



IDAHO WATER RESOURCE BOARD

Board Meeting No. 8-21

WORK SESSION

Thursday, May 20, 2021

8:00 a.m. (MST)

Water Center

Conference Rooms 602 B, C & D / Zoom Online

322 E. Front St.

BOISE

(This meeting will be conducted using guidance in response to the public health emergency caused by the COVID-19 pandemic. Masks are required & in person attendance is limited. Call or email if you have questions: jennifer.strange@idwr.idaho.gov)

Board Members & the Public may participate via Zoom

[Click here to join our Zoom Meeting](#)

Dial in Option: 1(253) 215-8782

Meeting ID: 919 4253 6145 Passcode: 904554

Brad Little
Governor

Jeff Raybould
Chairman
St. Anthony
At Large

Roger W. Chase
Vice-Chairman
Pocatello
District 4

Jo Ann Cole-Hansen
Secretary
Lewiston
At Large

Dale Van Stone
Hope
District 1

Albert Barker
Boise
District 2

Dean Stevenson
Paul
District 3

Peter Van Der Meulen
Hailey
At Large

Brian Olmstead
Twin Falls
At Large

1. Roll Call
2. Ethics and Open Meeting Law Training by Attorney General's Office
3. Bear River Planning Model Presentation
4. Cloud Seeding Analysis Presentation
5. Sawtooth Valley Water Rights Rental
6. Point Springs Grazing Association Loan
7. Non-Action Items for Discussion
8. Adjourn

The board will break for lunch at approximately noon.

1:00 p.m. – 4:00 p.m.: The board will depart for a field trip of the Boise Project Board of Control facilities.

Transportation will be provided for board members, IDWR staff, and invited guests.

* Action Item: A vote regarding this item may be made this meeting. Identifying an item as an action item on the agenda does not require a vote to be taken on the item. **Americans with Disabilities:** If you require special accommodations to attend, participate in, or understand the meeting, please make advance arrangements by contacting Department staff by email: jennifer.strange@idwr.idaho.gov or by phone at (208) 287-4800.

Memorandum

To: Idaho Water Resource Board

From: Brian Patton

Date: May 12, 2021

Re: Ethics and Open Meeting Law Training



The Attorney General's office will provide a training on Ethics and Open Meeting Law. They may provide materials at the meeting.

Idaho Ethics in Government

State of Idaho



**Office of Attorney General
Lawrence Wasden**

Office of the
Attorney General

Idaho Ethics In Government Manual



JULY 2015

LAWRENCE WASDEN
Attorney General
700 West Jefferson Street
Boise, ID 83720-0010
www.ag.idaho.gov

I.C. § 74-402 Why Ethics?

- **(1) Protect the integrity of government** throughout the state of Idaho while at the same time facilitating recruitment and retention of personnel needed within government;
- **(2) Assure independence, impartiality and honesty** of public officials in governmental functions;
- **(3) Inform citizens of the existence of personal interests** which may present a conflict of interest between an official's public trust and private concerns;
- **(4) Prevent public office from being used for personal gain** contrary to the public interest;
- **(5) Prevent special interests from unduly influencing** governmental action; and
- **(6) Assure that governmental functions and policies reflect, to the maximum extent possible, the public interest.**

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Public Office = Public Trust

- Government is a trust, officers trustees
 - Trust and trustees are created for benefit of people (Henry Clay). (Idaho Code sec.74-402)
- Trade off of a republic:
 - We can't do it all ourselves—elect representatives, acknowledge that they will have personal interests—but will put them aside to act in the public interest



Approaching Ethical Scenarios

- Floor or Ceiling?
 - Why do we need ethical rules/statutes?
 - Loopholes?
- Two Courts
 - The Traditional Judicial System
 - You may be able to make a legally correct defense of your actions....
 - BUT
 - The Court of Public Opinion
 - May not accept your explanation
 - The PRESS
 - A win in a judicial proceeding may not carry over to election time.



