

# State Board of Land Commissioners Open Meeting Checklist

Meeting Date: February 18, 2020

## Regular Meetings

2/7/2020	Notice of Meeting posted in prominent place in IDL's Boise Headquarters office five (5) or more calendar days before meeting.
2/7/2020	Notice of Meeting posted in prominent place in IDL's Coeur d'Alene Headquarters office five (5) or more calendar days before meeting.
2/7/2020	Notice of Meeting posted in prominent place at meeting location five (5) or more calendar days before meeting.
2/7/2020	Notice of Meeting emailed/faxed to list of media and interested citizens who have requested such notice five (5) or more calendar days before meeting.
2/7/2020	Notice of Meeting posted electronically on IDL's public website <a href="http://www.idl.idaho.gov">www.idl.idaho.gov</a> five (5) or more calendar days before meeting.
2/12/2020	Agenda posted in prominent place in IDL's Boise Headquarters office forty-eight (48) hours before meeting.
2/12/2020	Agenda posted in prominent place in IDL's Coeur d'Alene Headquarters office forty-eight (48) hours before meeting.
2/12/2020	Agenda posted in prominent place at meeting location forty-eight (48) hours before meeting.
2/12/2020	Agenda emailed/faxed to list of media and interested citizens who have requested such notice forty-eight (48) hours before meeting.
2/12/2020	Agenda posted electronically on IDL's public website <a href="http://www.idl.idaho.gov">www.idl.idaho.gov</a> forty-eight (48) hours before meeting.
12/9/2019	Land Board annual meeting schedule posted – Boise Director's office, Coeur d'Alene staff office, and IDL's public website <a href="http://www.idl.idaho.gov">www.idl.idaho.gov</a>

## Special Meetings

	Notice of Meeting and Agenda posted in a prominent place in IDL's Boise Director's office twenty-four (24) hours before meeting.
	Notice of Meeting and Agenda posted in a prominent place in IDL's Coeur d'Alene staff office twenty-four (24) hours before meeting.
	Notice of Meeting and Agenda posted at meeting location twenty-four (24) hours before meeting.
	Notice of Meeting and Agenda emailed/faxed to list of media and interested citizens who have requested such notice twenty-four (24) hours before meeting.
	Notice of Meeting and Agenda posted electronically on IDL's public website <a href="http://www.idl.idaho.gov">www.idl.idaho.gov</a> twenty-four (24) hours before meeting.
	Emergency situation exists – no advance Notice of Meeting or Agenda needed. "Emergency" defined in Idaho Code § 74-204(2).

## Executive Sessions *(If only an Executive Session will be held)*

	Notice of Meeting and Agenda posted in IDL's Boise Director's office twenty-four (24) hours before meeting.
	Notice of Meeting and Agenda posted in IDL's Coeur d'Alene staff office twenty-four (24) hours before meeting.
	Notice of Meeting and Agenda emailed/faxed to list of media and interested citizens who have requested such notice twenty-four (24) hours before meeting.
	Notice of Meeting and Agenda posted electronically on IDL's public website <a href="http://www.idl.idaho.gov">www.idl.idaho.gov</a> twenty-four (24) hours before meeting.
	Notice contains reason for the executive session and the applicable provision of Idaho Code § 74-206 that authorizes the executive session.

  
 Recording Secretary

February 12, 2020

Date



## Idaho State Board of Land Commissioners

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

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# NOTICE OF PUBLIC MEETING FEBRUARY 2020

The Idaho State Board of Land Commissioners will hold a Regular Meeting on Tuesday, February 18, 2020 in the **Boise City Council Chambers, Boise City Hall, 3rd Floor, 150 N. Capitol Blvd., Boise**. The meeting is scheduled to begin at 9:00 AM (Mountain).

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*Please note meeting location.*

*Directions: Enter City Hall from Capitol Blvd.; take the Capitol Boulevard elevators to the 3rd floor; Council Chambers are directly across from the elevators.*

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First Notice Posted: 2/7/2020-IDL Boise; 2/7/2020-IDL CDA

This notice is published pursuant to § 74-204 Idaho Code. For additional information regarding Idaho's Open Meeting law, please see Idaho Code §§ 74-201 through 74-208.



## Idaho State Board of Land Commissioners

Brad Little, Governor and President of the Board  
Lawrence E. Denney, Secretary of State  
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Sherri Ybarra, Superintendent of Public Instruction  
Dustin T. Miller, Secretary to the Board

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State Board of Land Commissioners Regular Meeting  
February 18, 2020 – 9:00 AM (MT)  
Final Agenda  
Boise City Council Chambers, Boise City Hall, 3rd Floor, 150 N. Capitol Blvd., Boise

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***Please note meeting location.***

***Directions: Enter City Hall from Capitol Blvd.; take the Capitol Boulevard elevators to the 3rd floor; Council Chambers are directly across from the elevators***

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

**Endowment Transactions**

- A. Timber Sales – January 2020
- B. Leases and Permits – January 2020

**Status Updates**

- C. Legislative Summary
- D. Resource Protection and Assistance Bureau Update

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

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

**Consent—Action Item(s)**

**3. Approval of Minutes** – January 21, 2020 Regular Meeting (Boise)

**Regular—Action Item(s)**

**4. Omnibus Rulemaking – Adoption of Temporary Rules** – Presented by Dustin Miller, Director

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State Board of Land Commissioners  
Final Agenda  
Regular Meeting – February 18, 2020  
Page 1 of 2

## Executive Session

- A. Idaho Code § 74-206(1)(f) – to communicate with legal counsel for the public agency to discuss the legal ramifications of and legal options for pending litigation, or controversies not yet being litigated but imminently likely to be litigated. [TOPIC: GNA Timber Sale]
- B. Idaho Code § 74-206(1)(f) – to communicate with legal counsel for the public agency to discuss the legal ramifications of and legal options for pending litigation, or controversies not yet being litigated but imminently likely to be litigated. [TOPIC: Recommended Order]

## Regular—Action Item(s)

- 5. **Review Recommended Decision and Order – Sharlie-Grouse Neighborhood Association v. State Board of Land Commissioners** – Presented by Becky Ophus, Section Chief-Fair Hearings Unit, Office of the Attorney General

## Information

None

The logo for the Idaho Department of Lands is a large, stylized diamond shape. It features a central light blue area with a white outline, surrounded by a yellow area with a white outline, and an outer grey area with a white outline. The text "IDAHO DEPARTMENT OF LANDS" is written in white, bold, uppercase letters across the center of the diamond.

IDAHO DEPARTMENT OF LANDS





# Idaho Statutes

TITLE 74  
TRANSPARENT AND ETHICAL GOVERNMENT  
CHAPTER 2  
OPEN MEETINGS LAW

74-206. EXECUTIVE SESSIONS – WHEN AUTHORIZED. (1) An executive session at which members of the public are excluded may be held, but only for the purposes and only in the manner set forth in this section. The motion to go into executive session shall identify the specific subsections of this section that authorize the executive session. There shall be a roll call vote on the motion and the vote shall be recorded in the minutes. An executive session shall be authorized by a two-thirds (2/3) vote of the governing body. An executive session may be held:

(a) To consider hiring a public officer, employee, staff member or individual agent, wherein the respective qualities of individuals are to be evaluated in order to fill a particular vacancy or need. This paragraph does not apply to filling a vacancy in an elective office or deliberations about staffing needs in general;

(b) To consider the evaluation, dismissal or disciplining of, or to hear complaints or charges brought against, a public officer, employee, staff member or individual agent, or public school student;

(c) To acquire an interest in real property not owned by a public agency;

(d) To consider records that are exempt from disclosure as provided in chapter 1, title 74, Idaho Code;

(e) To consider preliminary negotiations involving matters of trade or commerce in which the governing body is in competition with governing bodies in other states or nations;

(f) To communicate with legal counsel for the public agency to discuss the legal ramifications of and legal options for pending litigation, or controversies not yet being litigated but imminently likely to be litigated. The mere presence of legal counsel at an executive session does not satisfy this requirement;

(g) By the commission of pardons and parole, as provided by law;

(h) By the custody review board of the Idaho department of juvenile corrections, as provided by law;

(i) To engage in communications with a representative of the public agency's risk manager or insurance provider to discuss the adjustment of a pending claim or prevention of a claim imminently likely to be filed. The mere presence of a representative of the public agency's risk manager or insurance provider at an executive session does not satisfy this requirement; or

(j) To consider labor contract matters authorized under section 74-206A (1)(a) and (b), Idaho Code.

(2) The exceptions to the general policy in favor of open meetings stated in this section shall be narrowly construed. It shall be a violation of this chapter to change the subject within the executive session to one not identified within the motion to enter the executive session or to any topic for which an executive session is not provided.

(3) No executive session may be held for the purpose of taking any final action or making any final decision.

(4) If the governing board of a public school district, charter district, or public charter school has vacancies such that fewer than two-thirds (2/3) of board members have been seated, then the board may enter into executive session on a simple roll call majority vote.

#### History:

[74-206, added 2015, ch. 140, sec. 5, p. 371; am. 2015, ch. 271, sec. 1, p. 1125; am. 2018, ch. 169, sec. 25, p. 377; am. 2019, ch. 114, sec. 1, p. 439.]

**STATE BOARD OF LAND COMMISSIONERS**

February 18, 2020

Endowment Transactions

**Timber Sales**

During January 2020, the Department of Lands sold three endowment timber sales at auction. The endowment net sale value represents a 0.0% up bid over the advertised value.

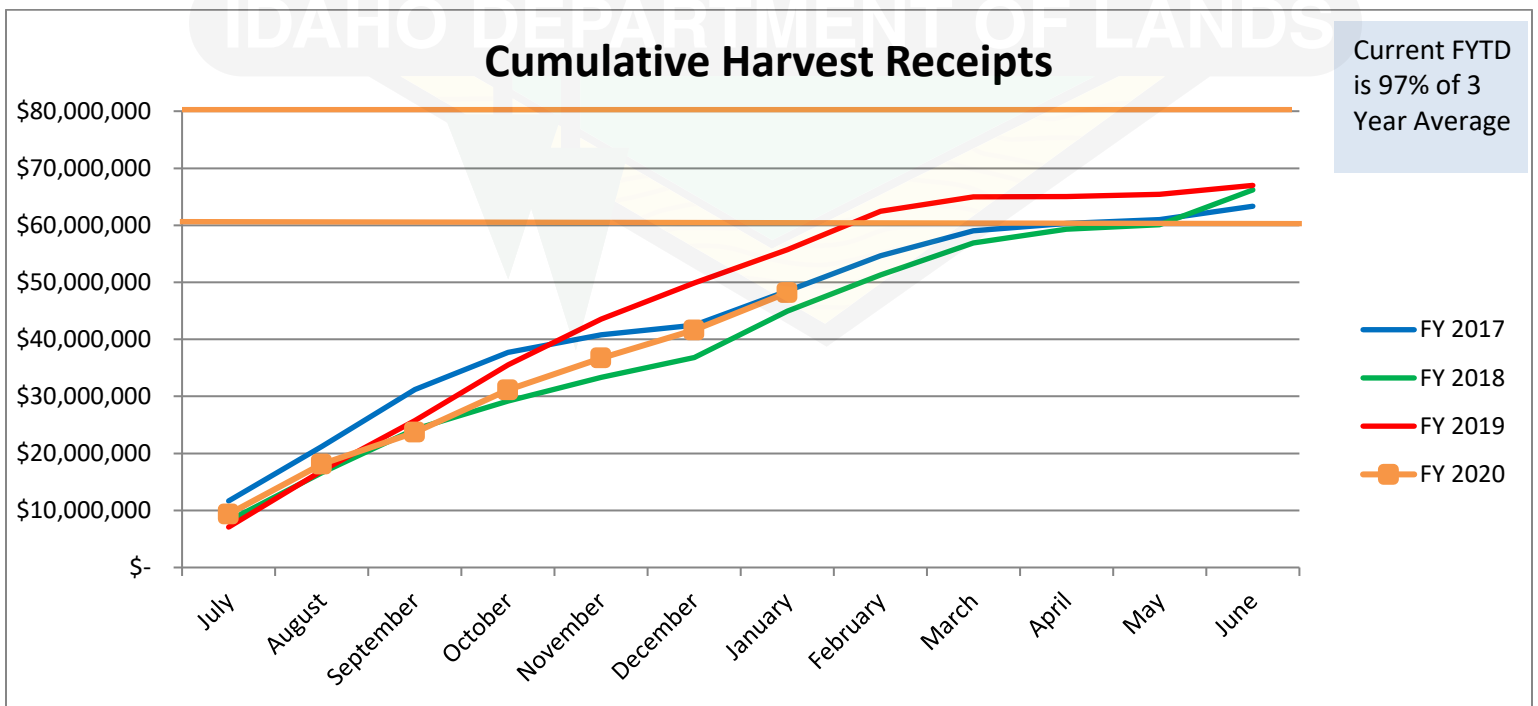
<b>TIMBER SALE AUCTIONS</b>								
Sale Name	Area	Sawlogs MBF	Cedar Prod MBF	Pulp MBF	Appraised Net Value	Sale Net Value	Net \$/MBF	Purchaser
Sandy Bear	POND	5,565			\$ 1,270,325.50	\$ 1,270,325.50	\$228.27	Bennett Lumber
Riley Pine Over	POL	3,120			\$ 745,453.50	\$ 745,453.50	\$238.93	IFG Timber LLC
Carey West	POL	4,310			\$ 882,691.50	\$ 882,691.50	\$204.80	IFG Timber LLC
<b>Endowment</b>		<b>12,995</b>	<b>0</b>	<b>0</b>	<b>\$ 2,898,470.50</b>	<b>\$ 2,898,470.50</b>	<b>\$223.05</b>	

<b>PROPOSED TIMBER SALES FOR AUCTION</b>				
Sale Name	Volume MBF	Advertised Net Value	Area	Estimated Auction Date
<b>North Operations</b>				
South Boehls	6,325	\$ 906,047	SJ	2/11/2020 (2nd Auction)
<b>South Operations</b>				
Scolytus and Rice	1,455	\$ 168,955	MC	2/12/2020
<b>Total</b>	<b>7,780</b>	<b>\$ 1,075,002</b>		

<b>VOLUME UNDER CONTRACT as of January 31, 2020</b>				
	Public School	Pooled	Total	3 Year Avg.
Active Contracts			<b>164</b>	163
Total Residual MBF Equivalent	351,688	201,742	<b>553,430</b>	472,106
Estimated residual value	\$90,323,760	\$54,330,470	<b>\$144,654,230</b>	\$136,583,397
Residual Value (\$/MBF)	\$256.83	\$269.31	<b>\$261.38</b>	\$289.14

TIMBER HARVEST RECEIPTS										
		January		FY to Date		February Projected				
		Stumpage		Interest		Harvest Receipts				
		Stumpage		Interest		Harvest Receipts				
<b>Public School</b>	\$	3,447,862.99	\$	351,734.64	\$	32,159,148.21	\$	2,371,057.75	\$	219,729.52
<b>Pooled</b>	\$	2,512,313.46	\$	233,091.88	\$	16,016,571.47	\$	2,952,182.31	\$	272,955.58
<b>General Fund</b>	\$	5.36	\$	0.42	\$	478.81	\$	722.56	\$	61.75
<b>TOTALS</b>	\$	5,960,181.81	\$	584,826.94	\$	48,176,198.49	\$	5,323,962.62	\$	492,746.85

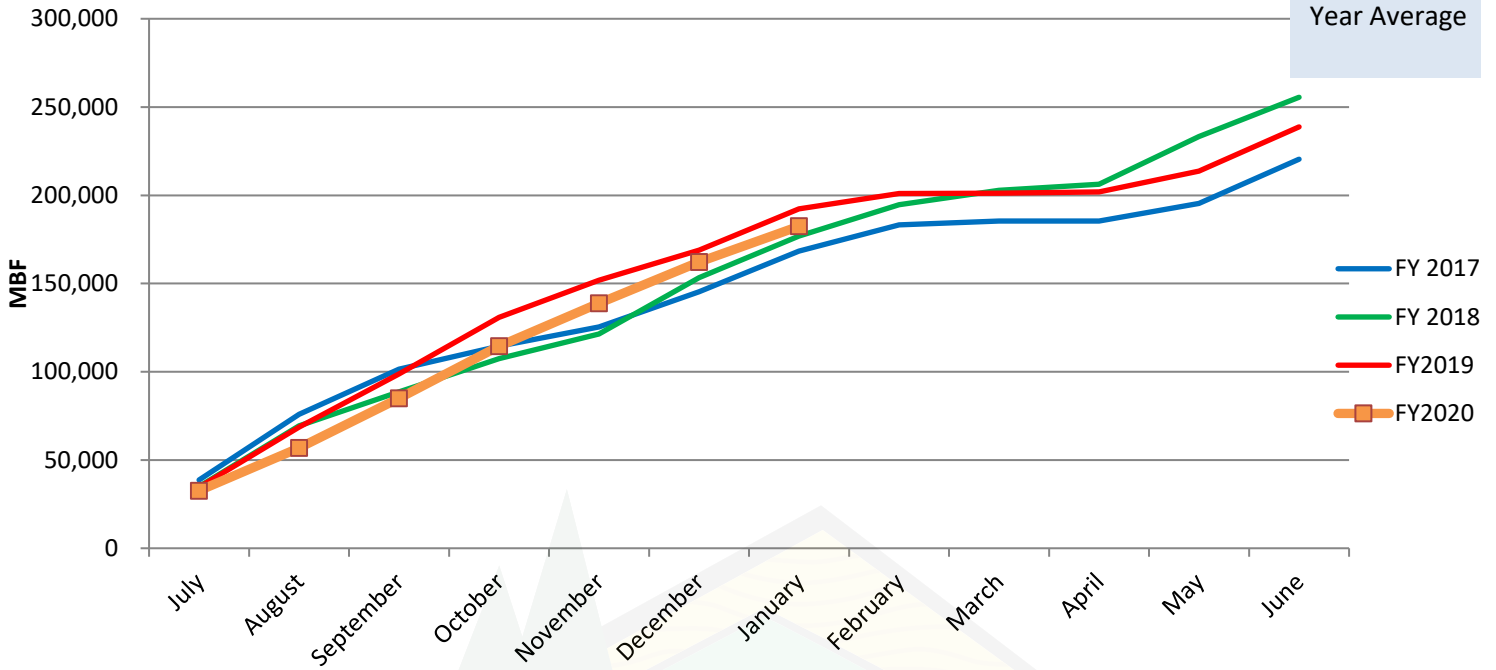
Status of FY 2020 Timber Sale Program						
	MBF Sawlog			Number Poles		
	Public School	Pooled	All Endowments	Public School	Pooled	All Endowments
Sold as of January 31, 2020	91,691	41,979	133,671	2,003	5,650	7,653
Currently Advertised	6,789	835	7,624	0	0	0
In Review	24,245	20,501	44,746	2,800	0	2,800
Did Not Sell <sup>1</sup>	0	0	0	0	0	0
<b>TOTALS</b>	122,725	63,315	186,040	4,803	5,650	10,453
FY-2020 Sales Plan			267,395			17,953
Percent to Date			70%			58%



