

# STATE BOARD OF LAND COMMISSIONERS

September 20, 2022

Regular Agenda

## Subject

Conveyance of three parcels of land patented to the State of Idaho in trust but never reclaimed pursuant to the Carey Act (43 U.S.C.A. § 641 *et seq.*).

## Question Presented

Shall the Land Board accept from the Idaho Department of Water Resources deeds conveying title to lands held pursuant to the Carey Act and convey those lands to the United States via a state deed?

## Background

The Carey Act enabled Idaho to manage the reclamation of a portion of its desert lands and the transfer of said lands to qualifying settlers. 43 U.S.C.A. § 641. In practice, the federal government, through the Department of the Interior (Interior) would donate, grant, and patent desert lands owned by the federal government that could be irrigated, reclaimed, and occupied, to Idaho, which, in turn, would convey to actual settlers upon their meeting certain conditions. *Id.* If reclamation did not occur according to the requirements of the Carey Act, the Secretary of Interior could “restore such lands not irrigated and reclaimed to the public domain.” *Id.* Where lands were conveyed to Idaho by patent pursuant to the Carey Act but never developed or reclaimed under the Carey Act, title may be revested by Interior.

The Question Presented relates to three parcels, described as follows:

- Parcel 1. T. 3 S, R. 33 E, sec. 28, NE1/4SE1/4 (Patent No. 168495)
- Parcel 2. T. 7 N, R. 1 W, sec. 28, NE1/4NE1/4 (Patent No. 368227)
- Parcel 3. T. 5 N, R. 33 E, sec. 6, N1/2SE1/4 and SW1/4SE1/4 (Patent No. 946311)

Parcels 1, 2, and 3 each were patented to the State of Idaho under the Carey Act and are administered by the Idaho Department of Water Resources (IDWR) under Idaho Code § 67-3301(2).

In the attached letter dated August 29, 2022, Interior concluded Parcels 1, 2, and 3 should be revested in the United States and its assigns (acting through the Department of Interior, Bureau of Land Management). Parcels 1 and 3 were not developed or reclaimed pursuant to the Carey Act, and no equitable claims to such lands under the Carey Act exist. Parcel 2 was not developed or reclaimed pursuant to the Carey Act, and, although two “equitable claims” have been alleged, IDWR has determined the alleged claims did not accrue prior to July 1, 1982. Therefore, Idaho Code § 67-3301(2) requires IDWR to convey the Parcel

1, 2, and 3 to the Idaho State Board of Land Commissioners (Land Board) for retention or disposal in accordance with applicable state law.

## Discussion

### The Carey Act

Land acquired by the State of Idaho under the Carey Act is a unique type of state land, an artifact of 19th Century federal desert reclamation efforts. The Carey Act's intent was to foster settlement and irrigation of desert lands by granting individuals title to land after certain reclamation conditions had been satisfied, and to allow the same individuals the ability to collectively finance the construction of irrigation projects. *See generally* Rosholt, John A., "The Carey Act Lands," *The Advocate*, Nov/Dec 2010, pp. 24-26.

Congress provided states the authority to manage the conveyance of reclaimed federal lands to actual, irrigating entrants on the land. 43 U.S.C.A. § 641. This authority enabled the states to enter into contracts to enable reclamation, induce settlement and cultivation, but the State was "not . . . authorized to lease any of said lands or to use or dispose of the same in any way whatever, except to secure their reclamation, cultivation, and settlement." *Id.*

The federal Carey Act Regulations explain that a state had 10 years from the date of the signing of the contract to cause said lands to be reclaimed, with Interior maintaining the authority to extend this period for up to 5 additional years or restore said lands to the public domain. 43 C.F.R. § 2611.2(a). Relevant to this discussion the regulations provide:

If there are portions [of land] which cannot be reclaimed, the nature, extent, location, and area of such portions should be fully stated. If less than 5 acres of a smallest legal subdivision can be reclaimed and the subdivision is not essential for the reclamation, cultivation, or settlement . . . such legal subdivision must be relinquished, and shall be restored to the public domain . . . .