Constitutional Prohibition

- Article VII, § 10—**Making profit from public money prohibited**—The making of profit, directly or indirectly, out of state, county, city, town, township or school district money, or using the same for any purpose not authorized by law, by any public officer shall be deemed a felony, and shall be punished as provided by law.
- *Nampa Hwy. Dist. No. 1 v. Graves*, 77 Idaho 381 (1956)

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Statutes

- Title 42, Section 1757
- Title 74, Chapters 4 (Ethics in Government) & 5 (Prohibitions Against Contracts with Officers)
- Title 18, Chapter 13, Bribery and Corrupt Influences Act



I.C. § 42-1757

No member of the board shall participate in the action of the board, nor be present during the board's deliberations, concerning an application for a loan by an entity in which such board member is an officer, agent or employee, or in which such board member has any interest.

Definition of Conflict of Interest

- Idaho Code sec. 74-403(4):
- “Conflict of interest” means any official action or any decision or recommendation by a person acting in a capacity as a public official, the effect of which would be to the private pecuniary benefit of the person or a member of the person’s household, or a business with which the person or a member of the person’s household is associated, unless the pecuniary benefit arises out of the following:
 - (a) An interest or membership in a particular business, industry, occupation or class required by law as a prerequisite to the holding by the person of the office or position;
 - (b) Any action in the person’s official capacity which would affect to the same degree a class consisting of an industry or occupation group in which the person, or a member of the person’s household or business with which the person is associated, is a member or is engaged;
 - (c) Any interest which the person has by virtue of his profession, trade or occupation where his interest would be affected to the same degree as that of a substantial group or class of others similarly engaged in the profession, trade or occupation;
 - (d) Any action by a public official upon any revenue measure, any appropriation measure or any measure imposing a tax, when similarly situated members of the general public are affected by the outcome of the action in a substantially similar manner and degree.

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Conflict is NOT

- Difference of Opinion
- Advice you don't like
- Previously stated policy position
- Personal dislike of someone

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Required Action in Conflicts

- Specifics in Idaho Code § 74-404
 - Disclosure
 - Acquiring of an opinion from counsel
 - Act on Advice of Counsel
 - If counsel is wrong—individual is protected
 - If individual is wrong without counsel—no protection



Enforcement

- Title 18—Criminal:
 - 18-1360. PENALTIES. Any public servant who violates the provisions of this chapter, unless otherwise provided, shall be guilty of a misdemeanor and may be punished by a fine not exceeding one thousand dollars (\$1,000), or by incarceration in the county jail for a period not exceeding one (1) year, or by both such fine and incarceration. In addition to any penalty imposed in this chapter, any person who violates the provisions of this chapter may be required to **forfeit his office** and may be ordered to make restitution of any benefit received by him to the governmental entity from which it was obtained.

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Conflict Exception

- Noncompensated
 - No salary or fee
 - Must observe procedure in Idaho Code § 18-1361A
- Civil Penalty for Violation
 - \$1,000
 - Plus may be prosecuted for any criminal violations

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How to identify a conflict?

- Ask—Am I doing this for me, or am I doing this for everyone?
- Is there an immediate or direct personal benefit—or one shared by a significant portion of the public?
- How large is the class of people it affects—100,000; 100; 1,000,000? As the class shrinks, the need to disclose increases.



Bribery & Corrupt Influences Act

- Chapter 13, Title 18:
- Defines:
 - Public Servant (18-1351)
 - Pecuniary Benefit (18-1351)
- Prohibits Bribery/Compensation for past action (18-1352)/(18-1354)
- Prohibits threats to public officials (18-1353 & 18-1353A)
- Retaliation 18-1355

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Bribery & Corrupt Influences Act

- Gifts—18-1356(4)
- Legislative and executive officials. No legislator or public servant shall solicit, accept or agree to accept any pecuniary benefit in return for action on a bill, legislation, proceeding or official transaction from any person known to be interested in a bill, legislation, official transaction or proceeding.

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Idaho Code 18- 1356(5)Exceptions

- This section shall not apply to:
- (a) fees prescribed by law to be received by a public servant, or any other benefit for which the recipient gives legitimate consideration or to which he is otherwise legally entitled; or
- (b) gifts or other benefits conferred on account of kinship or other personal, professional or business relationship independent of the official status of the receiver; or
- (c) trivial benefits not to exceed a value of fifty dollars (\$50.00) incidental to personal, professional or business contacts and involving no substantial risk of undermining official impartiality; or
- (d) benefits received as a result of lobbying activities that are disclosed in reports required by Chapter 66, Title 67, Idaho Code. This exception shall not apply to any activities prohibited by subsections (1) through (4) of this section.