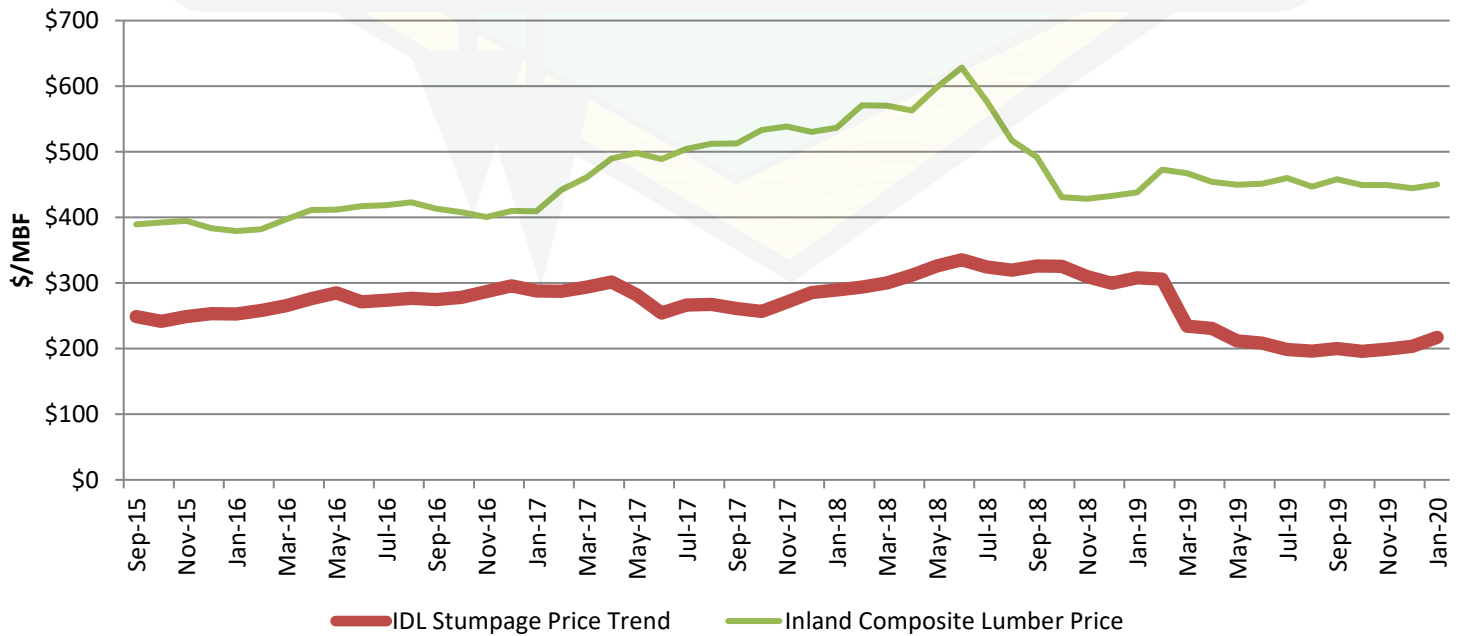
<sup>1</sup> After three attempts at auction.

## Cumulative Harvest Volume

Current FYTD is 102% of 3 Year Average



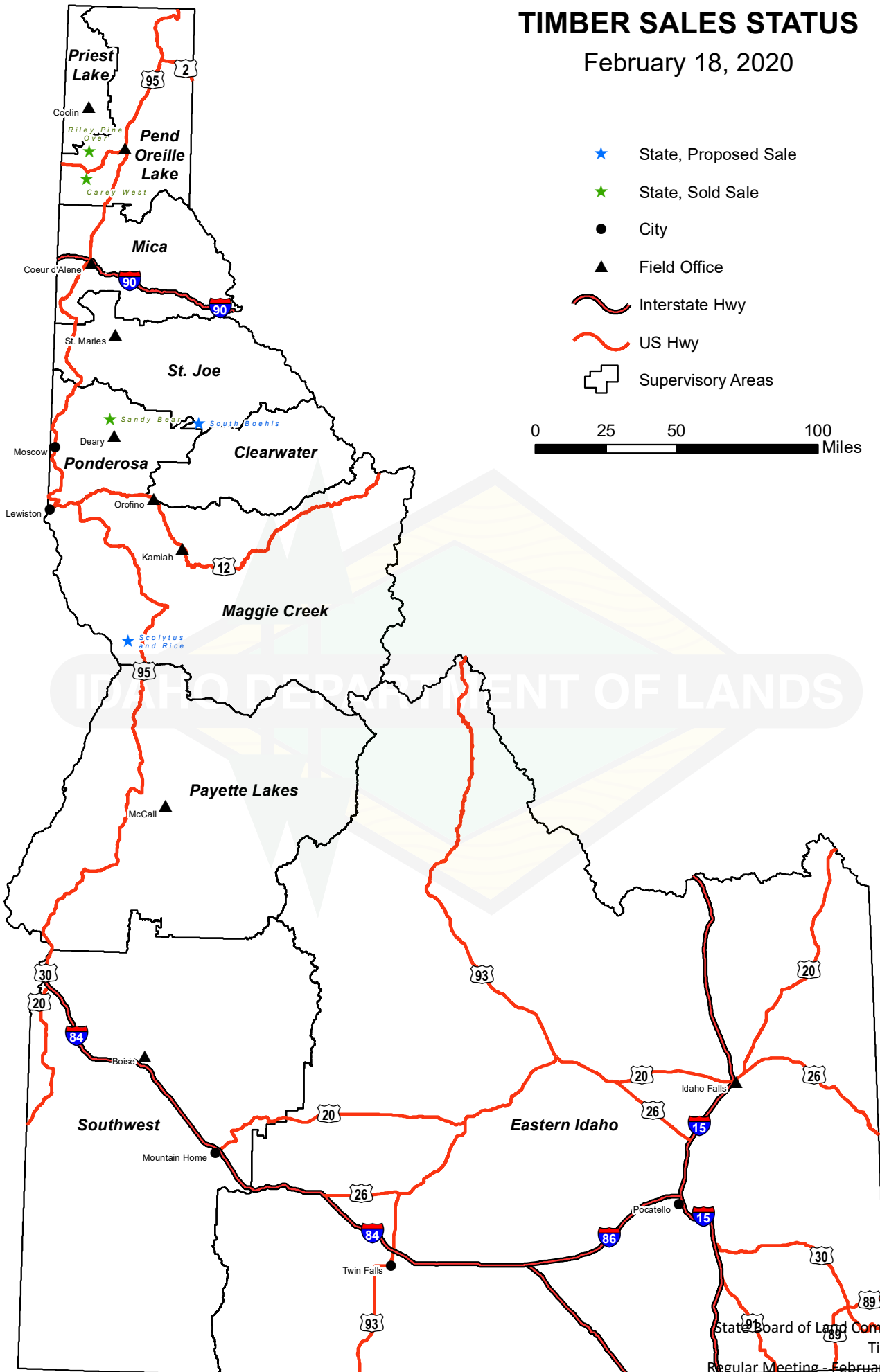
## Monthly Lumber and Stumpage Price



IDL Stumpage Price Line is a 6 month rolling average of the net sale price.

# TIMBER SALES STATUS

February 18, 2020



IDAHO DEPARTMENT OF LANDS



State Board of Land Commissioners  
Timber Sales  
Regular Meeting - February 18, 2020

**STATE BOARD OF LAND COMMISSIONERS**  
February 18, 2020  
Endowment Transactions

**Leases and Permits**

FISCAL YEAR 2020 – LEASING & PERMITTING TRANSACTIONS BY MONTH – through January 31, 2020														
ACTIVITY	JUL	AUG	SEP	OCT	NOV	DEC	JAN	FEB	MAR	APR	MAY	JUN	EST	FYTD
<b>SURFACE</b>														
Agriculture	-	-	-	-	-	-	2	-	-	-	-	-	12	2
Communication Sites	-	-	-	-	-	-	-	-	-	-	-	-	5	0
Grazing	-	-	-	-	-	-	37	-	-	-	-	-	142	37
<i>Assignments</i>	2	1	1	2	1	1	6	-	-	-	-	-	-	14
Residential	-	-	-	-	-	-	-	-	-	-	-	-	15	0
<i>Assignments</i>	-	1	1	1	-	-	1	-	-	-	-	-	-	4
<b>COMMERCIAL</b>														
Alternative Energy	-	-	-	-	-	-	-	-	-	-	-	-	-	0
Industrial	-	-	-	-	-	-	-	-	-	-	-	-	1	0
Military	-	-	-	-	-	-	-	-	-	-	-	-	3	0
Office/Retail	-	-	-	-	-	2	-	-	-	-	-	-	4	2
Recreation	-	-	-	-	-	-	-	-	-	-	-	-	4	0
<i>Assignments</i>	-	-	-	-	-	-	1	-	-	-	-	-	-	1
<b>OTHER</b>														
Conservation	-	-	-	-	-	-	-	-	-	-	-	-	1	0
<i>Assignments</i>	-	-	-	1	-	-	-	-	-	-	-	-	-	1
Geothermal	-	-	-	-	-	-	-	-	-	-	-	-	-	0
Minerals	-	-	-	-	-	-	-	-	-	-	-	-	9	0
<i>Assignments</i>	1	-	-	-	3	-	-	-	-	-	-	-	-	4
Non-Comm Recreation	-	-	-	-	-	-	-	-	-	-	-	-	-	0
Oil & Gas	-	-	-	-	-	-	-	-	-	-	-	-	-	0
<b>PERMITS</b>														
Land Use Permits	14	5	8	9	2	5	2	-	-	-	-	-	NA	45
<b>TOTAL INSTRUMENTS</b>	<b>17</b>	<b>7</b>	<b>10</b>	<b>13</b>	<b>6</b>	<b>8</b>	<b>49</b>	<b>-</b>	<b>-</b>	<b>-</b>	<b>-</b>	<b>-</b>	<b>NA</b>	<b>110</b>

**Real Estate**

FISCAL YEAR 2020 – REAL ESTATE TRANSACTIONS BY MONTH – through January 31, 2020														
ACTIVITY	JUL	AUG	SEP	OCT	NOV	DEC	JAN	FEB	MAR	APR	MAY	JUN	EST	FYTD
Deeds Acquired	-	-	-	-	-	-	-	-	-	-	-	-	-	0
Deeds Granted	6	1	11	14	1	3	1	-	-	-	-	-	-	37
Deeds Granted - Surplus	-	-	-	-	-	-	-	-	-	-	-	-	-	0
Easements Acquired	-	1	3	-	-	-	1	-	-	-	-	-	-	5
Easements Granted	1	1	2	2	-	2	-	-	-	-	-	-	-	8

*A significant number of the re-advertised 2020 leases have been processed. Over the next couple of months there will be similar trends. The Department continues to work on getting the leases processed and completed. The Department is now accepting 2021 lease applications. The one granted deed in January was the last deed to be issued from the 2019 (CY) sale of the Priest Lake cottage sites. The Department acquired 1,160 linear feet of access as the first phase of a project to access 840 acres of Charitable Institution endowment timberland. The acquired easement cost \$500.*

**LANDS AND WATERWAYS DIVISION**  
**2020FYTD GROSS REVENUE - ACTUAL AND FORECASTED**  
**through January 31, 2020**

	ACTUAL RECEIPTS AS OF 01.31.2020	REVENUE EXPECTED BY 01.31.2020**	REVENUE EXPECTED BY 06.30.2020
<b>SURFACE</b>			
AGRICULTURE	\$ 337,355	\$ 248,500	\$ 308,786
COMMUNICATION SITES	\$ 864,314	\$ 764,726	\$ 937,019
GRAZING	\$ 268,484	\$ 236,365	\$ 1,818,574
RESIDENTIAL	\$ 995,095	\$ 1,323,779	\$ 1,820,796
<b>COMMERCIAL</b>			
COMMERCIAL ENERGY RESOURCES	\$ 19,448	\$ 13,868	\$ 22,812
COMMERCIAL INDUSTRIAL	\$ 125,395	\$ 61,070	\$ 82,308
COMMERCIAL MILITARY	\$ 71,658	\$ 49,701	\$ 139,976
COMMERCIAL OFFICE/RETAIL	\$ 725,431	\$ 794,193	\$ 964,519
COMMERCIAL RECREATION	\$ 381,968	\$ 307,034	\$ 322,031
<b>OTHER</b>			
CONSERVATION LEASES	\$ 151,004	\$ 141,318	\$ 148,078
GEO THERMAL	\$ -	\$ 3,303	\$ 4,117
MINERAL	\$ 13,003	\$ 21,379	\$ 73,453
NON-COMMERCIAL RECREATION	\$ 91,201	\$ 75,069	\$ 80,496
OIL AND GAS LEASES	\$ 13,133	\$ 9,561	\$ 29,096
<b>Sub Total</b>	<b>\$ 4,057,492</b>	<b>\$ 4,049,866</b>	<b>\$ 6,752,062</b>
*LAND SALES/RECORDS	\$ 297,132	***	
*REAL ESTATE SERVICES	\$ 15		
<b>Grand Total</b>	<b>\$ 4,354,639</b>		

\* These categories are not included in the annual forecast.

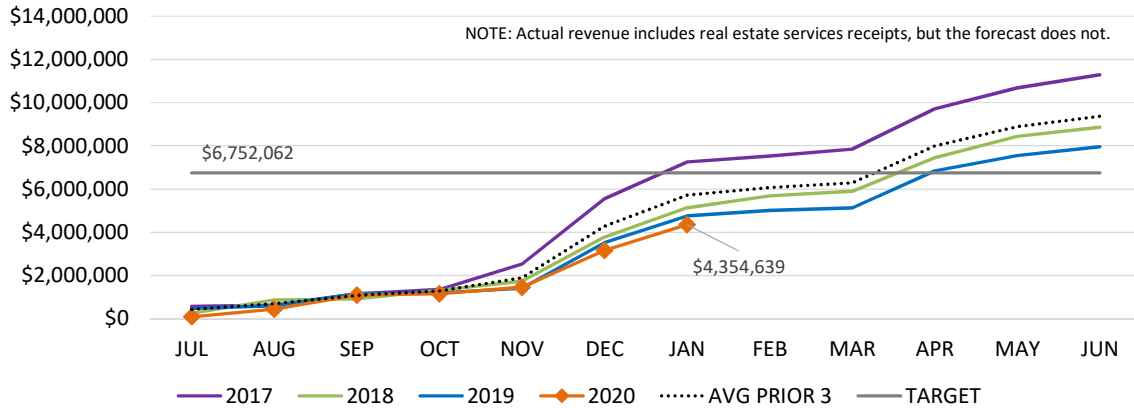
\*\* These figures are based on "normal" timing of revenue/billing throughout the year.

\*\*\* \$40,880 of "revenue" was removed from this total because it was passed through to a real estate broker.

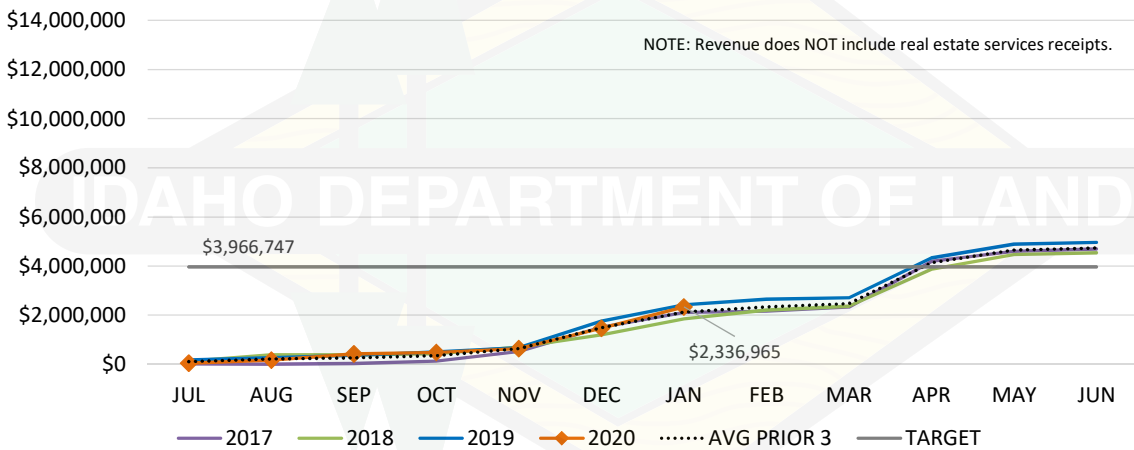
NOTE: The Department prepares the annual endowment revenue forecast by ASSET CLASS (not by Program). For this table, we have attempted to further breakdown the forecast by program by applying trend data.