43 C.F.R. § 2612.1.

If a patent issued to a state:

[I]t is the responsibility of the State to assure that the lands are cultivated and settled. If the State does not dispose of the patented lands within 5 years to actual settlers who have cultivated at least 20 acres of each 160 acre tract, or if the State disposes of the patented lands to any person who is not an actual settler or has not cultivated 20 acres of the 160 acre tract, action may be taken to revest title in the United States.

43 C.F.R. § 2612.3.

Idaho Code § 42-2001 *et seq.* governs Carey Act land grants under Idaho state law. Idaho Code § 42-2019 ("Proof of reclamation and settlement – Patent.") lays out requirements

for “proving up” a Carey Act claim. Proof of reclamation and settlement was to be submitted to IDWR:

[w]hen the works designed for the irrigation of lands under the provisions of this chapter shall be so far completed as to actually furnish an ample supply of water in a substantial ditch or canal to reclaim any particular tract of tracts of such lands, the State of Idaho shall, through [IDWR], make proof of such fact and shall apply for a patent to such lands in the manner provided in the regulations of the department of interior.

Idaho Code § 42-2019. Idaho Code § 42-2022 states “[u]pon issuance of a patent to any lands by the United States to the state, notice shall be forwarded to the settled upon such lands. It shall be the duty of [IDWR] to issue a patent to said lands from the state to the settler.” Idaho Code § 42- 2023.

The Idaho Legislature provided additional authority to IDWR through Idaho Code § 67-3301(2), which states, in relevant part:

Through this provision the department has authority to convey to equitable claimants, their heirs, successors or assigns, title to lands retained in state ownership which were patented to the state under the Carey Act prior to July 1, 1931, provided that the director determines that equitable claims to such lands have accrued prior to July 1, 1982, and are based upon the cultivation or improvement of such lands, or the payment property taxes thereon. Title to any such lands for which the director determines that an equitable claim has not accrued shall be conveyed to the state board of land commissioners for retention or disposal in accordance with applicable state law.

Section 67-3301(2) authorizes IDWR to convey Carey Act lands that were not formally conveyed to individuals who nevertheless had been cultivating or paying taxes on the land, as though they had formally acquired under the Carey Act. But if IDWR determines that such an equitable claim had not accrued before July 1, 1982, the land is to be conveyed to the Board for retention or disposal in accordance with state law.

### Parcels 1, 2, and 3

In some instances, land segregated under the Act and then patented to Idaho was never actually conveyed to a settler pursuant to the Carey Act or relinquished to the United States. Such is the case with Parcels 1, 2, and 3. Parcels 1, 2, and 3 are the last un-reclaimed Carey Act lands held by IDWR.

Title commitments to Parcels 1 and 3 show title with the State of Idaho, with a specific exemption for the relevant Carey Act patents. Parcels 1 and 3 were never reclaimed pursuant to the Carey Act or Idaho law implementing the Carey Act. No equitable claims regarding Parcels 1 and 3 have been presented to IDWR. Parcel 2 also shows title to an insurable certainty with the State of Idaho, with a specific exemption for Patent No. 368227. Parcel 2 was also

patented to the State pursuant to the Carey Act, but never successfully reclaimed, and, therefore, never conveyed to a settler pursuant to the Act.

At various times over the decades, IDWR sought out equitable claimants to Parcel 2 pursuant to Idaho Code § 67-3301(2). Having never found any, in 2018 IDWR began the process of conveying Parcel 2 to the Land Board, as contemplated in Idaho Code § 67-3301(2). Prior to the conveyance, IDWR conducted a survey of Parcel 2 which showed two encroachments. IDWR sent notices to cease and desist trespass to individuals encroaching on Parcel 2. Those individuals responded through counsel with “equitable claims” to those areas encroached upon under Idaho Code § 67-3301(2). IDWR has reviewed the alleged claims and has determined they did not accrue prior to July 1, 1982, as required by Idaho Code § 67-3301(2). A statement from the individuals asserting the equitable claims is attached for the Board’s consideration.