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Using Public Position for Gain

- Idaho Code 18-1359
 - Can't use position for private gain
 - Can't solicit payment/gifts
 - Use confidential information
 - Be interested in contract
 - Appoint or vote for appointment within 2nd degree
 - Exception—benefits, payments in ordinary course of business

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Caution

- Culture of entitlement
- Know who friends are...
 - Who you are; or
 - What you are?
- Little steps...
- Rationalization

Questions?

State of Idaho



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Idaho Open Meeting Law

State of Idaho



**Office of Attorney General
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Office of the
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**Idaho
Open Meeting Law
Manual**

Idaho Code §§ 74-201 through 74-208



JULY 2019

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It is policy of this state that formation of public policy is public business and shall not be conducted in secret.

(Idaho Code § 74-201)

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Outline

- I. Definitions**
- II. Notice and Agenda**
- III. Conduct of the Meeting**
- IV. Executive Sessions**
- V. Enforcement**

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Rule of statutory construction

Words are given the meaning set forth in the definition portion of the code section or chapter.

- The definition contained in code controls over the common definition of the word.
- Different chapters or code sections may define the same word slightly differently.
- If no statutory definition exists, the common meaning controls.

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Definitions

Decision

Any determination, action, vote or final disposition upon a motion, proposal, resolution, order, ordinance or measure on which a vote of a governing body is required, at any meeting at which a quorum is present. (Idaho Code § 74-202; Open Meeting Law Manual (OML) p. 23)

Deliberation

The receipt or exchange of information or opinion relating to a decision, but shall not include informal or impromptu discussions of a general nature. (OML p. 23)

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Definitions

Public Agency

Any state board, commission, department, authority, educational institution or other state agency created by or pursuant to statute or executive order of the governor. Any regional board, commission, department or authority created by or pursuant to statute. Any county, city, school district, special district, or other municipal corporation or political subdivision of the state of Idaho any subagency of a public agency which is created by or pursuant to statute or executive order of the governor, ordinance, or other legislative act. (OML p. 23-24)



Definitions

Governing Body

Members of any public agency which consists of two (2) or more members with the authority to make decisions for or recommendations to a public agency regarding any matter. (OML p. 24)

Meeting

Convening of a governing body of a public agency to make a decision or to deliberate toward a decision on any matter. (OML p. 24)

- regular meeting
- special meeting

Notice and Agenda

- Regular Meetings

No less than a five (5) calendar day meeting notice and a forty-eight (48) hour agenda notice shall be given, unless otherwise provided by statute. (Idaho Code § 74-204(1); OML p. 25)

- Special Meetings

Shall not be held without at least a twenty-four (24) hour meeting and agenda notice, unless an emergency exists. (Idaho Code § 74-204(2); OML p. 25)



****New Provision****

- Notice for meetings and agendas shall also be posted electronically if the entity maintains an online presence through a website or social media platform. (Idaho Code § 74-204(1))

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Notice and Agenda

- Executive Sessions

A twenty-four (24) hour meeting and agenda notice shall be given if only an executive session will be held. Notice must state reason and specific provision of law authorizing the executive session. (Idaho Code § 74-204(3); OML p. 26)



Notice and Agenda

- An agenda is required for each meeting.
 - posted same as meeting notice
 - only “good faith” amendments
 - motion and vote required for amendments made within 48 hours of, or during, the meeting

(Idaho Code § 74-204(4); OML p. 26)



****New Provisions****

- An agenda item that requires a vote shall be identified on the agenda as an “action item” to provide notice that action may be taken on that item. Identifying an item as an action item does not require a vote to be taken on that item. (Idaho Code § 74-204(4))
- Final action may not be taken on an agenda item added after the start of a meeting unless an emergency is declared necessitating action at that meeting. The declaration and justification shall be reflected in the minutes. (Idaho Code § 74-204(4)(c))

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Conduct of Meeting

- All meetings of a governing body of a public agency shall be open to the public. (Idaho Code § 74-203 & OML p. 24)
- A governing body shall not hold a meeting at any place where discrimination on the basis of race, creed, color, sex, age or national origin is practiced. (Idaho Code § 74-203(4) & OML p. 25)



Conduct of Meeting

- All meetings may be conducted using telecommunications devices. (Idaho Code § 74-203(5) & OML p. 25)
- Members of a public board may **not** use computers or texting to conduct private conversations among themselves about board business.