Cumulative L&W Program Receipts - Earnings Reserve  
ALL PROGRAMS  
FY17 - FYTD20

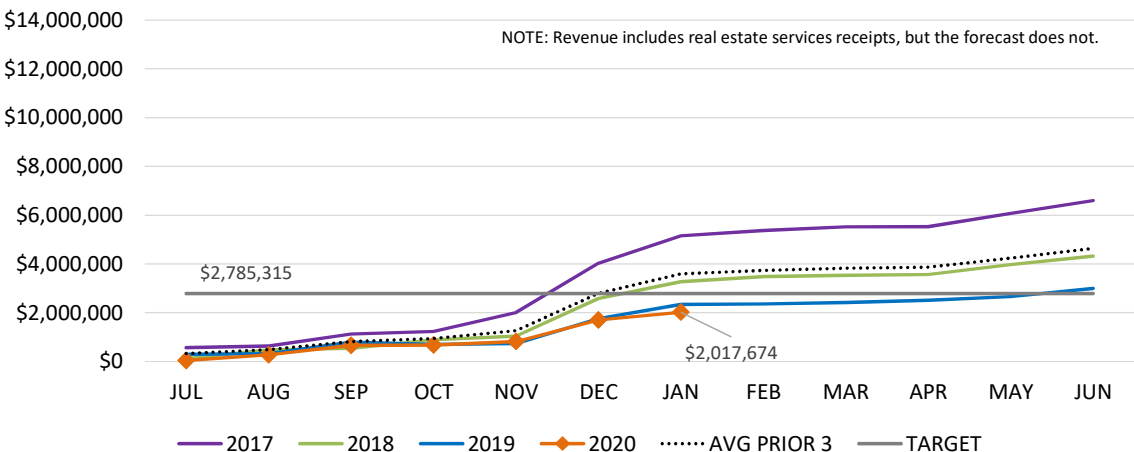
FYTDTotal is 76%  
of 3 Year Average



Cumulative L&W Program Receipts - Earnings Reserve  
NO COMMERCIAL RETAIL OR RESIDENTIAL REVENUE\* INCLUDED  
FY17 - FYTD20

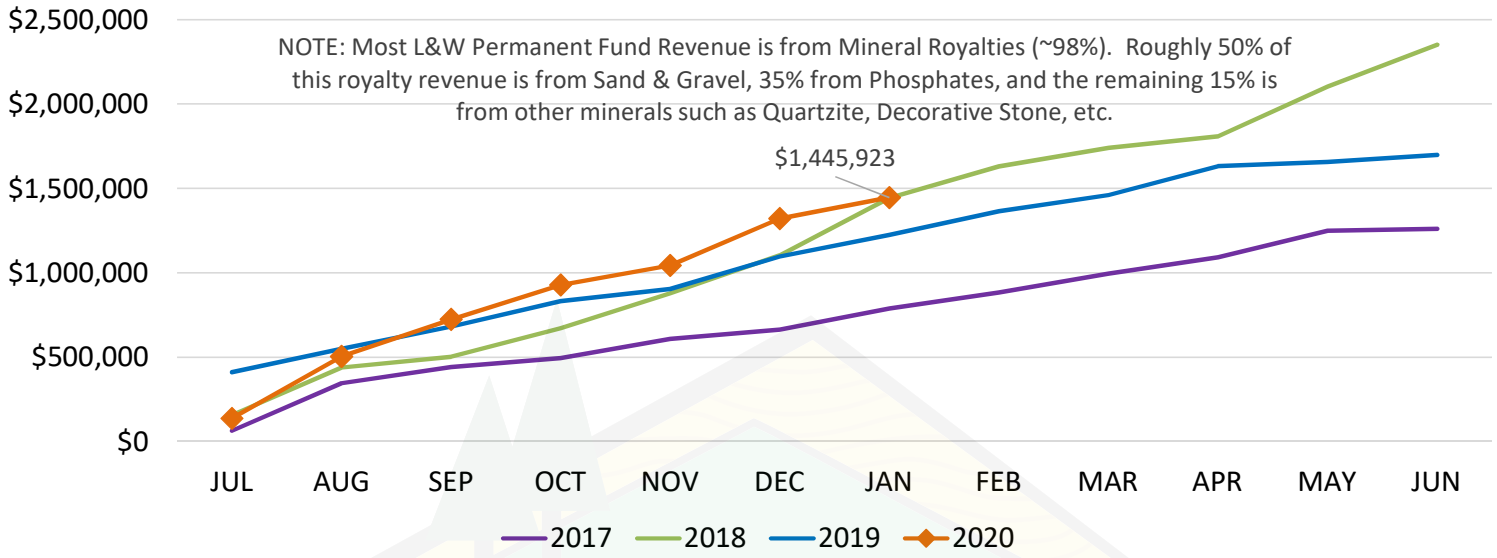


Cumulative L&W Program Receipts - Earnings Reserve  
ONLY COMMERCIAL RETAIL AND RESIDENTIAL REVENUE\* INCLUDED  
FY17 - FYTD20





**Cumulative L&W Permanent Fund Revenue/Royalties**  
 (Does NOT include Land Bank Revenue)  
 FY17 - FYTD20



**IDAHO DEPARTMENT OF LANDS**

## STATE BOARD OF LAND COMMISSIONERS

February 18, 2020  
2020 Legislative Summary

Status of legislation monitored by the Department of Lands

### IDL Pending Rules

#### [20-0000-1900 - Omnibus Non-Fee](#)

**Status:** House Resources and Conservation Committee - Approved; Senate Resources and Environment Committee – Approved.

#### [20-0000-1900F - Omnibus Fee](#)

**Status:** House Resources and Conservation Committee – Approved; Senate Resources and Environment Committee – Approved.

#### [IDAPA 20.03.02](#) – Rules Governing Mined Land Reclamation.

HB 141 required a temporary rule to be in place by August 1, 2019. The purpose of these changes was to more accurately reflect current industry and regulatory practices. Negotiated rulemaking continues for a permanent rule.

**Status:** House Resources and Conservation Committee – Approved; Senate Resources and Environment Committee – Approved.

#### [IDAPA 20.03.03](#) – Rules Governing Administration of the Reclamation Fund.

Removes the mandatory requirement that all eligible operators participate in the Reclamation Fund, expands the acreage and reclamation cost liability limits, and allows more operations to use the fund for financial assurance.

**Status:** House Resources and Conservation Committee – Approved; Senate Resources and Environment Committee – Approved.

#### [IDAPA 20.03.04](#) – Rules for the Regulation of Beds, Waters, and Airspace Over Navigable Lakes in the State of Idaho.

Allows the fee for encroachment permits to cover the actual processing cost.

**Status:** House Resources and Conservation Committee – Approved; Senate Resources and Environment Committee – Approved.

## **IDL Legislation**

### **Budget**

IDL budget setting is scheduled before JFAC on Friday, February 21.

EFIB budget setting is scheduled before JFAC on Monday, February 17.

### **Other Legislation Being Monitored**

#### **Mining**

[HJM011 Itafos Conda](#) – Stating findings of the Legislature, supporting the Itafos Conda project, and requesting that the federal government commit adequate personnel and resources to the project.

**Status:** House Adopted; Senate – pending vote.

[S1216 Cyanidation Facilities](#) – Amends existing law to require permanent closure plans for cyanidation facilities prior to the issuance of permits and to prohibit the construction and operation of a cyanidation facility until the permittee submits proof of financial assurance for its permanent closure plan.

**Status:** LAW.

#### **Miscellaneous**

[H0359 Taxes](#) – Amends existing law to repeal the property tax and to increase the sales tax.

**Status:** House Ways and Means Committee – pending a hearing.

[H0397 Boating](#) – Amends existing law to revise provisions regarding negligent operation, motorized watercraft operational zone designation, and penalties.

**Status:** House Resources and Conservation Committee – pending a hearing.

[HJR005 Constitutional Amendment](#) – Proposing an amendment to Article 7, Section 4 of the Idaho Constitution to provide for the taxation of public property leased to private entities if authorized by statute.

**Status:** House Revenue and Taxation Committee – pending a hearing.

[S1274 Idaho Administrative Procedure Act](#) – Amends and adds to existing law to revise procedures for contested cases and hearing officers.

**Status:** Senate State Affairs Committee – hearing held Monday, February 10.

[S1283 Administrative Rules](#) – Amends existing law to provide for a petition for a waiver or variance from an administrative rule.

**Status:** Senate State Affairs Committee – hearing held Wednesday, February 12.

[S1311 – Exploding Targets](#) – Adds to existing law to provide restrictions regarding the use of exploding targets.

**Status:** Senate State Affairs Committee – pending a hearing.

[S1317 Fish and Game](#) – To prohibit interference with certain lands, highways, and navigable streams, to clarify that specified law shall not apply to certain activities, to provide for violations and penalties, and to provide for civil damages

**Status:** Senate Resources and Environment Committee – pending a hearing.

The logo for the Idaho Department of Lands is centered on the page. It features a stylized mountain range in the background with a green diamond shape in the center. Overlaid on this is a horizontal banner with the text "IDAHO DEPARTMENT OF LANDS" in white, uppercase letters. The banner has a grey border and a slight shadow effect.

IDAHO DEPARTMENT OF LANDS

# STATE BOARD OF LAND COMMISSIONERS

February 18, 2020

## Resource Protection and Assistance Bureau Biannual Report

The Resource Protection and Assistance (RPA) Bureau houses the non-endowment regulatory functions within the Division of Minerals, Public Trust, and Oil and Gas. The Public Trust Program administers mostly lake encroachment permits and submerged lands leases, and the Minerals Program administers the surface mining reclamation plans, dredge and placer permits, and abandoned mine land projects. The Public Trust Program is self-supported through a dedicated account, and the Minerals Program is supported through a mixture of general fund and dedicated fund sources.

### Public Trust Program

#### PAST 6-MONTH HIGHLIGHTS

- **Instrument Activity.** Instruments issued FY2014 through first half FY2020:

Table 1: Public Trust Historical Instrument Numbers							
Instrument Type	2014	2015	2016	2017	2018	2019	2020
Encroachment Permits Issued	208	282	327	289	338	412	252
Active Submerged Land Leases	182	179	185	192	180	172	173
New Submerged Land Leases	12	26	11	8	36	48	0
Active Riverbed Mineral Leases	4	3	2	2	2	2	2
New Riverbed Mineral Leases	0	0	1	0	0	0	0
Active Exploration Locations	14	10	2	3	4	2	5
New Exploration Locations	0	2	0	1	2	4	0
New Submerged Land Easements	13	11	27	6	2	3	2
New Disclaimers of Interest	9	2	2	1	3	0	2

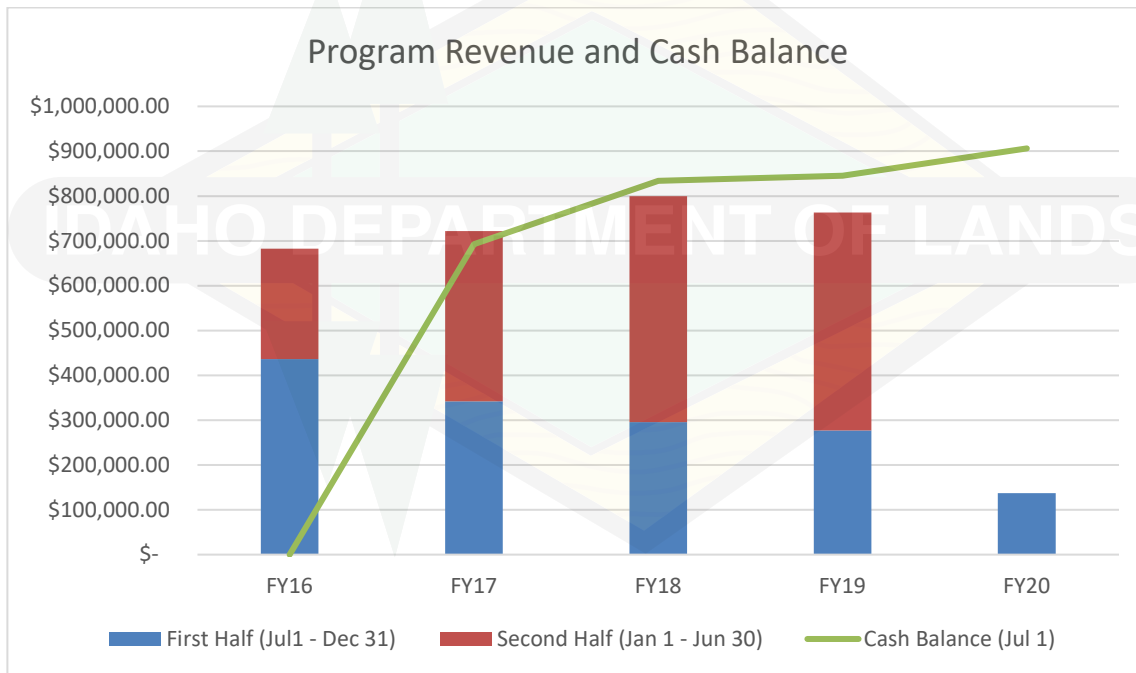
- **Negotiated Rulemaking.** The Notice of Proposed Rulemaking was published in the September 4, 2019 Administrative Bulletin. No written comments were received, and no one attended the hearing on September 16, 2019. The Pending Rule is before the 2020 legislative session.
- **Noncompliances.** Between July 1 and December 31, 2019, the Department issued two notices of noncompliance. Currently, the Department is working with 20 individuals to correct noncompliances with the Lake Protection Act and corresponding administrative rules.

- **Buoys on the Spokane River.** The Department found only four unpermitted buoys during an inspection last summer. Two of the land owners had also been notified of unpermitted buoys in 2018. The Department will schedule more inspections prior to the start of the 2020 boating season, and will follow up on any unpermitted buoys.
- **Administrative Hearings.** The Department ordered and held two contested case hearings and four public hearings on encroachment permit applications. All six resulted in orders approving the applications. A total of 14 hearings were held in calendar 2019.

**NEXT SIX MONTHS**

- **Administrative Hearings.** Since December, two hearings have been ordered; one was held in January and the other is scheduled for February 2020.
- **Budget Analysis.** The Department is reviewing potential changes to rental rates for the submerged lands leases.

**FINANCIAL UPDATE**



Revenue for the first half of FY21 is 40% of the average for this time. This is primarily due to the delay in renewing 35 submerged land leases. The Department has been working with the Attorney General's Office on an update to the lease template for the 19 leases that expired in 2019. The Department is also working with 16 lessees on expired leases to resolve noncompliance issues.

## Regulatory Minerals Program

### PAST 6-MONTH HIGHLIGHTS

- **Large Mine Reviews.** Participation continues for the Stibnite Gold Project Environmental Impact Statement (EIS) in the Payette Lakes Area. Data analysis was being provided to the agencies through November while the Preliminary Draft EIS was being drafted. A reclamation plan update for Thompson Creek Mine's Phase 8 is still incomplete due to questions over the bond calculations. A Final EIS was issued for the Dairy Syncline phosphate mine. The first reclamation plan application for an underground mine was received in December 2019. It is for a gold and silver mine near Elk City.
- **Bond Audit.** The results of the internal bond audit were used to update our database.
- **Negotiated Rulemaking for IDAPA 20.03.02 and 20.03.03.** Temporary rules for IDAPA 20.03.02 were approved by the Board in July 2019 and are now in effect. Negotiations for a proposed rule will continue through the summer of 2020. The Notice of Proposed Rulemaking for IDAPA 20.03.03 was published in the September 4, 2019 Administrative Bulletin. No written comments were received, and no one attended the hearing on September 16, 2020. The Pending Rule is before the 2020 legislative session.

### LOOKING FORWARD

- **Inspection Schedules.** With the passing of House Bill 141, a review of each permitted mine site must be conducted at least once every five years. The Bureau will develop a 5-year implementation plan and inspection schedule to meet the requirements.
- **Develop Procedures for ITD and County Review of Reclamation Plans.** The Department currently oversees approximately 600 reclamation plans that are held by Idaho counties or the Idaho Transportation Department. The Department is developing workflow processes within the new Land Information Management System (Landfolio) to ensure regulation of these permits while avoiding duplicative efforts by government employees.
- **Implementation of Financial Assurance Calculators.** The Department is in the process of developing financial assurance calculators to implement the changes from House Bill 141.

### TOTAL PERMITS AND BONDING

The Department currently regulates 1,561 mine sites covered by reclamation plans and 28 covered by a dredge and placer permit. The mines are presented in Table 3 by area and category, and Table 4 has historical plan numbers.

Table 3: Current Mine Permit Categories by IDL Supervisory Area				
IDL Area	Sand and Gravel Mines (IDAPA 20.03.02.069)	Hardrock, Phosphate & Complex Industrial (IDAPA 20.03.02.070)	Cyanidation Mines (IDAPA 20.03.02.071)	Dredge and Placer Permits (IDAPA 20.03.01)
Clearwater	34	-	-	-
Eastern	706	21	-	1
Maggie Creek	66	1	-	3
Mica	34	-	-	7
Payette Lakes	111	2	-	2
Pend Oreille Lake	139	-	-	-
Ponderosa	56	2	-	-
Priest Lake	18	-	-	-
Southwest	304	2	-	1
St. Joe	65	-	-	14
<b>TOTAL</b>	<b>1,533</b>	<b>28</b>	<b>-</b>	<b>28</b>

Table 4: Regulatory Minerals Historical Instrument Numbers									
Instrument Type	2012	2013	2014	2015	2016	2017	2018	2019	2020
<b>Surface Mining</b>									
New Reclamation Plans	36	20	20	25	36	24	18	28	9
Retirements	23	7	17	14	36	15	22	9	9
Total Reclamation Plans	1,496	1,536	1,537	1,528	1,530	1,542	1,540	1,561	1,561
<b>Dredge and Placer</b>									
New/Amended Dredge and Placer Permits	4	1	0	1	3	3	1	2	0
Retirements	-	-	-	-	-	2	0	1	0
Total Dredge and Placer Permits	20	21	21	22	25	26	27	28	28
<b>Note:</b> Inspections, Amendments, and Non-compliance are not currently tracked but will be with the implementation of the Land Information Management System (LIMS)									

For reclamation plans and dredge and placer permits, operators are eligible to provide bonding through traditional methods or the Bond Assurance Fund. Tables 5 and 6 list the acres and bond amounts currently in place for different types of mining operations. Created in 2006, the BAF provides another reclamation bonding option for small operators. Participation in the BAF is limited to disturbance equivalent to 40 acres or \$100,000 in liability. This is a dedicated account with revenue from annual fees of approximately \$147,000 per year. Billings are mailed in September with a November 1 due date. Table 7 has revenue from the FY2020 billing. Figure 1 illustrates the revenue, expenditures, and balance for this fund.



Table 5: Bonding for Sand and Gravel, Light Industrial, and Placer Permits								
	Reclamation Plans (IDAPA 20.03.02.069)				Dredge and Placer Permits (IDAPA 20.03.01)			
	Plans	Acres	Total Bond	Bond/Acre	Permits	Acres	Total Bond	Bond/Acre
Traditional Bond <sup>1</sup>	312	15,895	\$11.8 Million	\$742	22	861	\$941K	\$1,093
Bond Assurance Fund	620	31,815	n/a	n/a	8	241	n/a	n/a

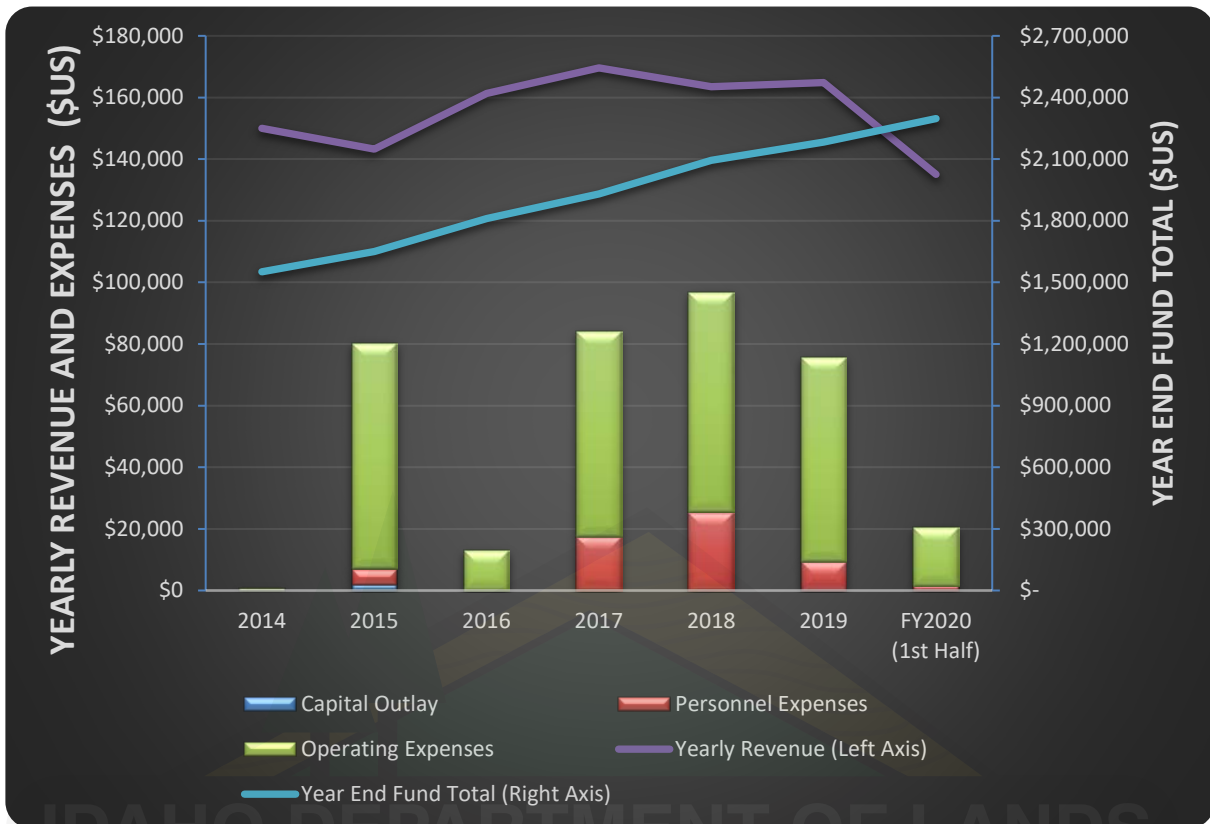
<sup>1</sup> Surety Bond, Letter of Credit, Certificate of Deposit, or Cash