Parcels 1, 2, and 3 are eligible for conveyance from IDWR to the Land Board under Idaho Code § 67-3301(2). IDWR has inquired with Interior about whether Interior will seek to revest title to Parcels 1, 2, 3. In the attached letter dated August 29, 2022, Interior confirmed that title to all three parcels should be revested in the “United States of America and its assigns (acting through the Department of Interior, Bureau of Land Management).” In discussions about the reversion process, the form of the conveyance to Interior was identified as an outstanding issue needing the Board’s resolution. Interior requests conveyance via warranty deed (or special warranty deed), unless a governing statute, regulation, policy, or corporate charter requires conveyance by a lesser instrument, such as a quitclaim deed. Interior’s August 29 letter further states that a resolution by the Land Board would be sufficient documentation of such a requirement. It is recommended that the Land Board direct that conveyance of the parcels to Interior be via quitclaim deed, which is commonly referred to as a state deed.

## **Recommendation**

1. Accept conveyance of Parcels 1, 2, and 3 from IDWR.
2. Convey Parcels 1, 2, and 3 via state deeds to the United States acting through the Department of Interior, Bureau of Land Management.

## **Board Action**

## **Attachments**

1. Letter dated August 29, 2022, to Tim Luke, IDWR Water Compliance Bureau Chief, from John Sullivan, Bureau of Land Management Supervisory Realty Specialist
2. Maps of parcels 1, 2, and 3
3. Statement dated September 8, 2022, to the Land Board, from Varden and Deborah Brendsel and Ellen Knapp and Charles Lox, regarding the return of Parcel 2 to Interior



## United States Department of the Interior

BUREAU OF LAND MANAGEMENT

Idaho State Office  
1387 South Vinnell Way  
Boise, Idaho 83709-1657  
<https://www.blm.gov>



In Reply Refer To:  
2610 (933)

August 29, 2022

Mr. Tim Luke  
Chief, Water Compliance Bureau  
Idaho Department of Water Resources  
Idaho Water Center  
322 E. Front St., Ste. 648  
Boise, Idaho 83702-7371

Dear Mr. Luke:

Anne Briggs and I appreciated meeting with you, Mark Cecchini-Beaver, Robert Follett, and Josh Purkiss on August 26, 2022, to continue our discussion about the proposed reversion of three Carey Act parcels. The purpose of this letter is to update you regarding how the BLM will address administration of the three parcels previously patented to the State of Idaho for Carey Act purposes, but never developed as required under the Carey Act. The following parcels are currently managed by the Idaho Department of Water Resources, and have been identified as appropriate for reversion:

**Parcel 1.** T. 3 S., R. 33 E., sec. 28, NE1/4SE1/4 in Bingham County (Patent No. 168495).

There are no apparent outstanding issues associated with this parcel other than a lack of development under the Carey Act.

**Parcel 2.** T. 7 N., R. 1 W., sec. 28, NE1/4NE1/4 in Gem County (Patent No. 368227). This parcel contains encroachments by two adjoining private landowners. Once the parcel returns to the United States, and to BLM's administration, BLM will complete a formal determination of suitability for public land management. If the parcel is determined to be unsuitable for public land management, administration of the parcel will be transferred to the U.S. General Services Administration to be disposed of as excess property.

**Parcel 3.** T. 5 N., R. 33 E., sec. 6, N1/2SE1/4 and SW1/4SE1/4 in Jefferson County (Patent No. 946311). This parcel lies within the Idaho National Laboratory (INL) boundary. Federal lands within the INL boundary are federal public lands but are managed by INL under a withdrawal to the Department of Energy. As such, reconveyance should be to BLM as the default managing agency.

Based on the above information, State deeds reconveying the three parcels should designate the grantee as “United States of America and its assigns (acting through the Department of Interior, Bureau of Land Management).”

As we discussed in our call, the U.S. Department of Justice’s Title Standards require conveyances to the United States be via a Warranty Deed. We can make an exception to this general rule if it can be demonstrated that the grantor must convey via a lesser instrument (such as a statutory warranty deed, bargain and sale deed, or quit-claim deed) because of a governing statute, regulation, policy or corporate charter. The recipient agency (here, BLM) must also determine that the form of conveyance does not affect the quality of title. Robert Follett has opined the state’s anti-deficiency legislation may limit its ability to convey through other than a quit-claim deed. If that is the case, then a resolution by the State of Idaho’s conveying entity—presumably the Idaho Land Board or the Idaho Water Resources Board--will be sufficient documentation.