Conduct of Meeting

- The governing body of a public agency shall provide for the taking of written minutes of all its meetings, and all minutes shall be available to the public. (Idaho Code § 74-205(1); OML p. 27)
- Minutes shall include:
 - All members of the governing body present
 - All motions, resolutions, orders, or ordinances proposed and their disposition
 - The results of all votes



Executive Sessions

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. (Idaho Code § 74-206(1); OML p. 27)

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Executive Sessions

- a) When, in hiring a public officer, employee, staff member, or individual agent, the respective qualities of individuals are to be evaluated in order to fill a particular vacancy or need.
- 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.

Executive Sessions

- c) To acquire an interest in real property which is not owned by a public agency.
- d) To consider records that are exempt from disclosure.
- 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

Executive Sessions

- 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.

Executive Sessions

- g) 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.
- h) To consider labor contract matters authorized under Section 74-206 (1)(a) and (b).



Executive Sessions

- 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 act 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. (Idaho Code § 74-206(2); OML p. 28)



Executive Sessions

- No executive session may be held for the purpose of taking any final action or making any final decision. (Idaho Code § 74-206(3); OML p. 28)
- Minutes pertaining to an executive session shall include a reference to the specific statutory subsection authorizing the executive session and shall also provide sufficient detail to identify the purpose and topic of the executive session but shall not contain information sufficient to compromise the purpose of going into executive session. (Idaho Code § 74-205(2); OML p. 27)



Negotiations in Open Session

- All negotiations between a governing board and a labor organization shall be in open session.
- A governing board may hold an executive session for the specific purpose of:
 - Considering a labor contract offer or to formulate a counteroffer; or
 - Receiving private information about a specific employee
- All documentation exchanged between the parties during negotiations shall be subject to public writings disclosure laws.
- Public testimony, if any, shall be posted as an agenda item.
- Any other provision notwithstanding, the governing body shall post notice of all negotiation sessions at the earliest possible time practicable.

Enforcement

- Failure to comply with the provisions of Idaho Code §§ 74-201 – 74-207 renders the action null.
- Any member who participates in a meeting that violates these provisions will be subject to a civil penalty.
 - up to \$250
 - up to \$1,500 for “knowingly” participating
 - up to \$2,500 if subsequent to previous violation within last 12 months

Enforcement

- Attorney General shall have the duty to enforce this act in relation to public agencies of state government.
- Prosecuting Attorneys' duty to enforce this act in relation to local public agencies within their respective jurisdictions.
- Any person affected by a violation of the provisions of this act may commence a civil action.



Enforcement

- A violation may be cured by a public agency upon:
 - The agency's self-recognition of a violation; or
 - Receipt by the secretary or clerk of the public agency of written notice of an alleged violation. A complaint filed and served upon the public agency may be substituted for other forms of written notice.
- Upon notice, the governing body has fourteen (14) days to respond publicly and either acknowledge the violation and state an intent to cure or state that it has determined that no violation has occurred and that no cure is necessary. Failure to respond shall be treated as a denial of any violation for purposes of proceeding with any enforcement action.