Table 6: Bonding for Hardrock, Phosphate & Complex Industrial				
	Reclamation Plans (IDAPA 20.03.02.070)			
	Permits	Permitted Acres	Total Bond	Bond/Acre
Traditional Bond <sup>1</sup>	28	18,981	\$101 Million	\$5,373

<sup>1</sup> Surety Bond, Letter of Credit, Certificate of Deposit, or Cash

Table 7: Bond Assurance Fund Billing (For FY 2020)				
Disturbance (ACRES)	Annual Fee Schedule (\$)	Total Permits Distribution	Total Annual Fees Due (\$)	Annual Fees Collected Through 12/31/2019
Mineral Leases	\$100	0	\$0	\$0
2 acres or less	\$100	155	\$17,600	\$12,100
> 2 acres ≤ 5 acres	\$200	156	\$35,000	\$24,200
> 5 acres ≤ 10 acres	\$250	144	\$32,500	\$28,000
> 10 acres ≤ 15 acres	\$300	60	\$21,300	\$14,100
> 15 acres ≤ 20 acres	\$350	38	\$10,500	\$10,500
> 20 acres ≤ 25 acres	\$400	26	\$10,400	\$8,000
> 25 acres ≤ 30 acres	\$450	21	\$6,750	\$7,200
> 30 acres ≤ 35 acres	\$500	10	\$6,000	\$4,000
> 35 acres ≤ 40 acres	\$550	12	\$4,950	\$4,950
<b>TOTAL</b>		<b>631</b>	<b>\$147,400</b>	<b>\$113,050</b>

**Figure 1: Bond Assurance Fund - Revenue, Expenditures, and Fund Balance**

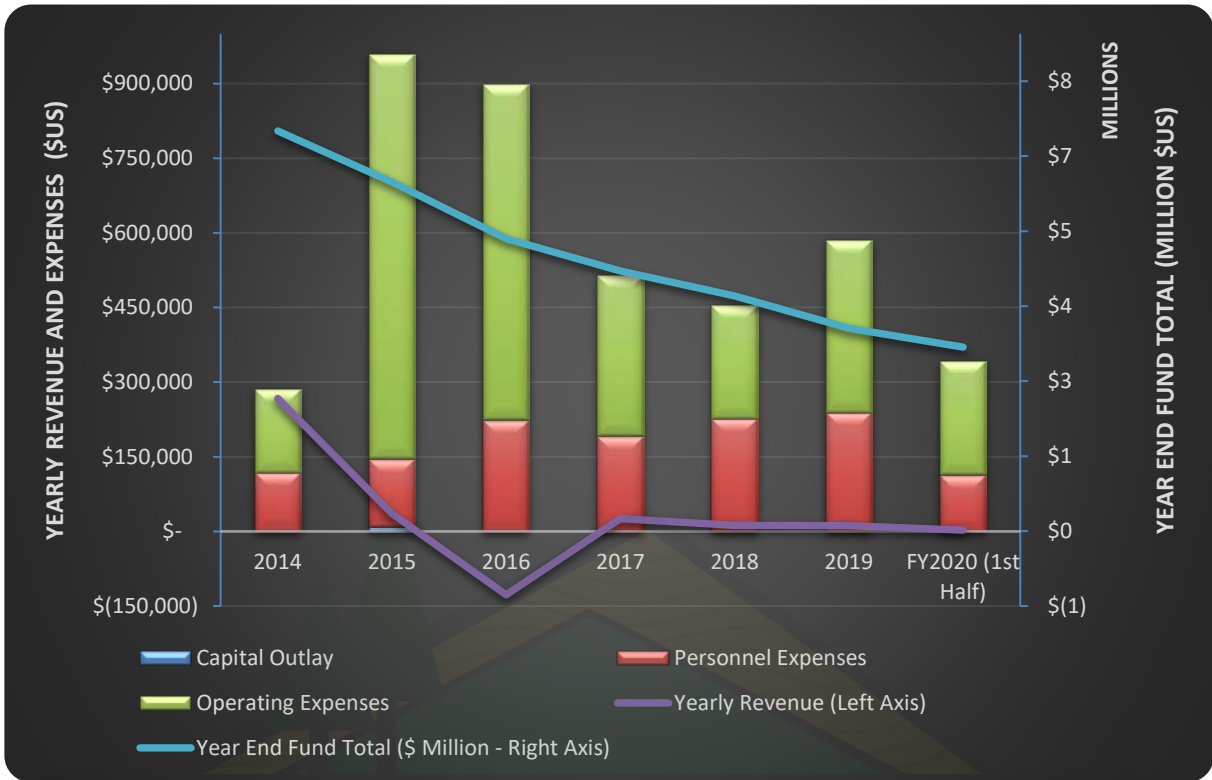


**ABANDONED MINE LANDS**

The abandoned mine lands (AML) program is funded through 34% of Idaho's Mine License Tax, a 1% net tax of Idaho's mining industry (excluding sand and gravel as described in Idaho Code § 47-1205). The last four years are among the five lowest revenue years of the fund's existence. IDL's share of income for the first half of FY20 was \$ 2,581.62. Table 8 lists the projects worked on in the first half of FY2020. Figure 2 illustrates the revenue, expenditures, and balance for this fund.

<b>Project Name</b>	<b>Project Description</b>
Triumph Mine	Sampling, monitoring well installation, ground water modeling, Five Year Review, NPDES permitting.
Idaho Geological Survey	AML information compilation and digitization.
IMA Mine	Inspection completed.
Gilmore District	8 mine openings closed with gates.
Royal Anne	2 adits closed with gates in Silver Valley.
Black Hornet Mine	One adit closed with foam, 2 others inspected for contract work.

**Figure 2: AML Fund - Revenue, Expenditures, and Fund Balance**



**IDAHO DEPARTMENT OF LANDS**



M. Dean Buffington :: Chairman  
Jerry F. Aldape            Gary L. Mahn  
Warren R. Bakes         Richelle A. Sugiyama  
Steven C. Harris         Thomas J. Wilford  
Irving Littman            Chuck Winder  
  
Chris J. Anton :: Manager of Investments

## Monthly Report to the Board of Land Commissioners

### Investment performance through January 31, 2020

**Month: -0.2%      Fiscal year: 6.6%**

Financial markets started the new year with healthy gains, but sold off sharply in late January over fears the coronavirus would close China to the world and strain global economic growth. Uncertainty over the virus – which has infected more than 31,000 people – has disrupted world-wide trade and supply chains, depressed asset prices and forced multinational business to make hard decisions with limited information. The U.S. and Europe are blocking visitors from China and screening citizens returning home. OPEC has called an emergency meeting to develop a response to softening demand for crude oil from China.

### Status of endowment fund reserves

Distributions for FY2020 and FY2021 are well secured. Estimated reserves as of December 2019, were 6.3 years for public schools and 6.9 years or more for the other endowments based on anticipated FY2021 distributions.

### Significant actions of the Endowment Fund Investment Board

None.

### Compliance/legal issues, areas of concern

**Material deviations from Investment Policy:** None.

**Material legal issues:** None.

**Changes in board membership or agency staffing:** None.

### Upcoming issues/events

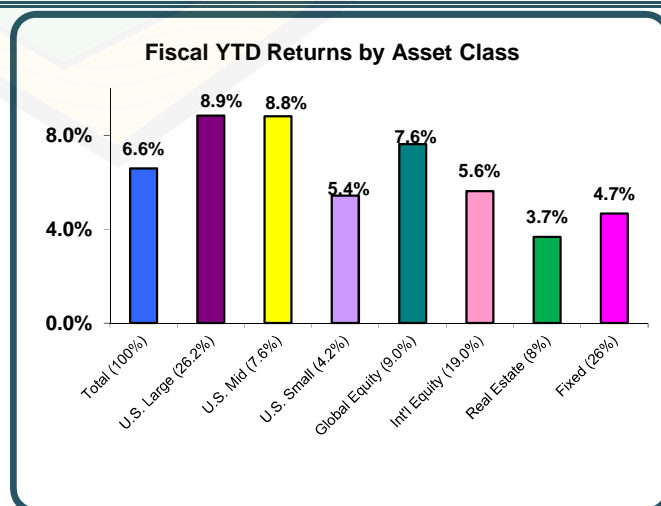
EFIB Board Meeting – February 13<sup>th</sup>

	<u>Month</u>	<u>FYTD</u>
<b>Beginning Value of Fund</b>	<b>\$ 2,463,888,480</b>	<b>\$ 2,318,780,865</b>
Distributions to Beneficiaries	(6,743,167)	(47,202,169)
Land Revenue net of IDL Expenses	8,380,861	54,244,416
Change in Market Value net of Investment Mgt. Expenses	<u>(2,526,315)</u>	<u>137,176,746</u>
<b>Current Value of Fund</b>	<b><u>\$ 2,462,999,858</u></b>	<b><u>\$ 2,462,999,858</u></b>

<u>Gross Returns</u>	<u>Current Month</u>	<u>Calendar Y-T-D</u>	<u>Fiscal Y-T-D</u>	<u>One Year</u>	<u>Three Year</u>	<u>Five Year</u>	<u>Ten Year</u>
<b>Total Fund</b>	-0.2%	-0.2%	6.6%	15.0%	10.2%	7.9%	9.7%
<i>Total Fund Benchmark*</i>	-0.1%	-0.2%	6.7%	14.1%	9.5%	7.6%	9.1%
<b>Total Fixed</b>	1.9%	1.9%	4.7%	10.1%	4.7%	3.1%	3.8%
<i>85% BB Agg, 15% TIPS</i>	1.8%	2.0%	4.4%	9.6%	4.5%	2.9%	3.7%
<b>Total Equity</b>	-1.2%	-1.2%	7.5%	17.7%	12.5%	9.8%	11.8%
<i>38% R3 19% Ax 9% AC</i>	-1.0%	-1.0%	8.1%	16.8%	11.6%	9.6%	11.2%
<b>Domestic Equity</b>	-0.7%	-0.7%	8.5%	17.9%	13.5%	11.4%	14.2%
<i>Russell 3000 (R3)</i>	-0.1%	-0.1%	10.2%	20.5%	13.8%	11.8%	13.8%
<b>Global Equity</b>	-0.2%	-0.2%	7.6%	20.7%	12.0%	7.7%	
<i>MSCI ACWI (AC)</i>	-1.1%	-1.1%	7.7%	16.0%	11.0%	8.5%	
<b>Int'l. Equity</b>	-2.7%	-2.7%	5.6%	16.0%	11.0%	6.9%	6.2%
<i>MSCI ACWI ex-US (Ax)</i>	-2.7%	-2.7%	4.1%	9.9%	7.6%	5.0%	5.2%
<b>Real Estate</b>			3.7%	5.2%	6.6%		
			1.9%	4.6%	6.3%		

\* Benchmark: 38% Russell 3000 19% ACWI ex-US 9% AC 26% BB Agg. 8% ODCE

	<u>Mkt Value (\$M)</u>	<u>Allocation</u>
<b>Domestic Equity</b>	<b>\$ 942.2</b>	<b>38.3%</b>
Large Cap	644.3	26.2%
Mid Cap	194.1	7.9%
Small Cap	103.8	4.2%
<b>Global Equity</b>	<b>222.6</b>	<b>9.0%</b>
<b>Int'l Equity</b>	<b>466.6</b>	<b>18.9%</b>
<b>Fixed Income</b>	<b>608.8</b>	<b>24.7%</b>
<b>Real Estate</b>	<b>195.5</b>	<b>7.9%</b>
Cash	<u>27.2</u>	<u>1.1%</u>
<b>Total Fund</b>	<b><u>\$ 2,463.0</u></b>	<b><u>100.0%</u></b>

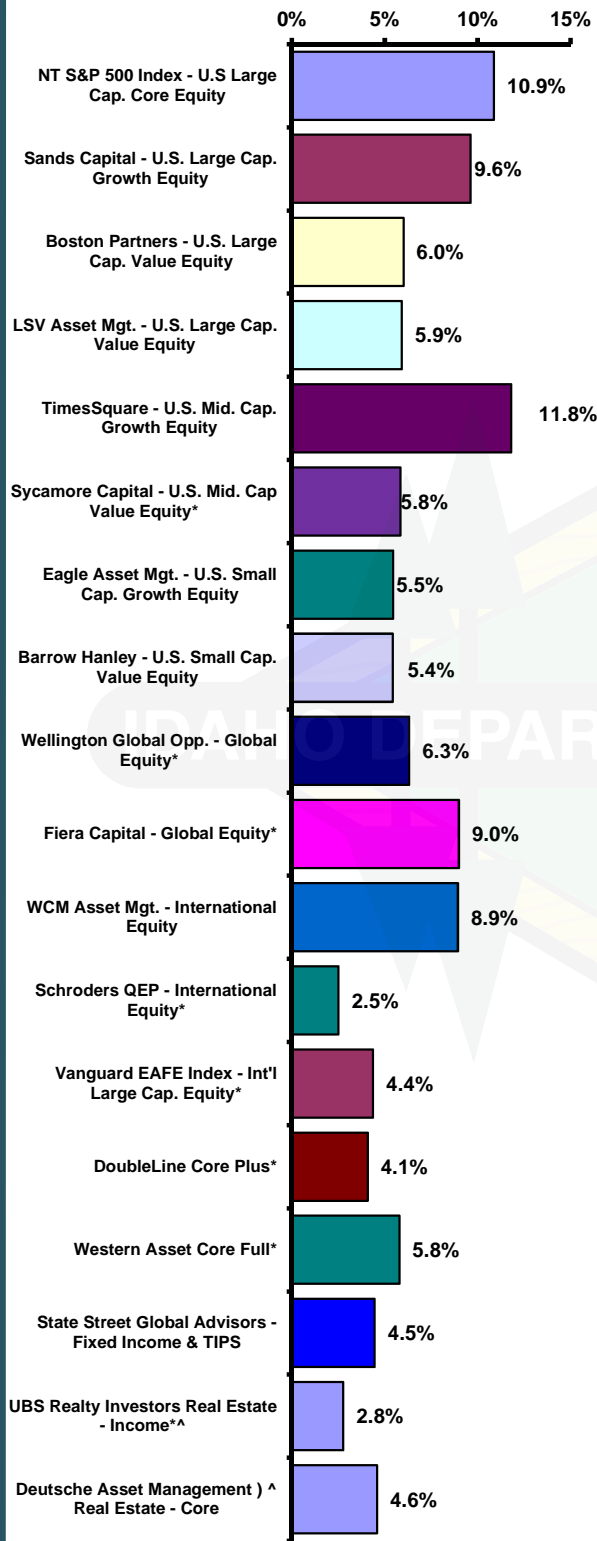


### Endowment Fund Staff Comments:

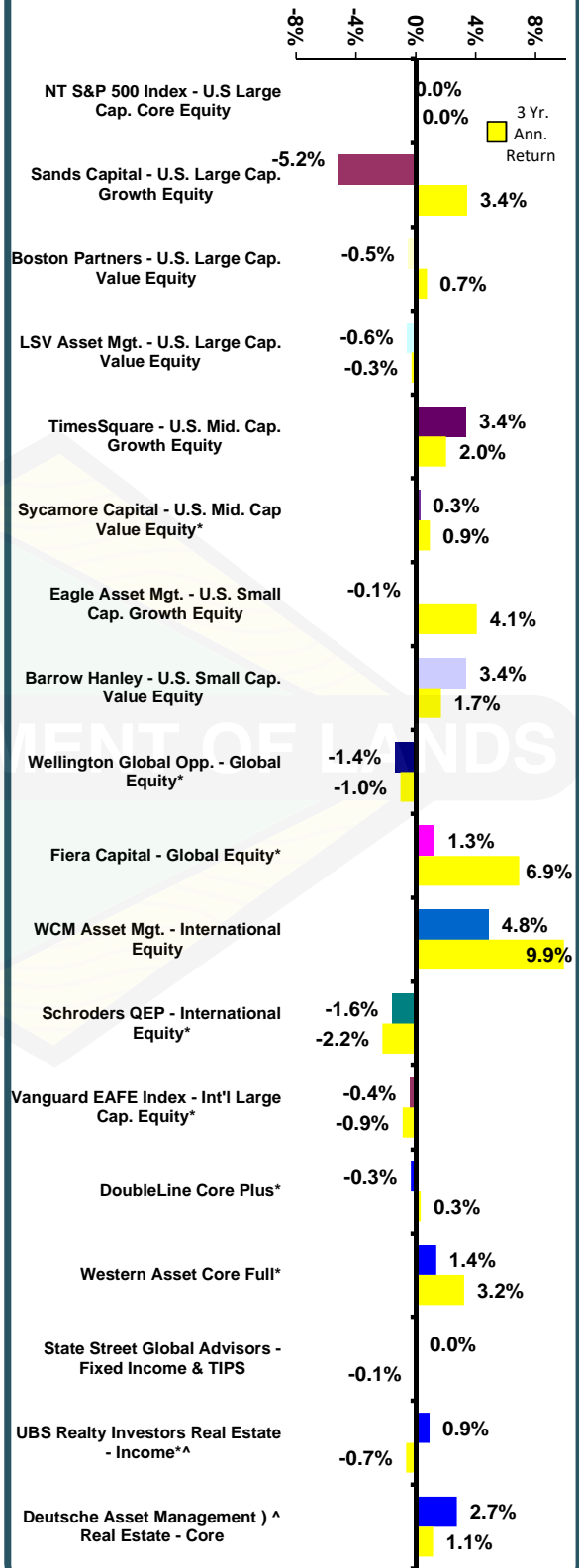
The fund was down 0.2% for the month, 0.1% under the benchmark. The Russell 3000 index was down 0.1%, Russell Midcap down 0.8% and Russell 2000 (small cap) down 3.2%. International equities (MSCI ACWI ex-US) were down 2.7%. Growth outperformed Value, while Domestic equity outperformed International equity. Bonds, as measured by the BBC Aggregate index, were up 1.9% and TIPS were up 2.1%. 7 of 15 active managers beat their benchmark this month. On a FYTD basis, the fund is up 6.6%, 0.1% under benchmark, and 8 of 15 active managers beat their benchmark.