During our meeting, we also discussed the status of funds currently held in a segregated account following the Land Board’s sale of T. 4 S, R. 31 E, sec. 33, SW1/4NW1/4 and NW1/4SW1/4 as surplus property in 2015. This parcel was previously patented to the State for Carey Act purposes (Patent 168496) but was not subsequently conveyed into private ownership since it was never developed. The parcel should have reverted in the United States, but instead was sold at auction. Because the State’s disposal of the parcel was not in accordance with the Carey Act’s reversion provisions, the United States has a legitimate claim to the funds arising from the sale. During our meeting, Robert and Mark stated they will follow up to identify the process the BLM will need to follow to claim the proceeds. In the meantime, please accept this letter as a formal notice that BLM intends to file a claim.

Again, Anne and I appreciated meeting with you and look forward to finalizing the resolution of this issue. Please contact me at 208-373-3863 if you have any questions.

Sincerely,

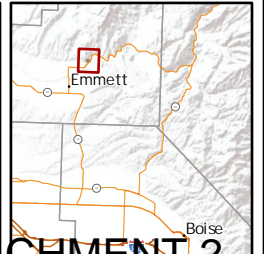
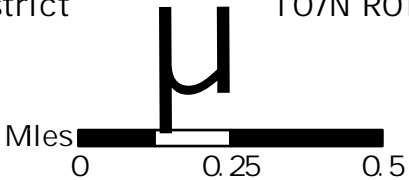
John Sullivan  
Supervisory Realty Specialist



-  Carey Act Parcel
-  Roads
-  BLM
-  Private
-  State
-  BOR

Idaho Department of Lands  
 Southwest Area/District  
 Gem County, Idaho  
 9/8/2022





Carey Act Parcel Revestiture  
 T07N R01W - Sec. 28 - NENE  
 GIS Acreage = 40  
 Scale: 1: 20,000



Disclaimer: This map has been compiled using the best information available to the Idaho Department of Lands at the time and may be updated and/or revised without notice. In situations where known accuracy and completeness is required, the user has the responsibility to verify the accuracy of the map and the underlying data sources.

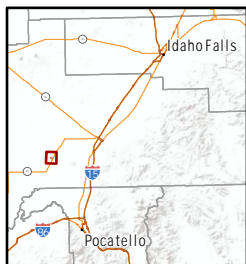
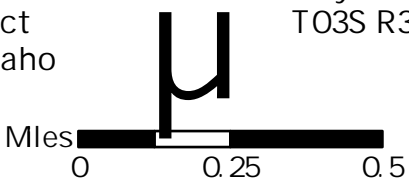
**ATTACHMENT 2**



-  Carey Act Parcel
-  Roads
-  BLM
-  Private

Idaho Department of Lands  
 Eastern Area/District  
 Bingham County, Idaho  
 9/8/2022


Carey Act Parcel Revestiture  
 T03S R33E - Sec. 28 - NESE  
 Acreage = 40  
 Scale: 1: 20,000



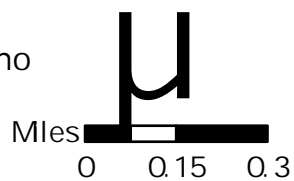
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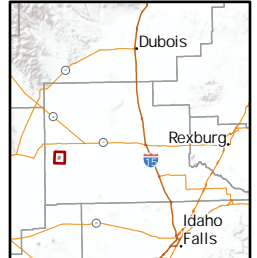