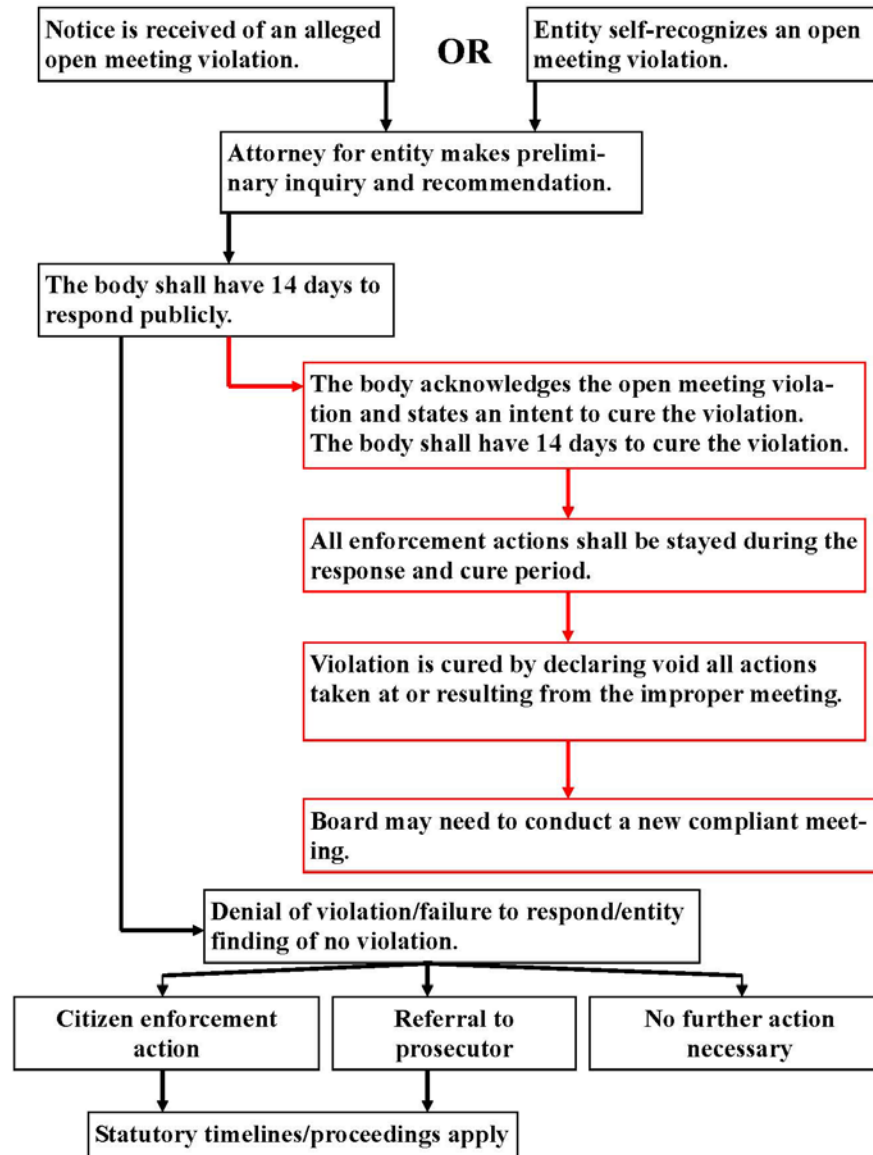
Enforcement

- Following the public agency's acknowledgment of a violation pursuant to paragraph (a)(i) or (a)(ii) of this subsection, the public agency shall have fourteen (14) days to cure the violation by declaring that all actions taken at or resulting from the meeting in violation of this act void.

Enforcement

- All enforcement actions shall be stayed during the response and cure period but may recommence at the discretion of the complainant after the cure period has expired.
- A cure as provided in this section shall act as a bar to the imposition of the civil penalty provided in subsection (2) of this section. A cure of a violation as provided in subsection (7)(a)(i) of this section shall act as a bar to the imposition of any civil penalty provided in subsection (4) of this section.

Curing Process – Idaho Code § 74-208(7)



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Office of the Attorney General
OPEN MEETING LAW CHECKLIST
Regular Meetings

Meeting Date and Time: _____

Meeting Location: _____

[Idaho Code § 74-203(4) and (5)]

Before Meeting

- ☐ Meeting Notice posted 5 or more calendar days prior to the meeting date.
[Idaho Code § 74-204(1)]
- ☐ Agenda Notice posted at least 48 hours prior to the meeting.
[Idaho Code § 74-204(1)]
- ☐ Posting of Amended Agenda [Idaho Code § 74-204(4)]

During Meeting

- ☐ First: Any agenda amendments? [Idaho Code § 74-204(4)(b) and (c)]
- ☐ Secretary or other person appointed to take minutes.
[Idaho Code § 74-205(1)]

After Meeting

- ☐ Minutes available to the public within a reasonable time after the meeting.
[Idaho Code § 74-205(1)]

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Office of the Attorney General
OPEN MEETING LAW CHECKLIST
Special Meetings

Meeting Date and Time: _____

Meeting Location: _____

[Idaho Code § 74-203(4) and (5)]