# INVESTMENT REPORT

## FYTD Manager Returns



## Manager Relative Returns Fiscal YTD and 3-Yr Ave. Annualized\*



\*ITD return used when manager has less than 3 years. ^ Most recent valuation.



## Idaho State Board of Land Commissioners

Brad Little, Governor and President of the Board

Lawrence E. Denney, Secretary of State

Lawrence G. Wasden, Attorney General

Brandon D Woolf, State Controller

Sherri Ybarra, Superintendent of Public Instruction

Dustin T. Miller, Director and Secretary to the Board

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

Draft Minutes  
State Board of Land Commissioners Regular Meeting  
January 21, 2020

The regular meeting of the Idaho State Board of Land Commissioners was held on Tuesday, January 21, 2020 in the Boise City Council Chambers, Boise City Hall, 3rd Floor, 150 N. Capitol Blvd., Boise, Idaho. The meeting began at 9:00 a.m. The Honorable Governor Brad Little presided. The following members were in attendance:

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

For the record, all Board members were present.

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

**Endowment Transactions**

A. Timber Sales – December 2019

**Discussion:** None.

B. Leases and Permits – December 2019

**Discussion:** Director Miller reported that revenue fiscal year-to-date is \$3.1 million. Governor Little noted that the forecasted revenue is \$6.7 million; Director Miller said that is correct.

**Status Updates**

C. Land Bank Fund

**Discussion:** None.



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

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

**Discussion:** Mr. Anton stated the endowment fund had a strong month during December. The portfolio was up 2.3% which left the fund up 6.9% fiscal year-to-date. Through the close of market on Friday, January 17, the fund was up 9%; a very good run midway through the fiscal year. Mr. Anton recalled that at the end of 2018, the financial markets were in turmoil as investors grew concerned that interest rate hikes by the Federal Reserve, and the trade war with China, would stall out the longest running economic expansion in U.S. history. Mr. Anton observed that turbulence was very short lived. The financial markets staged a very strong recovery in 2019 as the Federal Reserve reversed course and cut rates, and central banks around the world did the same. Global economic indicators have started to pick up, and the U.S. signed Phase One of the trade agreement with China. Mr. Anton was pleased to state that as a result of the positive progress, the endowment portfolio was up 22.7% during calendar year 2019.

Mr. Anton noted that earnings reserves are all fully funded: 6.2 years for public schools and 6.8 years or more for all other funds. There was no significant action of the Investment Board since the last Land Board meeting. EFIB's budget presentation is before JFAC on January 31; the next Investment Board meeting is scheduled for February 13.

Governor Little remarked that the endowment fund's 10-year average of 60 basis points above benchmark is incredible; those long-term results are what matters. Governor Little offered congratulations to Mr. Anton, his predecessors and the Investment Board.

**Consent—Action Item(s)**

**3. Disclaimer of Interest Request DI500270-Cascade River, LLC, North Fork of the Payette River – Presented by Andrew Smyth, Program Manager-Public Trust**

**Discussion:** Governor Little asked what the high water mark is based on, recalling a severe June storm approximately six years ago that caused the high water mark to be underwater at that time. Mr. Smyth noted that the ordinary high water mark (OHWM) would not be based on the highest water level the river had ever reached. Mr. Smyth explained that when Department staff conducts an inspection to determine the OHWM, they look for the impressions in the soil, the change in vegetation, and the markings on trees, if there are any. Governor Little inquired about FEMA<sup>1</sup> maps. Mr. Smyth replied that OHWM is not based on FEMA maps, it is based on physical indicators on the ground. Governor Little wondered about public input and if disclaimers are advertised in the local papers. Mr. Smyth responded that disclaimers are not advertised. Typically a disclaimer of interest is initiated by an entity that owns property adjacent to the river who has discovered a cloud on the property title. That entity contacts the Department about seeking a disclaimer, as opposed to seeking a quiet title action in the court.

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<sup>1</sup> Federal Emergency Management Agency



Attorney General Wasden asked if there is a means on the Department's website for the public to identify these 25-foot easements acquired through the disclaimer process. Mr. Smyth stated that there is an easements layer in the online Digital Land Records database.

**Recommendation:** Direct the Department to issue a disclaimer of interest for the parcels totaling 2.807 acres of the former bed of the North Fork of the Payette River, and to require Cascade River, LLC to pay the remaining processing fee of \$300 to the Department for this transaction.

**4. Disclaimer of Interest Request DI600282-Mianco Limited Partnership, Boise River** – Presented by Andrew Smyth, Program Manager-Public Trust

**Discussion:** None.

**Recommendation:** Direct the Department to issue a disclaimer of interest for two parcels totaling 11.08 acres of the former bed of the Boise River, and to require Mianco Limited Partnership to pay the remaining processing fee of \$300 to the Department for this transaction.

**5. Approval of Minutes** – December 17, 2019 Regular Meeting (Boise)

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

**Regular—Action Item(s)**

**6. Department of Lands Organizational Restructure** – Presented by Dustin Miller, Director

**Recommendation:** Approve the new organizational structure as outlined in Attachment 1 and authorize the Department to begin implementation during fiscal year 2020.

**Discussion:** Attorney General Wasden requested that Director Miller and the Department put in place a review process and undertake periodic reviews of the new organization structure to assess if the structure is working as intended, and if it is not working, to advise the Land Board. Director Miller said it is his priority to ensure that the Department is gaining the expected results and efficiencies as the new structure is implemented.

**Testimony:** David New, of Boise, Idaho, commented that he was familiar with public communication describing the Department's proposed reorganization, and thanked the Land Board for that. Mr. New remarked that this reorganization is important to the Department's continued successful endowment asset management and asked Land Board members to share their key objectives of this reorganization.

Governor Little noted that the Department of Lands has been around a long time. Any dynamic growing organization – the Governor reminded everyone that Idaho, the Department, did not even have Shared Stewardship and Good Neighbor Authority just a few years ago. The modernization of any organization to reflect what has changed in its role and mission is always a good thing to do. Governor Little said this restructure illustrates the new role and mission while still being focused on the Department's biggest responsibilities which is to maximize the long-term return to the endowment for the beneficiaries.

Controller Woolf observed that the Land Board hired Director Miller in October 2018 and gave him direction to run the Department as he determined best, and gave him the resources to be successful and make his team successful. Controller Woolf expressed full confidence and trust in Director Miller to do that. Controller Woolf noted that the Department has reviewed this proposed structure change, both from the regulatory and the endowment side, to determine what would work best. Controller Woolf expressed excitement for this reorganization and the opportunities it presents, and gave his full support.

Superintendent Ybarra expressed her support and added to Land Board members' comments that the new organization structure is a way to improve internal and external communications; Superintendent Ybarra appreciated the effort put into that.

Attorney General Wasden found the question to the members of the Land Board a little odd, but said that part of management is to create the atmosphere where the manager, the one that is responsible, can exercise authority and responsibility, and organize a structure that allows him to accomplish his responsibility. The Land Board's function is to address the question of review. Is the organization structure working or is it not working? The Land Board will not know that until it has been implemented and exercised for some time. If it is working, the Director will tell the Land Board. If it is not, he will tell the Land Board that, too. Attorney General Wasden remarked that it is not appropriate for the Land Board to look over Director Miller's shoulder in every decision that he makes or the organizational structure that he chooses. The Land Board hired him to be responsible and the Land Board is going to let him organize, and exercise his authority and responsibility. If it works, great; if not the Department and the Land Board will go back to the drawing board and try something else.

Secretary of State Denney agreed with Board members' statements. Secretary Denney commented that the Land Board puts a lot of trust in the Director and wants him to have that flexibility to run his operation as he sees fit. Secretary Denney supported the Attorney General's suggestion that there be periodic reviews; that is just good management and was already on the slate to happen. Secretary Denney said he certainly supports Director Miller and his reorganization, including giving him time to make sure that he gets the Department running in the way he would like it to run.

**Board Action:** A motion was made by Attorney General Wasden that the Board approve the new organizational structure as outlined in attachment 1 and authorize the Department to begin implementation in fiscal year 2020. Controller Woolf seconded the motion. The motion carried on a vote of 5-0.

## Information

None

## Executive Session

None

At the conclusion of the agenda, and prior to adjournment, Director Miller recognized Deputy Director and State Forester David Groeschl for his service to the Department of Lands for the past 12 years, and noted that Mr. Groeschl will be leaving the Department to pursue other opportunities.

Director Miller presented a plaque to Mr. Groeschl and read the inscription aloud. Governor Little remarked that he was glad Mr. Groeschl will remain in Idaho and hoped that Mr. Groeschl will be able to attend Land Board meetings in the future. Attorney General Wasden expressed his appreciation for Mr. Groeschl's service to the Land Board.

There being no further business before the Board, at 9:32 a.m. a motion to adjourn was made by Attorney General Wasden. Controller Woolf seconded the motion. The motion carried on a vote of 5-0.



# STATE BOARD OF LAND COMMISSIONERS

February 18, 2020

Regular Agenda

## Subject

Omnibus Rulemaking – Adoption of Temporary Rules

## Question Presented

Shall the Board adopt conditional temporary rules, to become effective only if the temporary rule adopted by the Land Board on July 16, 2019, and the proposed rules adopted by the Land Board as pending rules on October 17, 2019, are not otherwise approved or rejected by the 2020 Idaho Legislature and/or not extended pursuant to the Idaho Administrative Procedure Act?

## Background

All existing administrative rules in Idaho expire each year on July 1 unless reauthorized by the legislature. The legislature adjourned the 2019 session without reauthorizing all previously approved and codified administrative rules. Executive administrative action was required to ensure existing rules stayed in effect.

The governor and his staff, in coordination with the Office of the Attorney General, directed all state agencies to republish rules concurrently, as both temporary and proposed. The Land Board adopted omnibus temporary rules, effective June 30, 2019, and adopted those omnibus rules as pending on October 17, 2019.

Further, the Department undertook negotiated rulemaking regarding IDAPA 20.03.02, Rules Governing Mined Land Reclamation, and the Land Board adopted those rules as temporary on July 16, 2019, pursuant to Idaho Code § 47-1518(f). They will expire at the end of the 2020 legislative session unless extended by the Legislature.

The Department also undertook negotiated rulemaking regarding IDAPA 20.03.03, Rules Governing Administration of the Reclamation Fund and IDAPA 20.03.04, Rules Governing the Regulation of Beds, Waters and Airspace Over Navigable Lakes in the State of Idaho. The amended proposed rules for IDAPA 20.03.03, and the proposed rules for IDAPA 20.03.04, were adopted as pending rules by the Land Board on October 17, 2019. The rules will become final and effective if approved by the 2020 Idaho Legislature.

To address this unique circumstance of rules potentially expiring at adjournment of the 2020 legislative session, the governor and his staff have directed all state agencies to adopt omnibus temporary rules in preparation for post-*sine die* (Attachment 1).

## **Discussion**

To ensure the continuity of administrative rules following the adjournment of the 2020 legislative session, all agencies are required to submit an omnibus *Notice of Adoption of Temporary Rule* to the Division of Financial Management (DFM) by February 21, 2020 (Attachment 2).

The attached draft notices list all previously approved rules under IDAPA 20, rules of the Idaho Department of Lands. The majority of the 19 rule chapters under IDAPA 20 are under the authority of the Land Board. IDAPA 20 also includes rules pertaining to the conservation of oil and natural gas in the state of Idaho, authorized by the Idaho Oil and Gas Conservation Commission (Oil and Gas Commission) and rules of the Idaho Board of Scaling Practices (Scaling Board). The Oil and Gas Commission and Scaling Board are holding meetings on February 18, 2020 to consider whether to adopt a conditional temporary rule.

These rules are necessary to protect the public health, safety, and welfare of the citizens of Idaho and confer a benefit on its citizens. The rules of the Department serve the public interest by ensuring landowners, royalty owners, producers, and the public realize and enjoy the greatest good from the state's vital natural resources like oil, natural gas, and minerals. The rules also serve the public interest by regulating forestland management practices to maintain and enhance benefits such as job creation, tax generation, and distributions to endowment beneficiaries, and by conserving resources such as forest tree species, soil, air, water, and wildlife habitat.

If approved by the Land Board and other approving authorities, the Department will submit the notices of adoption of temporary rule to DFM. The rulemaking notices include rules of the Oil and Gas Commission and Scaling Board, because those rules are listed in IDAPA 20, the Department of Land's agency rules. However, the Department is not asking the Land Board to adopt the Oil and Gas Commission or Scaling Board rules.

## **Recommendation**

Adopt as conditional temporary rules all of the Department's temporary and pending rules, as set forth in Attachment 2. The rules will become effective only if the temporary and pending rules are not otherwise approved or rejected by the 2020 Idaho Legislature and/or not extended pursuant to the Idaho Administrative Procedure Act.

## **Board Action**

## **Attachments**

1. January 31, 2020 Memo from DFM: Preparing Administrative Rules for Post-*Sine Die*
2. Notices of Omnibus Rulemaking – Adoption of Temporary Rule



State of Idaho  
DIVISION OF FINANCIAL MANAGEMENT  
Executive Office of the Governor

BRAD LITTLE  
Governor

ALEX J. ADAMS  
Administrator

January 31, 2020

**MEMORANDUM**

TO: Executive Branch Agency/Department Heads  
Rules Review Officers

FROM: Alex J. Adams 

SUBJECT: Preparing Administrative Rules for Post-*Sine Die*

In order to ensure the continuity of administrative rules following the adjournment of the 2020 Legislative session, this memo outlines the process that agencies will need to complete prior to **February 21<sup>st</sup>**. While each agency must take these steps now, these temporary rules are conditional and will only become effective at *sine die* if the pending rules are not otherwise approved or rejected by the Legislature and/or not extended pursuant to the Idaho Administrative Procedure Act, including sections 67-5291 and 67-5292, Idaho Code.

1. Agencies must submit a completed Notice of Adoption of Temporary Rule form to DFM by February 21.
  - A template Notice is enclosed for both fee and non-fee rules.
  - Rules should be adopted as submitted to the 2020 Legislature with the following conditions:
    - a. If your agency had an omnibus docket and separate rulemaking actions, they will be combined by DFM into a **single** omnibus docket.
  - No ARRF will be required.
  - Please submit completed Notices to Adam Latham ([Adam.Latham@dfm.idaho.gov](mailto:Adam.Latham@dfm.idaho.gov))
2. If rulemaking authority is vested in a board or commission – not agency staff – the board or commission must convene to properly authorize the Notice. This is required by law. Please work closely with your attorney to ensure the Notice is properly authorized.
  - The meeting must be scheduled in a timeframe to submit a completed Notice to DFM prior to the February 21 deadline.
  - The motion should be made as follows:

“Pursuant to Section 67-5226, Idaho Code, the Governor has found that temporary adoption of this rule is appropriate to protect the public health, safety, and welfare of the citizens of Idaho and confer a benefit on its citizens.

These rules implement the duly enacted laws of the state of Idaho, provide citizens with the detailed rules and standards for complying with those laws, and assist in the orderly execution and enforcement of those laws.

The expiration of these rules without due consideration and processes would undermine the public health, safety and welfare of the citizens of Idaho and deprive them of the benefit intended by these rules.

**(Include if a fee rule)** The Governor has also found that the fee(s) or charge(s) being imposed or increased is/are justified and necessary to avoid immediate danger to the agency/department/board/commission’s budget, to the state budget, to necessary state functions and services, and to avoid immediate danger of a potential violation of Idaho’s constitutional requirement that it balance its budget.

Therefore, we are adopting this temporary rule to be effective upon *sine die* of the 2020 session of the Idaho Legislature. The approval is conditional and will only become effective if the rules are not otherwise approved or rejected by the Legislature and/or not extended pursuant to the Idaho Administrative Procedure Act, including sections 67-5291 and 67-5292, Idaho Code.”

3. DFM will publish those notices of temporary rulemaking at or shortly after *sine die* with the rules having an effective date as of *sine die*.
4. For these temporary rules only, agencies do not have to accept written comments pursuant to 67-5222(a) as its requirement and deadline applies to “publication of the notice of *proposed* rulemaking in the bulletin” (emphasis added). Of course, these are the same rules that each agency accepted public comments on and held over 150 public hearings on during the summer and fall of 2019.
5. Each agency must keep all records of this rulemaking process for at least two (2) years pursuant to Idaho Code § 67-5225. Please ensure the record is thorough and complete.

The logo for the Idaho Department of Lands is centered on the page. It features a stylized mountain range in the background with a central diamond shape containing a tree and a river. Overlaid on this is a horizontal banner with the text "IDAHO DEPARTMENT OF LANDS" in white, uppercase letters.

IDAHO DEPARTMENT OF LANDS



# IDAPA 20 – IDAHO DEPARTMENT OF LANDS

DOCKET NO. 20-0000-2000F

## NOTICE OF OMNIBUS RULEMAKING - ADOPTION OF TEMPORARY RULE

**EFFECTIVE DATE:** The effective date of the temporary rules being adopted through this omnibus rulemaking is upon the adjournment date of the second regular session of the 65th Idaho State Legislature (sine die).

**AUTHORITY:** In compliance with Sections 67-5226, Idaho Code, notice is hereby given this agency has adopted a temporary rule. The action is authorized pursuant to:

- Sections 38-132 and 38-402, Idaho Code;
- Title 38, Chapter 12, including Section 38-1208, Idaho Code;
- Title 47, Chapters 3, 7, 8, 15, 16 and 18, including Sections 47-314(8), 47-315(8), 47-328(1), 47-710, 47-714, and 47-1316, Idaho Code;
- Title 58, Chapters 1, 3, 6, 12 and 13, including Sections 58-104, 58-105, 58-127, and 58-304 through 58-312, Idaho Code;
- Title 67, Chapter 52, Idaho Code;
- Article IX, Sections 7 and 8 of the Idaho Constitution; and
- The Equal Footing Doctrine (Idaho Admission Act of July 3, 1890, 26 Stat. 215, Chapter 656).

**DESCRIPTIVE SUMMARY:** The following is the required finding and concise statement of its supporting reasons for adopting a temporary rule:

Through this temporary rule, the Idaho Department of Lands adopts the following chapters under IDAPA 20:

- 20.02.14, Rules for Selling Forest Products on State-Owned Endowment Lands
- 20.03.01, Rules Governing Dredge and Placer Mining Operations in Idaho
- 20.03.02, Rules Governing Mined Land Reclamation
- 20.03.03, Rules Governing Administration of the Reclamation Fund
- 20.03.04, Rules for the Regulation of Beds, Waters, and Airspace Over Navigable Lakes in the State of Idaho
- 20.03.05, Riverbed Mineral Leasing in Idaho
- 20.03.08, Easements on State Owned Lands
- 20.03.09, Easements on State Owned Submerged Lands and Formerly Submerged Lands
- 20.03.13, Administration of Cottage Site Leases on State Lands
- 20.03.14, Rules Governing Grazing, Farming, Conservation, Noncommercial Recreation, and Communication Site Leases
- 20.03.15, Rules Governing Geothermal Leasing on Idaho State Lands
- 20.03.16, Rules Governing Oil and Gas Leasing on Idaho State Lands
- 20.03.17, Rules Governing Leases on State-Owned Submerged Lands and Formerly Submerged Lands
- 20.04.02, Rules Pertaining to the Idaho Forestry Act and Fire Hazard Reduction Laws

Through this temporary rule, the Idaho Board of Scaling Practices adopts the following chapter under IDAPA 20:

- 20.06.01, Rules of the Idaho Board of Scaling Practices

Through this temporary rule, the Oil and Gas Conservation Commission adopts the following chapter under IDAPA 20:

- 20.07.02, Rules Governing Conservation of Oil and Natural Gas in the State of Idaho

**TEMPORARY RULE JUSTIFICATION:** Pursuant to Section(s) 67-5226(1) and 67-5226(2), Idaho Code, the Governor has found that temporary adoption of the rule is appropriate for the following reasons:

These temporary rules are necessary to protect the public health, safety, and welfare of the citizens of Idaho and confer a benefit on its citizens. These temporary rules implement the duly enacted laws of the state of Idaho, provide citizens with the detailed rules and standards for complying with those laws, and assist in the orderly execution and enforcement of those laws. The expiration of these rules without due consideration and processes would undermine the public health, safety and welfare of the citizens of Idaho and deprive them of the benefit intended by these rules.