 Carey Act Parcel  
 Roads  
 Private  
 INL

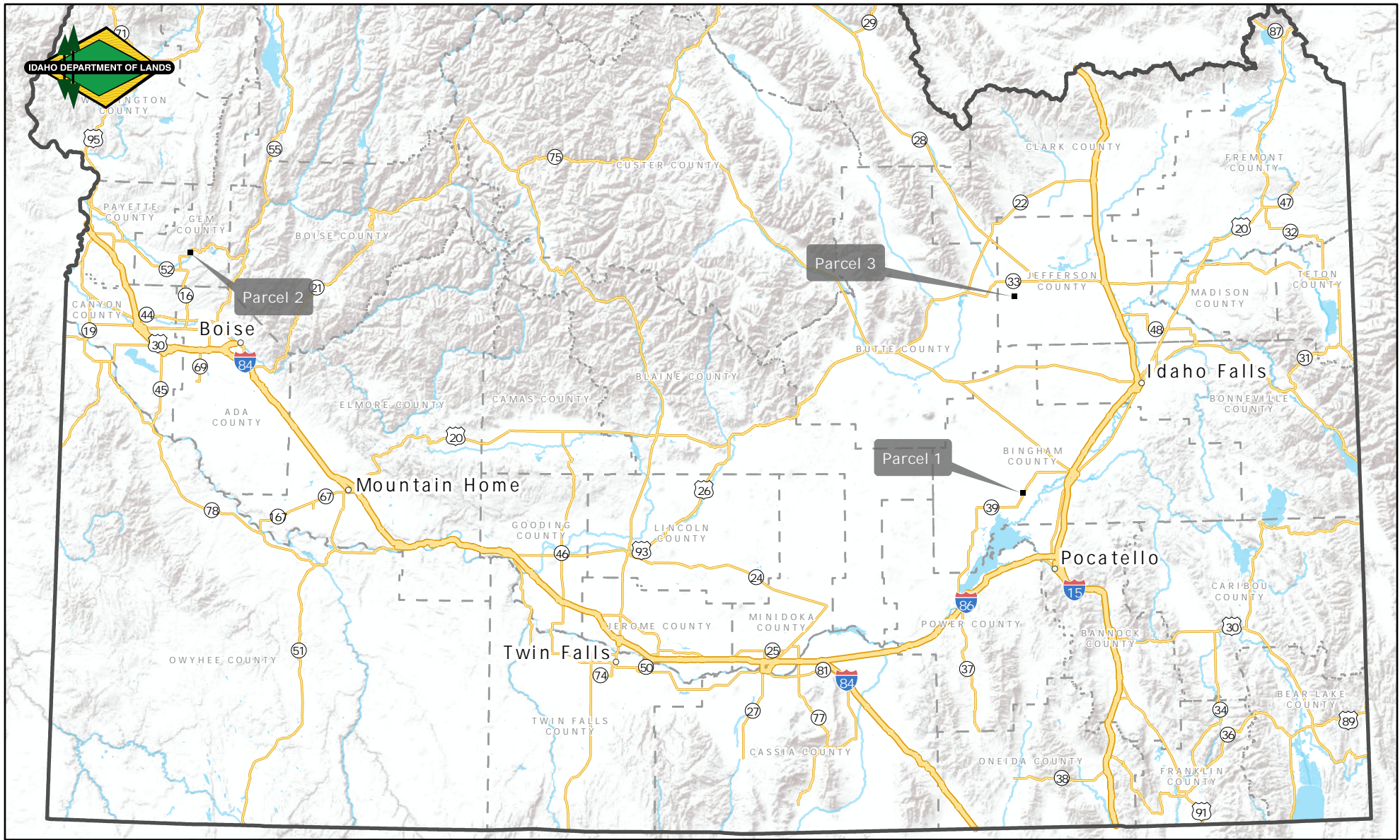
Idaho Department of Lands  
 Eastern Area  
 Jefferson County, Idaho  
 9/8/2022



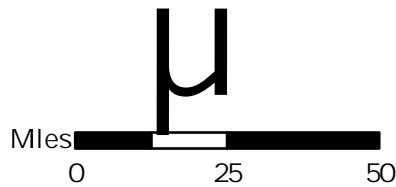
Carey Act Parcel Revestiture  
 T05N R33E - Sec. 6;  
 Pts. N½SE, SWSE  
 GIS Acreage = 120  
 Scale: 1: 20,000



Disclaimer: This map has been compiled using the best information available to the Idaho Department of Lands at the time and may be updated and/or revised without notice. In situations where known accuracy and completeness is required, the user has the responsibility to verify the accuracy of the map and the underlying data sources.