Before Meeting

- ☐ Meeting and Agenda Notice posted **at least 24 hours** prior to the meeting.
[Idaho Code § 74-204(2)]
- ☐ Notification provided to the news media. [Idaho Code § 74-204(2)]
- ☐ Posting of Amended Agenda [Idaho Code § 74-204(4)]

During Meeting

- ☐ First: Any agenda amendments? [Idaho Code § 74-204(4)(b) and (c)]
- ☐ Secretary or other person appointed to take minutes.
[Idaho Code § 74-205(1)]

After Meeting

- ☐ Minutes available to the public within a reasonable time after the meeting.
[Idaho Code § 74-205(1)]

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Office of the Attorney General
OPEN MEETING LAW CHECKLIST
Executive Sessions

Session Date and Time: _____

Session Location: _____

[Idaho Code § 74-203(4) and (5)]

Executive Session Only

- ☐ Meeting and Agenda Notice posted **at least 24 hours** prior to the session.
[Idaho Code § 74-204(3)]
- ☐ Posting of Amended Agenda [Idaho Code § 74-204(4)]

Executive Session During Regular or Special Meeting

- ☐ Motion to enter Executive Session to discuss one of the exemptions listed in Idaho Code § 74-206.
- ☐ $\frac{2}{3}$ vote to enter Executive Session reflected in regular/special meeting minutes. [Idaho Code § 74-206(1)]

During Session

- ☐ First: Any agenda amendments? [Idaho Code § 74-204(4)(b) and (c)]
- ☐ Secretary or other person appointed to take minutes.
[Idaho Code § 74-205(1)]

After Session

- ☐ Minutes must reference statutory subsection authorizing executive session and identify purpose and topic of session. [Idaho Code § 74-205(2)]
- ☐ Minutes available to the public within a reasonable time after the meeting.
[Idaho Code § 74-205(1)]

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>> SAMPLE FORM <<

Public Agency: _____, Idaho
(name of county, city, district, etc.)

Governing Body: _____
(i.e., "Board of County Commissioners", "City Council", etc.)

Meeting Date, Time and Location: _____

EXECUTIVE SESSION MOTION AND ORDER

_____, (print name), _____ (print title),
MOVES THAT THE BOARD, PURSUANT TO IDAHO CODE § 74-206, CONVENE
IN EXECUTIVE SESSION TO: (identify one or more of the following)

- ☐ Consider personnel matters [Idaho Code § 74-206(1)(a) & (b)]
- ☐ Deliberate regarding an acquisition of an interest in real property [Idaho Code § 74-206(1)(c)]
- ☐ Consider records that are exempt from public disclosure [Idaho Code § 74-206(1)(d)]
- ☐ Consider preliminary negotiations involving matters of trade or commerce in which this governing body is in competition with another governing body [Idaho Code § 74-206(1)(e)]
- ☐ Communicate with legal counsel regarding pending/imminently-likely litigation [Idaho Code § 74-206(1)(f)]
- ☐ Communicate with risk manager/insurer regarding pending/imminently-likely claims [Idaho Code § 74-206(1)(i)]

Purpose/Topic summary (required): _____
AND THE VOTE TO DO SO BY ROLL CALL.

CONVENE AT: _____ ADJOURN AT: _____

YES NO ABSTAIN

_____, Chair _____
(print name)

_____, Member _____
(print name)

_____, Member _____
(print name)

Clerk/Deputy Clerk: _____
(Signature)

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>> SAMPLE FORM <<

Public Agency: _____, Idaho
(name of county, city, district, etc.)

Governing Body: _____
(i.e., "Board of County Commissioners", "City Council", etc.)

Meeting Date, Time and Location: _____

MOTION AND ORDER TO AMEND AGENDA

(less than 48 hours before regular meeting or 24 hours before special meeting)

_____, (print name), _____ (print title),
MOVES THAT THIS GOVERNING BODY, PURSUANT TO IDAHO CODE § 74-
204, AMEND THE AGENDA FOR THIS MEETING AS FOLLOWS:

Good faith reason item not included in posted agenda (required):

	<u>YES</u>	<u>NO</u>	<u>ABSTAIN</u>
_____, Chair (print name)	_____	_____	_____
_____, Member (print name)	_____	_____	_____
_____, Member (print name)	_____	_____	_____

Clerk/Deputy Clerk: _____
(Signature)

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Lawrence Wasden

Questions?