**FEE SUMMARY:** Pursuant to Section 67-5226(2), the Governor has found that the fee(s) or charge(s) being imposed or increased is justified and necessary to avoid immediate danger and the fee(s) is described herein:

The fees or charges, authorized in Sections 38-122, 38-404, 38-1209, 47-315(5)(e), 47-316, 47-710, 47-1506(g), 47-1508(f), 47-1316, 47-1803, 58-104, 58-105 and 58-127, 58-304, 58-601, 58-603, 58-1307, Idaho Code, are part of the agency's 2020 budget that relies upon the existence of these fees or charges to meet the state's obligations and provide necessary state services. Failing to reauthorize these temporary rules would create immediate danger to the state budget, immediate danger to necessary state functions and services, and immediate danger of a violation of Idaho's constitutional requirement that it balance its budget.

The following is a specific description of the fees or charges:

- 20.02.14 – Stumpage payments and associated bonding for removal of state timber from endowment land pursuant to timber sales.
- 20.03.01 – Application fee, amendment fee, assignment fee, and inspection fee for all dredge and placer permits in the state of Idaho.
- 20.03.02 – Application fee for permanent closure plans and assignment fee for reclamation plans and permanent closure plans.
- 20.03.03 – Annual payment for Reclamation Fund participation.
- 20.03.04 – Application fees for encroachment permits and deposits toward the cost of newspaper publication.
- 20.03.05 – Fees for applications, advertising applications, exploration locations, and approval of assignments for riverbed mineral leasing.
- 20.03.08 – Application fee, easement consideration fee, appraisal costs, and assignment fee for easements on state-owned lands.
- 20.03.09 – Administrative fee, appraisal costs, and assignment fee for easements on state-owned submerged lands and formerly submerged lands.
- 20.03.13 – Annual rental payment paid to the endowment for which the property is held.
- 20.03.14 – Lease application fee, full lease assignment fee, partial lease assignment fee, mortgage agreement fee, sublease fee, late rental payment fee, minimum lease fee, and lease payment extension request fee on state endowment trust lands.
- 20.03.15 – Application fee, assignment fee, and late payment fee for geothermal leases on state-owned lands.
- 20.03.16 – Exploration location permit fee, nomination fee, and processing fee for oil and gas leases on endowment lands.
- 20.03.17 – Application fee, rental rate, and assignment fee for leases on state-owned submerged lands and formerly submerged lands.
- 20.04.02 – Fee imposed upon the harvest and sale of forest products to establish hazard management performance bonds for the abatement of fire hazard created by a timber harvest operation, and fees imposed upon contractors for transferring fire suppression cost liability back to the State.
- 20.06.01 – Scaling assessment fee paid to a dedicated scaling account for all scaled timber harvested within the state of Idaho; administrative fees for registration, renewal, and transfer of log brands; fees for testing and issuance of a temporary scaling permit, specialty scaling license, and standard scaling license; fee to renew a specialty or standard scaling license; and fee for a requested check scale involving a scaling dispute.
- 20.07.02 – Bonding for oil and gas activities in Idaho and application fees for seismic operations; permit to drill, deepen or plug back; multiple zone completions; well treatment; pits and directional deviated wells.

**ASSISTANCE ON TECHNICAL QUESTIONS:** For assistance on technical questions concerning the temporary rule, contact Amy Johnson at (208) 334-0255 or [rulemaking@idl.idaho.gov](mailto:rulemaking@idl.idaho.gov).

DATED this 21st day of February, 2020.

Dustin Miller  
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## IDAPA 20 – IDAHO DEPARTMENT OF LANDS

DOCKET NO. 20-0000-2000

### NOTICE OF OMNIBUS RULEMAKING - ADOPTION OF TEMPORARY RULE

**EFFECTIVE DATE:** The effective date of the temporary rules being adopted through this omnibus rulemaking is upon the adjournment date of the second regular session of the 65th Idaho State Legislature (sine die).

**AUTHORITY:** In compliance with Sections 67-5226, Idaho Code, notice is hereby given this agency has adopted a temporary rule. The action is authorized pursuant to Sections 38-115, 38-132, 38-402, 38-1304, 58-104, 58-105, and 67-5201 et seq., Idaho Code.

**DESCRIPTIVE SUMMARY:** The following is the required finding and concise statement of its supporting reasons for adopting a temporary rule:

This temporary rule adopts the following chapters under IDAPA 20:

- 20.01.01, Rules of Practice and Procedure Before the State Board of Land Commissioners
- 20.02.01, Rules Pertaining to the Idaho Forest Practices Act
- 20.04.01, Rules Pertaining to Forest Fire Protection

**TEMPORARY RULE JUSTIFICATION:** Pursuant to Sections 67-5226(1), Idaho Code, the Governor has found that temporary adoption of the rule is appropriate for the following reasons:

These temporary rules are necessary to protect the public health, safety, and welfare of the citizens of Idaho and confer a benefit on its citizens. These temporary rules implement the duly enacted laws of the state of Idaho, provide citizens with the detailed rules and standards for complying with those laws, and assist in the orderly execution and enforcement of those laws. The expiration of these rules without due consideration and processes would undermine the public health, safety and welfare of the citizens of Idaho and deprive them of the benefit intended by these rules.

**FEE SUMMARY:** This rulemaking does not impose a fee or charge.

**ASSISTANCE ON TECHNICAL QUESTIONS:** For assistance on technical questions concerning the temporary rule, contact Amy Johnson at (208) 334-0255 or [rulemaking@idl.idaho.gov](mailto:rulemaking@idl.idaho.gov).

DATED this 21st day of February, 2020.

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# STATE BOARD OF LAND COMMISSIONERS

February 18, 2020

Regular Agenda

## Subject

Review of Recommended Decision and Order – Sharlie-Grouse Neighborhood Association, Inc. v. State Board of Land Commissioners.

## Background

Sharlie-Grouse Neighborhood Association, Inc. (SGNA) filed a Petition for Declaratory Ruling with the Idaho Department of Lands on May 29, 2018 (Attachment 1). On October 3, 2018, the Director of the Idaho Department of Lands appointed a hearing officer to decide all procedural and pre-hearing matters, and submit a recommended order to the State Board of Land Commissioners (Land Board). A hearing was held on August 27, 2019. The hearing officer issued a Recommended Decision and Order on Petition for Declaratory Ruling, and Order Dismissing Petition for Declaratory Ruling on November 13, 2019 (Attachment 2).

On November 26, 2019, SGNA requested reconsideration (Attachment 3). On December 17, 2019, the hearing officer denied the request in a Decision on Petition for Reconsideration (Attachment 4) because SGNA's arguments and authorities cited did not show sufficient grounds for reconsideration.

None of the parties filed exceptions to the Order Dismissing Petition for Declaratory Ruling (Attachment 5). The parties waived the 56-day timeframe for Board review per Idaho Code § 67-5244, with the understanding that the Board would review the matter at its February 2020 meeting.

Per Idaho Code §§ 58-104 and 67-5244, and IDAPA 20.01.01.720, this matter is now before the Land Board for review.

## Discussion

SGNA's Petition for Declaratory Ruling (Petition) seeks a ruling on eight (8) points related to a 2013 Land Board agency action: 1) the conveyance of State lands set forth in a 2014 deed and the 2015 amended deed (that resulted from the Board's 2013 action) constitute the disposal or disposition of State endowment lands; 2) the disposal or disposition of State endowment lands required the Board to employ a public auction process; 3) Idaho law sets forth in clear terms the procedural requirements for the disposal of State lands by public auction; 4) there was no exemption from, or exception to, the public auction requirements, statutory or otherwise, that applied to the State lands, including the SGNA property; 5) the Board failed to abide by the statutes and laws governing the disposition of State lands when it conveyed the State lands to Payette Lake Cottage Site Owners Association (PLCSOA);

6) the Board had no authority or jurisdiction to dispose of the State lands without a public auction; 7) because the Board lacked authority and jurisdiction to convey the State lands without a public auction, the deed and amended deed are void and without effect; and 8) because the deed and amended deed are void and without effect, the Board continues to hold title to the State lands, and may commence with a public auction thereof in accordance with the requirements of State law.

The Land Board (as a party to the action), along with PLCSOA and Wagon Wheel Bay Dock Association (WWBDA), who collectively joined the matter, requested summary judgment and dismissal of the Petition on various grounds, including that the Land Board lacked subject matter jurisdiction of the claims because: 1) a declaratory ruling would be an untimely advisory opinion and could not void the deeds; 2) SGNA did not timely seek judicial review of the 2013 agency action and such review was the sole remedy available to SGNA for the relief it seeks; and 3) the Land Board lacks the authority to void the deeds.

SGNA submitted a motion for summary judgment requesting declaratory relief, alleging that the constitutional and statutory constraints applicable to the conveyance of trust property were violated, rendering the conveyance of a community beach unlawful, null, and void, and requesting a ruling that the Land Board has jurisdiction to provide a declaratory ruling.

The parties extensively briefed the motions for summary judgment.

The hearing officer issued an Order Dismissing Petition for Declaratory Ruling, finding SGNA did not demonstrate an available administrative avenue to pursue the relief it desires. Specifically, the 2013 Board action constituted a final agency action subject to judicial review, SGNA did not seek judicial review of the 2013 Board action, a declaratory ruling was not an available administrative remedy for the relief SGNA seeks, and SGNA did not seek initiation of a contested case nor did the Land Board authorize such a proceeding.

SGNA requested reconsideration. On December 17, 2019, the hearing officer denied the request in a Decision on Petition for Reconsideration because SGNA's arguments and authorities cited did not show sufficient grounds to reconsider the recommended order.

## **Guidance**

The Board must take one (1) of the following actions:

- 1) Issue a final order (adopt, modify, reject);
- 2) Remand the matter for additional hearings; or
- 3) Hold additional hearings.

## Board Action

### Attachments

1. SGNA Petition
2. Recommended Decision and Order
3. Petition for Reconsideration
4. Decision on Petition
5. Order Dismissing Petition

A complete copy of the agency record can be found online at <https://www.idl.idaho.gov/lakes-rivers/administrative-hearings/sharlie-grouse-neighborhood-association-petition/>



IDAHO DEPARTMENT OF LANDS

ORIGINAL

DEPT. OF LANDS  
MAY 29 2018  
BOISE, IDAHO

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Attorneys for Sharlie-Grouse Neighborhood Association, Inc.

**BEFORE THE STATE BOARD OF LAND COMMISSIONERS**

SHARLIE-GROUSE NEIGHBORHOOD )  
ASSOCIATION, INC., )  
 )  
Petitioner, )

**PETITION FOR DECLARATORY  
RULING**

vs. )

IDAHO STATE BOARD OF LAND )  
COMMISSIONERS, )  
 )  
Respondent. )

1. Sharlie-Grouse Neighborhood Association, Inc., an Idaho non-profit corporation (“SGNA” or “Petitioner”), by and through undersigned counsel, files this Petition for Declaratory Ruling (“Petition”) pursuant to Idaho Code Sections 67-5232 and 67-5255 and the Department of Lands Rules of Practice and Procedure before the State Board of Land Commissioners, IDAPA 20.01.01.400.

I.

**FACTS RELEVANT TO PETITION FOR DECLARATORY RULING**

*The Disposition of State Lands in Question*

2. On or about April 23, 2014, the State Board of Land Commissioners (“Board”) executed State Deed No. SD13867, a Quitclaim Deed (the “Deed”) disposing of various parcels of state-owned endowment lands in Valley County, Idaho (the “State Land”). The Deed, recorded as Valley County Instrument No. 384477, purports to convey all right, title and interest of the Board in such State Land to Payette Lakes Cottage Sites Owners Association, Inc. (“PLCSOA”).

3. On or about January 28, 2015, the Board executed State Deed No. SD13867, an Amended Quitclaim Deed relating to the State Land (the “Amended Deed”). The Deed, recorded as Valley County Instrument No. 389629, again purports to convey all right, title and interest of the Board in such State Land to PLCSOA.

4. On information and belief, the State Lands constituted endowment lands, for the benefit of Idaho’s public schools and institutions.

*Petitioner’s Interest in State Lands, in Particular, the SGN Property*

5. Petitioner is a homeowners’ association consisting of owners of real property immediately adjacent to various parcels of State Land conveyed by the Deed and Amended Deed.

6. On September 23, 2013, in advance of the disposal or disposition of the above-referenced State Lands, Petitioner made known via letter to the Department its interest in obtaining title to certain of such lands. Specifically, Petitioner sought the opportunity to own Sharlie Lane, Sharlie Way, Community Beach Access Road, Grouse Way and the Community Beach (collectively, the “SGN Property”).



7. Petitioner's members' interest in acquiring rights over the SGN Property had a significant historical and practical basis. The SGN Property is entirely located within an enclave of land controlled by and within Petitioner's members' respective properties. For example, the roadways within the SGN Property only serve Petitioner's members' properties. The Community Beach, located at Lot 1, Block 2 of the SW Payette Cottage Sites Subdivision, is central to Petitioner's members' neighborhood and the use thereof.

8. Petitioner's members have for decades maintained all of the SGN Property, including roadways and the Community Beach, and had an interest in continuing to do so. Petitioner's members have assigned significant value to the SGN Property and would have been willing to enter into a competitive auction, if necessary, and to invest funds in order to maintain their historical maintenance, use, and oversight of the SGN Property.

*Petitioner's Actions Evidence Financial Value Associated  
with the SGN Property that the Board Failed to Capture*

9. Petitioner's members' actions evidence clear financial value to the SGN Property that could have been captured by the Department if it had been willing to enter into a competitive auction prior to disposing of the SGN Property.

10. The Department, unfortunately, has not recognized the value of the SGN Property. Instead, on October 8, 2013, counsel for the Board responded, stating that "a majority of the roads, easements and common areas" will be transferred to PLCSOA, and that the Board did "not intend to further fragmentize ownership or control of the roads, easements and common area among other homeowners associations such as SGNA."

11. In short, notwithstanding a competing offer from a homeowners' association with an expressed interest in owning and maintaining the SGN Property (property Petitioner's members have traditionally maintained for the benefit of themselves and the public), the Board



declined to afford Petitioner or any other person the right to participate in an auction of the SGN Property.

12. On information and belief, the Board conveyed the State Lands, including the SGN Property, to PLCSOA by and through the Deed and Amended Deed, respectively, without holding a public auction and without receiving any financial consideration whatsoever.

13. Given Petitioner's competing offer for the SGN Property, it should have been obvious to the Department that there is financial value associated with the SGN Property. The Board has ignored these competing offers and failed to recognize or acquire the financial interest in the SGN Property in connection with its liquidation of these endowment lands, in contravention of its constitutional and statutory duties.

*The Board's Actions in this Regard Violate its Constitutional and Statutory Duties*

14. Article IX, Section 8 of the Idaho Constitution provides:

The legislature shall . . . provide by law that the general grants of land made by congress to the state shall be judiciously located and carefully preserved and held in trust, subject to disposal at public auction for the use and benefit of the respective object for which said grants of land were made, and the legislature shall provide for the sale of said lands from time to time and for the sale of timber on all state lands and for the faithful application of the proceeds thereof . . .

IDAHO CONST., ART. IX, § 8.

15. "The State's endowment lands are part of a sacred trust reserved for the benefit of Idaho's public schools and public institutions." *Wasden v. State Bd. Of Land Com'rs*, 153 Idaho 190, 195, 280 P.3d 693, 698 (2012). State endowment lands are to be held in trust to secure the maximum long term financial return, subject only to "disposal" at public auction. *Id.*

16. "The 'disposal' or 'disposition' of public lands obviously includes the sale thereof and just as obviously includes other types of disposal or disposition. . . . The language of Article

IX, §8, unambiguously requires that any disposal of endowment land must be at public auction.”

*Wasden* , 153 Idaho at 197-98, 280 P.3d at 700-01.

17. These important responsibilities are detailed throughout Idaho Code. This includes, for example, the advertisement and basic auction requirements. Idaho Code Section 58-313 provides, in pertinent part:

The state board of land commissioners may at any time direct the sale of any state lands, in such parcels as they shall deem for the best interests of the state. All sales of state land shall be advertised in four (4) consecutive issues of some weekly newspaper in the county in which the land is situated, if there be such paper, if not, then in some newspaper published in an adjoining county, and in such other paper or papers as the board may direct. The advertisement shall state the time, place and terms of sale, a description of land and value of the improvements, if any, thereon, and the minimum price per acre of each parcel as fixed by the board, below which no bid shall be received. . . . When lands on which improvements have been made, as above, are sold, the purchaser, if other than the owner or former owner of said improvements, shall pay the appraised value of said improvements to the owner thereof. . . .

IDAHO CODE § 58-313.

18. Even if the Department determines that property is “surplus,” Idaho Code ensures that the property is not simply given away. For example, Idaho Code Section 58-332 provides, in pertinent part:

If no tax-supported agency or unit of the state of Idaho or the United States acquires the surplus property, the state board of land commissioners may offer at public sale, after notice of publication for four (4) consecutive weeks in a newspaper published in the county in which the property is situated, and sell the same to the highest and best bidder upon terms and conditions to be determined by the board and specified in the notice of sale. If the property does not sell at public auction, the board may have the property appraised and enter into negotiations with any party(s) to effect disposition of the property for adequate and valuable consideration.

IDAHO CODE § 58-332.

19. There is no statutory exemption from, or exception to, the public auction requirement that applied to the Board’s disposal of the State Land, including the SGN Property.

*The Board did not comply with the Idaho Administrative Procedures Act.*

20. Upon information and belief, the Board did not engage in a rulemaking, nor issue any rule, that purported to allow it to dispose of the State Land, including the SGN Property, without a public auction. Interested parties were not afforded the requisite opportunity to participate in a rulemaking relating to the disposal.

21. Upon information and belief, the Board did not issue any order that purported to allow it to dispose of the State Land, including the SGN Property, without a public auction. Interested parties were not afforded the requisite opportunity to participate in a contested case relating to the disposal.