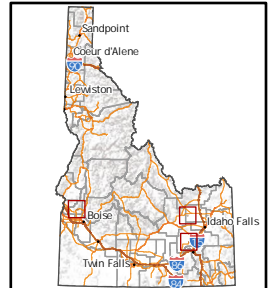


Idaho Department of Lands  
 Southwest & Eastern Areas  
 Gem, Bingham, and  
 Jefferson Counties  
 9/13/2022



Carey Act Parcel Revestiture  
 Parcel 1 = 40 acres  
 Parcel 2 = 40 acres  
 Parcel 3 = 120 acres  
 Scale: 2,000,000

Disclaimer: This map has been compiled using the best information available to the Idaho Department of Lands at the time and may be updated and/or revised without notice. In situations where known accuracy and completeness is required, the user has the responsibility to verify the accuracy of the map and the underlying data sources.



Governor Little and Members of the Land Board:

**Regarding the return of the NE quarter of the NE quarter of section 28, a land-locked parcel, to the Department of the Interior.**

In February 2019, we (Brendsel and Knapp/Lox families) received separate letters from Tim Luke, Water Compliance Bureau Chief, IDWR demanding we “immediately cease and desist trespassing on State Land.” Continued trespass on State Land would “result in the Department turning the matter over to the Idaho Attorney General’s office for prosecution.” This was the first contact the State of Idaho had with either of us regarding any trespass concern. IDWR claimed the land - NENE Section 28 - was owned by the State as a result of the Carey Act. The letter caught us completely off guard.

We were highly proactive in addressing the issue to expedite a timely resolution. In March 2019, we and our attorney, Chris Bromley of McHugh Bromley, met with Tim Luke, IDWR, Garrick Baxter, DAG IDWR, and Ryan Montoya, IDL, to discuss the issue.

We have worked extensively on this issue and done much research, only to have all progress upended, resulting in the need to start over. This has caused much consternation and unneeded additional stress. There have been endless delays and we have been kept intentionally ignorant throughout most of this process.

In April 2019, we sent a letter to Gary Spackman, Director IDWR, documenting Carey Act requirements were met by us and supporting Carey Act equitable claims to the lands for both the Brendsel and Knapp/Lox families per Idaho Code section 67-3301.

In May 2019, IDWR received a Commitment for Title Insurance for NENE Section 28. Upon review of the report Tim Luke wrote in an email “the State of Idaho is confident that legal title is insurable to the State of Idaho.”

Between July 2019 and April 2021, Chris Bromley repeatedly requested status updates from Mr. Baxter and IDWR. Many requests came with no update. In January 2020, Mr. Baxter acknowledged the ball was in IDWR’s court to review the April 2019 letter we provided as to our Carey Act claims.

In mid-April 2021, more than two (2) years after the Cease and Desist letter, Sean Costello, DAG IDWR, informed our attorney, based on his legal research, that the land would return to the Department of the Interior.

We are in the fourth year without resolution to the issue and are now in the ninth month of 2022, more than one year after being informed the land will return to the Department of the Interior. Our hope is that once the land is returned to the Department of the Interior that the disposal decisions and processes remain the responsibility of the local Field Office resulting in the conveyance of the land to us.

We support the return of the land to the Department of the Interior. We understand this will: (1) result in clear title; and (2) pave the way for the Federal Government to convey the clear title to us.

We are requesting your support and oversight and ask for two things: (1) to ensure the Department of the Interior, BLM, and GSA proceed correctly and convey the land to us; and (2) ask for a statement from the Land Board that the land shall be conveyed to us from the Federal Government. If these requests are not possible, we ask, at a minimum, that the Land Board assist us to the greatest extent possible in our dealings with the Federal Government so we are treated fairly.

Thank you Governor Little and Members of the Land Board.

Respectfully,  
Varden and Deborah Brendsel  
Ellen Knapp and Charles Lox

9/8/2022

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**ATTACHMENT 3**