State of Idaho



**Office of Attorney General
Lawrence Wasden**

**Office of the
Attorney General**

Idaho Ethics In Government Manual



JULY 2019

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State of Idaho Office of Attorney General Lawrence Wasden

INTRODUCTION

Honest and open government is fundamental to a free society. The Idaho Legislature has formalized our state's commitment to honest and ethical government by enacting several statutes governing the ethical behavior of public officers. These laws are intended to ensure that public officials remain public servants.

Idaho has four primary statutes governing ethics in government: the Bribery and Corrupt Influence Act; the Prohibition Against Contracts with Officers Act; the Ethics in Government Act; and the Public Integrity in Elections Act. In addition, statutes that govern a particular state agency, state subdivision or municipal corporation often contain provisions regulating the ethical behavior of public officials.

Any complete analysis of an ethical question involving a public official must include the four acts named above as well as statutes dealing specifically with the governmental agency, office or subdivision involved. Specific statutes relating to the particular agency or subdivision will control over the more general statutes. When two or more general statutes apply to the same subject, an attempt should be made to reconcile the statutes.

All of us who accept public office, whether elected or appointed, also accept an ethical duty to serve honestly and in the public's interest. While the state and the people must demand compliance with Idaho's ethics laws, public officials should understand that these laws set a minimum standard of behavior. Crossing these lines can result in fines and incarceration. Responsible and ethical public officials hold themselves to an even higher standard than mere compliance.

My Office has prepared this legal manual for your information. I hope it assists you when presented with applicable situations.

Sincerely,

LAWRENCE G. WASDEN
Attorney General

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QUESTIONS AND ANSWERS

STATUTORY INTERPRETATION

Question No. 1: Is there overlap between the various ethical statutes pertaining to public employees and officials, and how should the statutes be analyzed?

Answer: Yes. The first step in analyzing which statute applies to a particular situation is to determine whether there is a specific statute dealing with the governmental entity or the public position in question. For example, Idaho Code § 33-507 contains a prohibition against school board trustees contracting with the school district. This statute controls the more general anti-contracting provisions found in chapter 13, title 18, or chapter 5, title 74, Idaho Code. *See* Attorney General Opinion No. 93-10. In addition, when dealing with the more general ethics statutes, there may be some overlap. In the case where two or more general statutes apply to the same situation, an attempt should be made to reconcile the statutes.

Too often, conflict analysis begins and ends with an analysis of chapter 4 of title 74, the Ethics in Government Act. Chapter 4 covers acts by members of legislative or administrative bodies and does not necessarily prohibit any act, but merely requires disclosure. However, the action creating the conflict may be prohibited by other provisions contained within the Idaho Code.

PURPOSE OF ANALYSIS OF ETHICS STATUTES

Question No. 2: What is the purpose of the analysis of the ethical statutes with regard to the actions of public officials?

Answer: The purpose of the ethical statutes is to establish a ground floor for conduct by public officials. Proper analysis of ethical statutes should not be for “loopholes” or “technicalities” by which one can take advantage of government, the public, or other interested parties. If your analysis requires that you find a “loophole” within Idaho’s ethical statutes, then your conduct is likely unethical. Ethics for public officials is also tricky for another reason. Within public service, there are often two courts: the traditional legal system, and the court of public opinion. A win in one does not guarantee a win in the other. When determining the proper answer to any ethics determination, a public official should be mindful of the impact his decision may have both legally and publicly. Public officials, by the

trusteeship given them by the electorate, are held to a higher ethical standard.

PUBLIC EMPLOYEES OR OFFICIALS COVERED BY ETHICS STATUTES

Question No. 3: Who is subject to Idaho Code §§ 18-1351 et seq., the Bribery and Corrupt Influence statutes?

Answer: Idaho Code §§ 18-1351, et seq., regulate the conduct of public servants in the areas of bribery and corrupt practices, including conflicts of interest and nepotism. Unless otherwise stated, these statutes apply to all “public servants,” which is defined to mean: “any officer or employee of government, including legislators and judges, and any person participating as juror, advisor, consultant or otherwise, in performing a governmental function; but the term does not include witnesses.”