*Administrative actions taken without authority or jurisdiction are void.*

22. The Board, as an administrative agency, has no authority other than that given to it by the legislature. *See Wash. Water Power Co. v. Kootenai Env'tl. Alliance*, 99 Idaho 875, 879, 591 P.2d 122, 126 (1979). “Administrative agencies are ‘creature[s] of statute’ and, therefore, are ‘limited to the power and authority granted [them] by the Legislature.’” *Henderson v. Eclipse Traffic Control*, 147 Idaho 628, 632, 213 P.3d 718, 722 (2009) (quoting *Welch v. Del Monte Corp.*, 128 Idaho 513, 514, 915 P.2d 1371, 1372 (1996)). Such authority “is primary and exclusive in the absence of clearly manifested expression to the contrary.” *Roberts v. Idaho Transp. Dep’t*, 121 Idaho 727, 732, 827 P.2d 1178, 1138 (Ct. App. 1991). An agency “may not exercise its sub-legislative powers to modify, alter, enlarge or diminish the provisions of the legislative act which is being administered.” *Id.*

23. An administrative agency “exercises limited jurisdiction, and nothing is presumed in favor of its jurisdiction.” *Henderson*, 147 Idaho at 632, 213 P.3d at 722; *see also United States v. Utah Power & Light Co.*, 98 Idaho 665, 570 P.2d 1353 (1977). An agency’s authority and jurisdiction is “dependent entirely upon the statutes reposing power in them and they cannot

confer it upon themselves. . . .” *Wash. Water Power Co.*, 99 Idaho at 879, 591 P.2d at 126. If the provision of governing rules or statutes are not met and complied with, no authority or jurisdiction exists.” *Id.* (citing *Arrow Transp. Co. v. Idaho Pub. Util. Comm’n*, 85 Idaho 307, 379 P.2d 422 (1963)).

24. Acts taken by an agency without statutory authority or jurisdiction are void and must be set aside. *See Arrow Transp. Co.*, 85 Idaho at 314-15, 379 P.2d at 426-27; *A&B Irrigation Dis. V. Idaho Dep’t of Water Res.*, 153 Idaho 500, 505, 284 P.3d 225, 230 (2012).

## II.

### REQUEST FOR DECLARATORY RELIEF

25. Pursuant to Idaho Code Sections 67-5232 and 67-5255 and the Department of Lands Rules of Practice and Procedure before the State Board of Land Commissioners, IDAPA 20.01.01.400, Petitioner seeks a declaratory ruling that:

- a. The conveyance of the State Lands set forth in the Deed and Amended Deed constituted the disposal or disposition of state endowment lands
- b. The disposal or disposition of state endowment lands required the Board to employ a public auction process.
- c. Idaho law sets forth in clear terms the procedural requirements for the disposal of state lands by public auction.
- d. There was no exemption from, or exception to, the public auction requirement, statutory or otherwise, that applied to the State Lands, including the SGN Property.
- e. The Board failed to abide by the statutes and laws governing the disposition of state lands when it conveyed the State Lands to PLCSOA.

- f. The Board had no authority or jurisdiction to dispose of the State Lands without a public auction.
- g. Because the Board lacked authority and jurisdiction to convey the State Lands without a public auction, the Deed and Amended Deed are void and without effect.
- h. Because the Deed and Amended Deed are void and without effect, the Board continues to hold title to the State Lands, and may commence with a public auction thereof in accordance with the requirements of state law.

DATED this 29 day of May 2018.

SPINK BUTLER, LLP

By: 

T. Hethe Clark  
Matthew J. McGee  
Attorneys for Sharlie-Grouse Neighborhood  
Association, Inc.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 29 day of May 2018, I caused a true and correct copy of the above to be served upon the following individuals in the manner indicated below:

Payette Lakes Cottage Sites  
Owners Association, Inc.  
P.O. Box 4226  
McCall, Idaho 83638

- U.S. Mail
- Hand-Delivery
- Federal Express
- Via Facsimile
- Via E-Mail



Matthew J. McGee



IDAHO DEPARTMENT OF LANDS

NOV 13 2019

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**BEFORE THE STATE BOARD OF LAND COMMISSIONERS**

SHARLIE-GROUSE NEIGHBORHOOD  
ASSOCIATION, INC.

Petitioner,

v.

IDAHO STATE BOARD OF LAND  
COMMISSIONERS,

Respondent,

and

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

Intervenors.

**RECOMMENDED DECISION AND  
ORDER ON PETITION FOR  
DECLARATORY RULING**

The Petitioner in this matter seeks a declaratory ruling which would invalidate an agency action whereby the Respondent relinquished the State's interest in a parcel of real property located on Payette Lake in Valley County, Idaho.

**BACKGROUND**

In 1924, the Idaho State Board of Land Commissioners (Land Board) created and platted the Southwest Payette Cottage Sites Subdivision (Subdivision), located along Payette Lake in

Valley County. In addition to laying out subdivision lots, the 1924 plat donated and dedicated “the streets, roads, alleys, commons and public grounds shown on the plat to the use of the public forever.” An amended 1932 plat reiterated the donation and dedication. The dedicated common areas included a 1.01-acre parcel designated on the plats as “Community Beach.”

Starting in 1986, the Land Board decided to convey the roads and common areas to the lot owners as a whole. From then on, all deeds issued by the Idaho Department of Lands for Subdivision lots contained language vesting “in common” in all lot holders “the right to use and enjoyment” of the previously dedicated roads and common areas. The vesting of such rights was to occur, simultaneously with the divestment of any interest of the State of Idaho, “[u]pon conveyance of the last state-owned lot in fee simple” in the Subdivision.

At a meeting held on May 17, 2011, the Land Board voted to move forward with a plan for the eventual sale of all lots in the Subdivision. Over the next two years, the Land Department staff developed a plan to carry out the Land Board’s plan. It included the preparation of an amended plat, which provided that common areas and roads would be quitclaim deeded to an association of lot owners and lessees. A Declaration of Covenants, Conditions and Restrictions (CC&Rs) was prepared, which provided for members of an incorporated nonprofit association, known as “Payette Lakes Cottage Sites Owners Association, Inc.” (PLCSOA), to operate and maintain the roads and common areas. Final action was taken on the plan at a Land Board meeting held on October 15, 2013. All parties to this proceeding were represented by legal counsel at such meeting. None of the parties sought judicial review of the Land Board action. The amended plat and CC&Rs were then recorded. A quitclaim deed, which transferred to PLCSOA any interest of the State of Idaho in and to the Subdivision roads and common areas, was recorded on April 25, 2014. An amended quitclaim deed with the same effect was recorded on January 30, 2015.



## PROCEDURAL POSTURE

Sharlie-Grouse Neighborhood Association, Inc. (SGNA), an association consisting of lot owners in the northern part of the Subdivision, filed a Petition for Declaratory Ruling with the Idaho Department of Lands on May 29, 2018, initiating this proceeding. SGNA sought a declaratory ruling that the two quitclaim deeds were issued in violation of various constitutional provisions and statutes, that the deeds were invalid to convey title to the roads and common areas to PLCSOA, and that the Land Board continues to hold title to the roads and common areas. The Land Board answered the Petition, raising a variety of affirmative defenses. On October 3, 2018, the Director of the Idaho Department of Lands appointed the undersigned as Hearing Officer “to decide all procedural and pre-hearing matters,” and “submit a recommended order to the State Board of Land Commissioners.”

Two additional groups of lot owners in the Subdivision, PLCSOA and Wagon Wheel Bay Dock Association, Inc., (Intervenors), subsequently sought and were granted intervention in this proceeding. The Intervenors have generally supported the position of Respondent in this matter. Following various procedural motions and orders, the parties were requested to file a stipulation regarding discovery, scheduling, and the manner of handling dispositive motions. The parties agreed upon and submitted such a stipulation, which was approved by order of the Hearing Officer. Dispositive motions with supporting memoranda, declarations, and affidavits were submitted by all parties pursuant to the stipulation and the same were scheduled for oral argument before the Hearing Officer on August 27, 2019. All parties characterized their dispositive motions as motions for summary judgment.

All of the parties were represented by counsel at the dispositive motion hearing. Prior to the hearing, Intervenors had submitted a motion to strike the declarations of Mark Richey,

Christopher A. Mothorpe, and Zephaniah Johnson, all of which had been filed by SNGA along with its moving papers. Having considered written arguments previously submitted by the parties in support and opposition, the Hearing Officer ruled from the bench before the submission of oral argument. The declarations of Richey and Mothorpe were stricken on grounds of relevance. The motion to strike the Johnson declaration was denied. The parties then submitted oral argument on all pending dispositive motions and the Hearing Officer took the matter under advisement.

### ANALYSIS

Before launching into an analysis of the declaratory ruling issue, it is necessary to consider what actions of the Land Board are being challenged in this proceeding. In its summary judgment reply brief, SGNA specifically states that “it seeks no relief with respect to the roads.” Indeed, SGNA’s oral and written argument specifically focuses on the Land Board’s disposition of Community Beach, which SGNA claims was violative of controlling constitutional and statutory provisions. Thus, the analysis here will focus exclusively upon Community Beach.

SGNA contends that the Land Board violated its constitutional and statutory duties by acting to dispose of Community Beach, by recording CC&Rs relating to the disposal and by issuing the two quitclaim deeds. However, the alleged violations all stem from the Land Board’s action on October 15, 2013, which approved the Land Department staff’s plan for disposition of the Subdivision’s roads and common areas. That Land Board action authorized the recording of the amended plat, the CC&Rs and the quitclaim deeds. The execution and recording of those documents were simply ministerial acts to carry out the action taken by the Land Board on October 15, 2013. That action is the focus of this proceeding.

The next question is what occurred on October 15? That is, was it an “agency action” or an “order” or a “contested case” or something else? This is an important question because the answer dictates when and how the propriety of the Land Board’s may be subjected to challenge.

None of the parties assert that the October 15 action was the culmination of a contested case. Even though SGNA had participated in Land Board proceedings leading up to the October 15 meeting and was aware the Land Board would likely decide upon the disposition of the Subdivision streets and common areas at the meeting, the proceedings did not fit the statutory definition of a contested case. Idaho Code section 67-5201(6) defines a contested case as a proceeding “which results in the issuance of an order.” The action taken by the Land Board at that meeting does not fit the definition of “order” in Idaho Code section 67-5201(12). The Land Board’s action does, however, fit the definition of an “agency action” set out in Idaho Code section 67-5201(3)(c)— “[An] agency’s performance of, or failure to perform, any duty placed on it by law.” SGNA contends that in deciding how to dispose of Community Beach, the Land Board failed to perform its lawful duties.

The Land Board contends that SGNA’s sole mechanism for challenging the October 15 agency action was to file a timely petition for judicial review. Idaho Code section 67-5270(2) provides that a “person aggrieved by a final agency action other than an order in a contested case is entitled to judicial review.” Idaho Code section 67-5273 (3) specifies that a petition for judicial review “must be” filed within twenty-eight (28) days of the agency action. That did not occur here.

SGNA did not seek to challenge the October 15 agency action until four and one-half years later. Whether this challenge is called a request for judicial review or a petition for declaratory ruling, it is untimely. In *Cobbley v. City of Challis*, 143 Idaho 130, 139 P.3d 732 (2006), the Idaho Supreme Court stated:

Judicial review of an administrative decision is wholly statutory; there is no right of judicial review absent the statutory grant. ... Thus, a party's failure to physically file a petition for judicial review with the district court within the time limits prescribed by statute and the Rules of Civil Procedure is jurisdictional and results in a dismissal of the appeal.

*Id.* at 133, 139 P.3d at 735. The Court went on to say, "one cannot challenge in a separate civil suit the action of a board where that board has acted on matters within its jurisdiction." *Id.* at 134, 139 P.3d at 736. It almost goes without saying that a party may not challenge an agency action in a separate administrative proceeding where the party failed to file a timely petition for judicial review of that action.

SGNA creatively seeks to avoid the bar interposed by its failure to timely petition for judicial review by characterizing its Petition for Declaratory Ruling as the initiation of a contested case. There are two provisions of the Idaho Administrative Procedure Act pertaining to declaratory rulings. Idaho Code section 67-5255(1) allows any person to petition an agency for a declaratory ruling as to the applicability of any order issued by the agency. Because an "order" is not the subject of SGNA's petition, this provision does not apply.

Idaho Code section 67-5232(1) allows for a declaratory ruling as to the applicability of any statutory provision or rule administered by an agency. Subsection (2) goes on to provide that a petition for declaratory ruling does not preclude an agency from initiating a contested case in the matter. SGNA contends that the Notice of Appointment of Hearing Officer makes reference to Idaho Code section 58-122, which outlines certain procedures for contested cases. Section 58-122 authorizes the Director of the Land Department to appoint hearing officers for contested cases. However, it contains an important proviso pertaining to cases where the Land Board "is exercising its duties and authorities concerning the direction, control or disposition of the public lands of the state pursuant to sections 7 and 8 article IX," of the Idaho Constitution. Those actions "shall not

be 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.”

While the Land Board decided to appoint a hearing officer at its meeting on July 17, 2018, there is no indication that it made a discretionary determination to initiate a contested case. At most, it gave the Director of the Land Department the authority to appoint a hearing officer to conduct a hearing on the petition and submit a recommended order. Where the hearing officer is appointed under the proviso, there should be a clear statement by the Land Board that it intends to have the hearing officer conduct a contested case hearing, along with a delineation of the scope of the contested case.

It should be noted that SGNA did not request the initiation of a contested case in its Petition for Declaratory Ruling. It filed the petition “pursuant to Idaho Code Sections 67-5232 and 67-5255” and the Land Board’s procedural rules. Although SGNA claimed the Land Board had violated its constitutional duties, the cited rules would allow it, at most, to obtain a ruling “as to the applicability of any statutory provision or of any rule administered by the agency.”

There are simply no administrative avenues of relief for SNGA to pursue in its quest to undo the actions taken by the Land Board at its meeting on October 15, 2013. It failed to seek judicial review of this agency action. Had it availed itself of this statutory remedy, most of the issues it seeks to raise here could have been presented to a district judge for determination. SNGA’s failure to seek judicial review resulted in the recording of the amended plat, the CC&Rs and the quitclaim deeds. Each of those actions has seriously complicated the possibility of undoing the Land Board’s action. Other lot owners in the Subdivision have accumulated certain rights under those documents, as well as previous deeds and plats, that cannot be taken away by any agency

action. Only a court of law could void those documents. 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.

The parties have devoted substantial briefing to the question of whether a declaratory ruling is an appropriate mechanism to obtain the relief SGNA seeks. Idaho Code section 67-5232(1) provides for a declaratory ruling “as to the applicability of any statutory provision.” SGNA is correct when it argues that the requirements of Idaho Code section 58-313 apply to the sale of State endowment lands, such as the Subdivision property. However, the Land Board is correct in pointing out the application of Idaho Code section 58-317, which authorizes the Land Board to lay out State lands in subdivisions when it determines that the property “will sell at a better price than when undivided.” This section also provides for the Land Board to file subdivision plats, which necessarily includes the dedication or designation of roads and common areas for the benefit of lot owners or the public. It appears that both statutes apply, which seems to be the extent of any determination under Section 67-5232.

Having failed to pursue judicial review of the Land Board’s action, there is no separate administrative avenue for SGNA to pursue for the relief it has requested. Indeed, the relief sought would only be a possibility in a regular civil action in the court system. Only a court of law could invalidate the quitclaim deeds that SGNA claims to be violative of constitutional and statutory provisions. Substantial legal and factual questions are presented that could only be dealt with in a court of law. Those questions would be outside the purview of a declaratory action in the court system, let alone an administrative proceeding.

Decisions of the Idaho Supreme Court under Idaho Code section 10-1201, the Declaratory Judgment Act provide guidance on the limits of declaratory relief. In *Farmers Ins. Exchange v.*



*Tucker*, 42 Idaho 191, 125 P.3d 1067 (2005), the Court had before it a case in which the principal question was the amount of damages payable under an insurance policy. The Court first noted, citing Idaho Code section 10-1209, that where a proceeding under the Act involved the determination of an issue of fact, such issue may be tried and determined as in other actions at law. *Id.* at 194, 125 P.3d at 1070. However, the Court stated further, citing *Country Ins. Co. v. Agricultural Development, Inc.*, 107 Idaho 961, 972, 695 P.2d 346, 357 (1984), “the Declaratory Judgment Act is not a freeway open for the litigation of factual disputes.” *Id.* The Court went on to say that in *Country Ins. Co.* it had “held that a declaratory judgment should not be allowed ‘where the issues presented should be the subject of judicial investigation in a regular action.’” *Id.*

In addition to presenting constitutional issues beyond the scope of an administrative action, this case would require resolution of substantial factual disputes which are inappropriate for determination in a declaratory proceeding. 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. The Land Board contends the dedicated/deeded roads and common areas increased the prices it was able to charge for rental or sale of the lots. SGNA contends there was substantial residual value of the Land Board’s ownership interest in Community Beach as of October 15, 2013, that should have been realized upon its disposal. The valuation issue depends on a determination of the property rights held by the Land Board as of the October 15 meeting. While it still held the underlying fee to Community Beach, all of the lot owners in the Subdivision had vested rights in and to the “in common” use and enjoyment of all of the common areas, including Community Beach. This type of encumbrance would likely have a substantial impact on the market value of the Community Beach property. Resolution of such

factual issues would be well beyond the scope of either an administrative or judicial declaratory proceeding.

### **RECOMMENDED DECISION AND ORDER**

The parties have raised interesting issues in their substantial briefing, but SGNA has been unable to demonstrate an available administrative avenue to pursue the relief it desires. It could have sought judicial review of the Land Board's October 15, 2013 decision but it failed to do so. There is no other available administrative remedy. 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. SGNA did not seek the initiation of a contested case and the Land Board did not authorize such a proceeding. A contested administrative proceeding seeking to undo the Land Board's action of October 15, 2013, would, in essence, constitute an impermissible collateral attack on that action.

The parties have styled their dispositive motions as motions for summary judgment and, therefore, a summary judgment standard will be applied here. This Hearing Officer can find no genuine issue as to any material fact regarding SGNA's ability to attack the Land Board's action of October 15, 2013, which approved the disposal of the State's interest in and to the roads and common areas of Southwest Payette Cottage Sites Subdivision, including Community Beach. SGNA failed to file a timely petition for judicial review of that agency action and may not collaterally attack the action in the present proceeding. Therefore, the Petition for Declaratory Ruling should be dismissed on summary judgment as a matter of law.

The Hearing Officer recommends that the Idaho State Board of Land Commissioners approve and adopt the foregoing decision and issue the recommended order served concurrent herewith, dismissing the Petition for Declaratory Ruling.

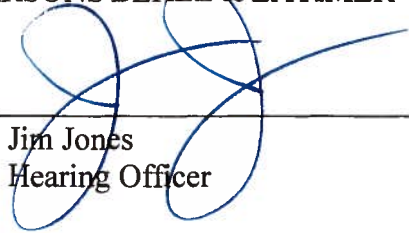


DATED this 12th day of November 2019.

