considering constitutional issues in administrative matters. Indeed, they ought to be at the forefront. For example, no one would suggest that the Idaho Department of Water Resources is jurisdictionally prohibited from taking into account in an administrative matter the effect of the constitutional requirement for maximum utilization of water.¹⁴ The *Decision* is incorrect in describing the constitutional provisions respecting endowment lands as “beyond the scope of an administrative action.”

Second, turning to the declaratory ruling statute itself, SGNA acknowledges that Idaho Code § 67-5232(1) refers only to statutes and rules, not to the Constitution. SGNA urges that it not be read so literally as to preclude a petition based solely on application of a constitutional provision.

But we need not decide that here, because SGNA identified three statutes that it believes have been violated, Idaho Code §§ 58-301, 58-313, and 58-332. In any event, one would expect the applicability of those statutes to be explored in the context of their constitutional underpinnings.

¹⁴ “Additionally, the Director relied on the policy of promoting the optimum development of the State’s water resources enunciated in Article XV, section 7 of the Idaho Constitution and this Court’s decision in *Clear Springs*, where we stated that ‘[t]he policy of the law of this State is to secure the maximum use and benefit, and least wasteful use, of its water resources.’” *Rangen, Inc. v. IDWR* (“*Rangen II*”), 160 Idaho 119, 129, 369 P.3d 897, 907 (2016) (J. Jones, C.J.) (brackets original).

K. The fact that actions have occurred in reliance on the Land Board's action in 2013 does not preclude the Land Board from recognizing and identifying error in the conveyance of Community Beach.

The Firefighters' petition sought the upending of a COLA put into place years earlier, the result of which would result in payment of substantial sums of money with impacts on investments, budgeting decisions, and who knows what other repercussions. And, of course, every dollar moved from PERSI to the Firefighters is a dollar made unavailable to other pensioners. Nowhere did the Court even hint that this should preclude issuance of backwards-looking relief as a matter of jurisdiction.

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

In short, recognizing past error can be hard, but it is not jurisdictionally precluded.

REQUEST FOR ORAL ARGUMENT

SGNA respectfully requests oral argument before the Hearing Officer at an appropriate time.

CONCLUSION

SGNA submits this *Petition for Reconsideration* with deep respect for the integrity of this process and for the Hearing Officer. In a case that has covered enough legal turf to fill a law review volume, SGNA may have devoted insufficient attention and effort to address the

preliminary issues that the Hearing Officer found dispositive. SGNA appreciates the opportunity afforded here to provide this clarification of its legal contentions.

Respectfully submitted this 26th day of November, 2019.

GIVENS PURSLEY LLP

By 
Christopher H. Meyer

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 26th day of November, 2019, the foregoing (together with attachments or exhibits, if any) was filed, served, and copied as follows:

DOCUMENT FILED:

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

SERVICE COPIES TO:

| | | |
|----------------------------------|-------------------------------------|------------------------------|
| Angela Schaer Kaufmann, Esq. | <input checked="" type="checkbox"/> | U. S. Mail |
| Joy M. Vega, Esq. | <input type="checkbox"/> | Hand Delivered |
| Deputy Attorney General | <input type="checkbox"/> | Overnight Mail |
| Natural Resources Division | <input type="checkbox"/> | Facsimile (208-854-8072) |
| OFFICE OF THE ATTORNEY GENERAL | <input checked="" type="checkbox"/> | E-mail: |
| P.O. Box 83720 | | angela.kaufmann@ag.idaho.gov |
| Boise, ID 83720-0010 | | joy.vega@ag.idaho.gov |
| Hand delivery or overnight mail: | | |
| 700 W State St, 2nd Floor | | |
| Boise, ID 83702 | | |
| <i>(Counsel for Respondent)</i> | | |

| | | |
|----------------------------------|-------------------------------------|--------------------------|
| Mark D. Perison, Esq. | <input checked="" type="checkbox"/> | U. S. Mail |
| Tricia K. Soper, Esq. | <input type="checkbox"/> | Hand Delivered |
| MARK D. PERISON, P.A. | <input type="checkbox"/> | Overnight Mail |
| P.O. Box 6575 | <input type="checkbox"/> | Facsimile (208-343-5838) |
| Boise, ID 83707-6575 | <input checked="" type="checkbox"/> | E-mail: |
| Hand delivery or overnight mail: | | mark@markperison.com |
| 314 South 9th Street, Ste. 300 | | tricia@markperison.com |
| Boise, ID 83702 | | |
| <i>(Counsel for Intervenors)</i> | | |

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