PARSONS BEHLE & LATIMER

By \_\_\_\_\_

Jim Jones  
Hearing Officer



IDAHO DEPARTMENT OF LANDS

CERTIFICATE OF SERVICE

I hereby certify that on November 12, 2019, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

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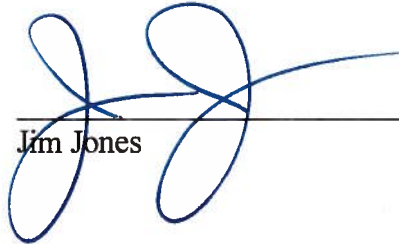
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Jim Jones



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

SHARLIE-GROUSE NEIGHBORHOOD  
ASSOCIATION, INC.

Petitioners,

v.

IDAHO STATE BOARD OF LAND  
COMMISSIONERS,

Respondent,

and

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

Intervenors.

**ORDER DISMISSING PETITION FOR  
DECLARATORY RULING**

IDAHO DEPARTMENT OF LANDS

The Idaho State Board of Land Commissioners, having reviewed and considered the Recommended Decision and Order on Petition for Declaratory Ruling prepared by Hearing Officer Jim Jones, finds the same to be in compliance with the applicable law. The Board finds that there is no genuine issue of material fact as to the jurisdiction of the Board to entertain this proceeding. Sharlie-Grouse Neighborhood Association, Inc., failed to seek judicial review of the Board's agency action of October 15, 2013, and may not collaterally attack that action in this proceeding, regardless of how the attack may be labeled. The Board hereby approves and adopts the decision of the Hearing Officer and dismisses the Petitioner's Petition for Declaratory Ruling.

This is a recommended order of the Hearing Officer. It will not become final without action of the agency head. Any party may file a petition for reconsideration of this recommended

order with the Hearing Officer within fourteen (14) days of the service date of this order. The Hearing Officer will dispose of any petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See Section 67-5243(3), Idaho Code.

Within twenty-one (21) days after (a) the service date of this recommended order, (b) the service date of a denial of a petition for reconsideration from this recommended order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this recommended order, any party may, in writing, support or take exceptions to any part of this recommended order and file briefs in support of the party's position on any issue in the proceeding.

Written briefs in support of or taking exceptions to the recommended order shall be filed with the agency head (or designee of the agency head). Opposing parties shall have twenty-one (21) days to respond. The agency head or designee may schedule oral argument in the matter before issuing a final order. The agency head or designee will issue a final order within fifty-six (56) days of receipt of the written briefs or oral argument, whichever is later, unless waived by the parties or for good cause shown.

DATED and entered this 12th day of November 2019.

PARSONS BEHLE & LATIMER

By \_\_\_\_\_

Jim Jones  
Hearing Officer

CERTIFICATE OF SERVICE

I hereby certify that on November 12, 2019, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

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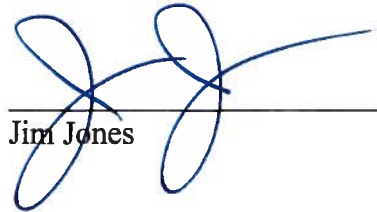
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NOV 26 2019

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**BEFORE THE STATE BOARD OF LAND COMMISSIONERS**

SHARLIE-GROUSE NEIGHBORHOOD  
ASSOCIATION, INC.,

Petitioner,

v.

IDAHO STATE BOARD OF LAND  
COMMISSIONERS,

Respondent,

and

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

Intervenors.

**PETITION FOR RECONSIDERATION AND  
MEMORANDUM IN SUPPORT**

IDAHO DEPARTMENT OF LANDS



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## 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”?<sup>1</sup>

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

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<sup>1</sup> 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](http://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.<sup>2</sup> But Idaho is not like other states. Idaho decisions reflect a heightened concern that governmental entities adhere to the rule of law.<sup>3</sup>

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.

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<sup>2</sup> 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.

<sup>3</sup> 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.<sup>4</sup>

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.

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<sup>4</sup> 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.<sup>5</sup>

Notably, the Firefighters did not seek judicial review of PERB's action in 2009 approving the new COLA.<sup>6</sup> 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.

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<sup>5</sup> 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.

<sup>6</sup> 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.”<sup>7</sup> By Intervenors’ own admission,<sup>8</sup>

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<sup>7</sup> *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.

<sup>8</sup> 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.<sup>9</sup> 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

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<sup>9</sup> 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.<sup>10</sup> 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

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<sup>10</sup> 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.<sup>11</sup> Moreover, the *Notice* states that it is issued pursuant to IDAPA 20.01.01.410, which

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<sup>11</sup> 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.<sup>12</sup>

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*

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<sup>12</sup> 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.<sup>13</sup> 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

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<sup>13</sup> "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.<sup>14</sup> 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.

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<sup>14</sup> “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:

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**BEFORE THE STATE BOARD OF LAND COMMISSIONERS**

SHARLIE-GROUSE NEIGHBORHOOD  
ASSOCIATION, INC.

Petitioner,

v.

IDAHO STATE BOARD OF LAND  
COMMISSIONERS,

Respondent,

and

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

Intervenors.

**DECISION ON PETITION FOR  
RECONSIDERATION**

The Petitioner, Sharlie-Grouse Neighborhood Association, Inc. (SGNA), has filed a Petition for Reconsideration of the Recommended Order proposed in this matter by the undersigned hearing officer. Having considered the arguments raised and authorities cited in SGNA's supporting memorandum, it does not appear that SGNA has shown sufficient grounds for reconsidering the Recommended Order. The Petition for Reconsideration is therefore denied for the reasons set forth below.

SGNA contends that the action taken by the Idaho State Board of Land Commissioners (Land Board) on October 15, 2013, did not constitute an “agency action” within the meaning of Idaho Code section 67-5201(3)(c). That provision defines an “agency action” as “[An] agency’s performance of, or failure to perform, any duty placed on it by law.”

At its October 15 meeting, the Land Board voted to approve a plan to dispose of any interest the State retained in and to the roads and common areas of Southwest Payette Cottage Sites Subdivision (Subdivision). The Land Board’s action approved: (1) the filing of an amended plat for the Subdivision; (2) a Declaration of Covenants, Conditions and Restrictions (CC&Rs) for an incorporated nonprofit association, “Payette Lakes Cottage Sites Owners Association, Inc.” (PLCSOA), to operate and maintain the roads and common areas of the Subdivision; and (3) the execution and recording of a quitclaim deed, relinquishing to PLCSOA any interest of the State of Idaho in and to the Subdivision roads and common areas. Such a quitclaim deed was recorded with the Valley County Recorder on April 25, 2014, and an amended quitclaim deed was recorded on January 30, 2015.

SGNA did not seek judicial review of any action taken by the Land Board on October 15, 2013, or of any of the ministerial acts authorized to be taken by the Land Board’s action on that date – the recording of the amended plat, the execution and recording of the CC&Rs, or the execution and recording of the two quitclaim deeds.

It is without doubt that the Land Board has the constitutional responsibility of holding, managing, and disposing of State endowment lands, such as the lands encompassed within the Subdivision, and that it is charged with the responsibility of doing so in accordance with constitutional and statutory law. In its Petition for Declaratory Ruling, SGNA claimed that the Land Board’s disposal of the State’s interest in the roads and common areas of the Subdivision

violated several duties placed on the Land Board by Idaho law. SGNA alleged that the Land Board's actions violated "its Constitutional and Statutory Duties," specifying Article IX, section 8 of the Idaho Constitution and the provisions of Idaho Code section 58-313. The claim was that the Land Board failed to conduct the disposal of the property interests in accordance with the duties placed upon it by these provisions of Idaho law. The Land Board's action on October 15 was clearly a discretionary agency action, which was subject to judicial review under Idaho Code section 67-5270(2).

SGNA argues that only ministerial acts can be characterized as agency actions subject to judicial review. The recording of the CC&Rs and quit claim deeds were obviously ministerial acts required pursuant to the Land Board's action of October 15, 2013. The problem for SGNA is that it did not seek judicial review of those ministerial acts. Indeed, even if the Land Board were to have second thoughts about the propriety of its action taken on October 15, whatever remedial action it might try to take would likely not qualify for judicial review under SGNA's concept of agency action. That is, any remedial action taken by the Land Board would not be in the form of a ministerial act and would not, in SGNA's view, be subject to judicial review by any party. Discretionary actions of an agency are without a doubt subject to judicial review. See, Idaho Code section 67-5279(2)(d).

SGNA next argues that it has a right to seek a declaratory ruling under Idaho Code section 67-5232(1) to determine the propriety of the Land Board's action in disposing of the Subdivision's roads and common areas. That provision allows for a declaratory ruling as to the applicability of any statutory provision or rule administered by an agency. It does not authorize declaratory rulings involving constitutional provisions. SGNA seeks a ruling that: (1) the advertisement and auction requirements in Idaho Code section 58-313 apply to the Land Board's actions and (2) the Land

Board's actions violated the provisions of that code section. The latter request certainly seems to exceed the scope of the statutory provision. It also overlooks the fact that SGNA did not seek judicial review of any actions taken by the Land Board between October 15, 2013, and January 30, 2015, when the amended quitclaim deed was filed with Valley County. None of those actions were the subject of a petition for judicial review within the 28-day time limitation in Idaho Code section 67-5273(3). Where a party has failed to avail itself of an available remedy, Idaho Code section 67-5232 does not provide an alternate avenue for attacking an agency action. If that were the case, an aggrieved party could use the declaratory ruling provision to launch serial attacks against a disappointing decision without having to observe any time limit.

Additionally, it is not clear that a declaratory ruling would produce the type of result SGNA wishes. The Subdivision consisted of endowment property and clearly was subject to being disposed of pursuant to applicable Land Board statutes and rules. The lots would obviously have to be disposed of in accordance with the provisions of Idaho Code section 58-313 regarding the advertisement and sale of lands or Idaho Code section 58-138 regarding equal-value exchanges.

However, the Land Board points out that the roads and common areas were platted and disposed of pursuant to Idaho Code section 58-317, which authorizes the Land Board to lay out State lands in subdivisions when it determines that the property "will sell at a better price than when undivided." It contends that Subdivision was developed to take advantage of this better price option and that lot owners have paid a higher price for their individual lots over the years because of the access roads and common areas that came along with the deal.

Nevertheless, SGNA claims that the State's underlying fee interest in Community Beach had a residual value that should have been advertised and auctioned instead of being deeded to PLCSOA. In its opening brief SGNA states: "When SGNA members learned that the Land Board

was considering conveying Community Beach, they urged that it be conveyed to SGNA, so they could maintain it in its natural state for community and public use.” The Land Board chose, instead, to proceed with its plan to transfer its remaining interest in the dedicated property to PLCSOA for future maintenance and management.

The dispute appears to be more of a management controversy than a question of fee ownership. Because of the dedication of all of the common areas to the use and enjoyment of all lot owners in the Subdivision, and perhaps the public, there is not much the owner of the underlying fee could do with the property other than manage it for the benefit of those to whom the dedication was made. A brief look at the dedication history is instructive.

When the Subdivision plat was filed in 1924, “the streets, roads, alleys, commons and public grounds shown on the plat,” were donated and dedicated to the use of the public forever. An amended 1932 plat reiterated the donation and dedication. Starting in 1986, all deeds issued for Subdivision lots contained language vesting “in common” in all Subdivision lot holders “the right to use and enjoyment” of the previously dedicated roads and common areas. The vesting was to occur “upon conveyance of the last state-owned lot in fee simple.” It is not entirely clear from the record when the last lot was sold but appears that the sale must have been the event that triggered the Land Board’s action on October 15, 2013. The roads and common areas of the Subdivision have been donated and dedicated to the use and benefit of either the public, as stated in the plats, or the lot owners, as stated in documents recorded in and after 1986.

In its memorandum, SGNA notes that lot owners have had “the full benefit of use of the roads and Community Beach for many decades” by virtue of the “common law dedication in 1924 and/or 1932.” It recognizes that the State’s residual interest in the roads was valueless, that the conveyance of the roads to PLCSOA was a “housekeeping matter that facilitated management of

the roads” and that the State’s quitclaim of any interest in the roads to PLCSOA did not need to comply with the auction requirement of Idaho Code section 58-313. The same observation can be made with regard to the ten common areas, including Community Beach, that were quitclaimed to PLCSOA by the two deeds.

Each and every lot owner in the Subdivision has a vested, perpetual right to the use and enjoyment of Community Beach and the nine other common areas. This is an amenity that factored, to some degree, into the price they paid for their lot. There is no way short of judicial intervention that any lot owner in any part of the Subdivision can be deprived of the right to the “in common” use of all of the common areas. The Land Board appears to have made the determination that one management entity for all common areas would be more workable than having separate management entities for each common area, where all Subdivision lot owners had a vested interest in and to all of the ten common areas.

It appears that all SGNA lot owners are either members of, or eligible for membership in, PLCSOA, where they could have a voice in management decisions. There are certainly imperfections in the manner common area management entities operate at times, as evidenced by the number of HOA lawsuits that make their way through the court system. However, those who have concerns about the manner in which such entities operate have available recourse through the court system, not through Land Board administrative proceedings. If PLCSOA takes action that infringes on the rights of SGNA members to the “in common” use and enjoyment of Community Beach or other Subdivision common areas, the courts provide a forum for potential relief.

Because of the perpetual dedication of Community Beach to the use and enjoyment of all Subdivision lot owners, and perhaps the public, no use can be made of the land that would be inconsistent with such purpose. That fact would certainly have an impact upon the market value



of the land. SGNA argues that the Land Board's quitclaim deeds transferred significant value to PLCSOA because the Bagley family and its entities paid estimated rentals in excess of \$100,000 to the State for a .216-acre encroachment into Community Beach over a period of 29 years. That does not necessarily mean that a willing buyer would pay that sum for the fee underlying the dedicated property. The Bagley family had no right to encroach on the land and, by rights, should have been required to remove the encroaching improvements for the benefit of those having the in common right to use and enjoy that property. Payment of the rental may have been easier than going to the trouble of removing the improvements. The payment amounts are not necessarily indicative of what a willing buyer may have been willing to pay for the property at any point in time.

One might question the Land Board's decision to enter into a lease granting one lot owner the exclusive right to occupy a portion of a common area that had been dedicated to the use of all Subdivision lot owners, but that is beyond the scope of this proceeding. What is more relevant is that the Land Board did not quitclaim its interest in the roads and common areas to a stranger to the Subdivision. Rather, the quitclaim deeds transferred the State's property interests to an entity that encompassed the entire Subdivision, making each lot-owning member of PLCSOA an equity owner of a proportionate share of those quitclaimed interests.

SGNA recognizes that the Land Board does not have the power to void all or part of the quitclaim deeds, but suggests that it could make a non-binding declaratory ruling to the effect that it had "violated requirements respecting public auctions." That would, in essence, be an advisory opinion. Courts decline to issue advisory opinions in declaratory proceedings. *Wylie v. State, Idaho Transp. Bd.*, 151 Idaho 26, 31, 253 P 3d 700, 705 (2011). They are no more appropriate in administrative proceedings.



SGNA reiterates that it sought and the Land Board granted a contested case hearing. The Recommended Decision and Order (Decision) considered those contentions and disagreed. They are no more persuasive the second time around. As noted in the Decision, SGNA specifically initiated its request for declaratory relief under IDAPA 20.01.01.400, which provides for a “declaratory ruling on the applicability of any statute, rule, or order administered by the agency.” Such a proceeding is not a contested case. Both types of proceedings, however, are decided by an order. See, IDAPA 20.01.01.400 and IDAPA 20.01.01.005.07.

The Director of the Department of Lands used his delegated authority under Idaho Code section 58-122 to appoint a hearing officer to conduct a hearing in this matter. That section does not automatically make every appointment of a hearing officer a contested case proceeding, particularly where the matter involves the Land Board’s duties under Article IX, sections 7 and 8 of the Idaho Constitution. The statute does not authorize the Director to initiate a contested case in those matters. In those cases, the Land Board may, in its discretion, initiate a contested case. There is no evidence that the Land Board exercised its discretion to initiate a contested case here. This hearing officer does not have the authority to initiate a contested case on his own. It must be initiated by action of the Land Board, not the Director. If SGNA continues to disagree on this issue, the matter may be raised directly with the Land Board in an exception under IDAPA 20.01.01.720.02.b.

In any event, it is likely that the outcome of this proceeding would be the same whether it was characterized as a declaratory proceeding or a contested case. The parties stipulated to the filing of dispositive motions and all parties submitted such motions, along with supporting briefs, affidavits and declarations. The hearing officer determined that there was no genuine issue as to any material fact regarding SGNA’s ability to attack the Land Board’s disposal of the State’s

interest in and to Community Beach. It is likely that the same result would obtain whether the proceeding was labeled as a declaratory case or a contested case.

The undersigned hearing officer appreciates the diligent and inventive advocacy of SGNA's counsel, but can find no reason to reconsider the Recommended Order previously entered in this matter. An order will be entered, denying SGNA's Petition for Reconsideration and request for oral argument.

DATED this 16th day of December 2019.

PARSONS BEHLE & LATIMER

By \_\_\_\_\_

Jim Jones  
Hearing Officer



IDAHO DEPARTMENT OF LANDS

CERTIFICATE OF SERVICE

I hereby certify that on December 16, 2019, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

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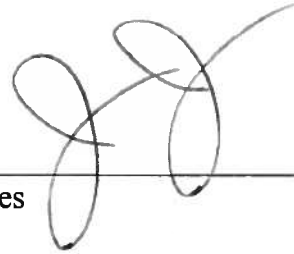
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IDAHO DEPARTMENT OF LANDS

BEFORE THE STATE BOARD OF LAND COMMISSIONERS

SHARLIE-GROUSE NEIGHBORHOOD ASSOCIATION, INC.

Petitioners,

v.

IDAHO STATE BOARD OF LAND COMMISSIONERS,

Respondent,

and

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

Intervenors.

ORDER DISMISSING PETITION FOR DECLARATORY RULING



The Petitioner, Sharlie-Grouse Neighborhood Association, Inc., has filed a Petition for Reconsideration of the Recommended Order proposed in this matter by the undersigned hearing officer. Having considered the arguments raised and the authorities cited in the Petitioner’s supporting memorandum, it does not appear that sufficient grounds have been shown for reconsideration of the Recommended Order or for setting the matter for additional oral argument.

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

- 1. The Petition for Reconsideration is denied.
- 2. The request for oral argument is denied.

Within twenty-one (21) days after the service date of this order, any party may, in writing, support or take exceptions to any part of the recommended order and file briefs in support of the party's position on any issue in the proceeding.

Written briefs in support of or taking exceptions to the recommended order shall be filed with the agency head (or designee of the agency head). Opposing parties shall have twenty-one (21) days to respond. The agency head or designee may schedule oral argument in the matter before issuing a final order. The agency head or designee will issue a final order within fifty-six (56) days of receipt of the written briefs or oral argument, whichever is later, unless waived by the parties or for good cause shown.

DATED and entered this 16th day of December 2019.

PARSONS BEHLE & LATIMER

By \_\_\_\_\_

Jim Jones  
Hearing Officer

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I hereby certify that on December 16, 2019, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

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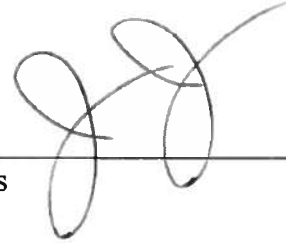
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