Question No. 4: Who is subject to chapter 4 of title 74, the Ethics in Government Act?

Answer: All “public officials” are subject to the Ethics in Government Act. “Public official” means any person holding public office in the following capacity:

- (a) As an elected public official meaning any person holding public office of a governmental entity by virtue of an elected process, including persons appointed to a vacant elected office of a governmental entity, excluding members of the judiciary; or
- (b) As an elected legislative public official meaning any person holding public office as a legislator; or
- (c) As an appointed public official meaning any person holding public office of a governmental entity by virtue of formal appointment as required by law; or
- (d) As an employed public official meaning any person holding public office of a governmental entity by virtue of employment, or a person employed by a governmental entity on a consultative basis.

Question No. 5: Who is subject to the prohibition against contracts with officers contained in chapter 5, title 74, Idaho Code?

Answer: All members of the legislature and state, county, city, district and precinct officers are subject to the prohibitions contained in chapter 5, title 74, Idaho Code. While “officer” is not defined, the definition of “public official” contained in the Ethics in Government Act should be considered as a guide to those covered by the prohibitions in chapter 5, title 74, Idaho Code.

NEPOTISM

Question No. 6: Is the current employment of a public employee jeopardized by the subsequent election of a relative to a public office that has supervisory authority over that employee?

Answer: Idaho Code § 18-1359 sets forth the nepotism policy of the state of Idaho. The Attorney General’s Office has taken the position that existing public employment will not be jeopardized by the subsequent election of a relative of that employee to public office.

Question No. 7: How does the subsequent election of a relative affect promotion/advancement potential of a current employee?

Answer: Under Idaho Code § 18-1359(5), the employee may continue to work in the current job assignment and remain eligible to receive non-meritorious pay increases. Idaho Code § 18-1359(e) prohibits the public official from appointing or voting for the appointment of the relative to any position, employment or duty. Similarly, more specific sections relating to the mayor, city council, county commissioners and state legislators may prohibit any person, not just the related elected official, from appointing the current employee to any office, position, employment or duty.

Question No. 8: When a county employee’s spouse is elected to the county commission, is the employee’s position jeopardized?

Answer: As stated above, Idaho Code § 18-1359 states that existing public employment should not be jeopardized by the subsequent election of a relative to public office. The 2002 enactment of Idaho Code § 18-1359(5) is intended to permit the spouse of an elected official to continue in his/her present employment. However, Idaho Code § 74-501 may cast some doubt on whether Idaho Code § 18-1359(5) fully permits continued employment. Due to the enactment of Idaho Code § 18-1359(5) and the Statement of Purpose

accompanying the bill, it appears that a court would likely permit the continued employment of a spouse of a subsequently elected official.

Idaho Code § 33-507 may prohibit the continued employment by a school district of an employee whose spouse is elected to the district's board of trustees where the contract must be renewed annually. Idaho Code § 33-2106 incorporates Idaho Code § 33-507 applying the prohibition to trustees of junior college districts.

Question No. 9: May a county enter into a contract for goods or services with the son/daughter-in-law of one of the commissioners?

Answer: Idaho Code §§ 18-1359(4) and 67-9230 applies in this situation. The code section provides:

No person related to a county commissioner by blood or marriage within the second degree shall be appointed to any clerkship, office, position, employment or duty with the commissioner's county when the salary, wages, pay or compensation of such appointee or employee is to be paid out of public funds.

The commissioner's son/daughter-in-law is clearly related by marriage within the second degree, and will be compensated for the performance of his/her duties. The county would be prohibited from hiring the commissioner's son/daughter-in-law.

CONFLICTS OF INTEREST/PROHIBITED CONTRACTS

Question No. 10: What action is required under chapter 4 of title 74, Idaho Code, the Ethics in Government Act, if a conflict of interest exists?

Answer: The Ethics in Government Act requires certain action when a conflict of interest exists. A conflict of interest is generally defined as any "official action or any decision or recommendation by a person acting in a capacity as a public official, the effect of which would be to the private pecuniary benefit of the person or a member of the person's household, or a business with which the person or a member of the person's household is associated."

When a conflict of interest exists, the public official must disclose the conflict. Under the Ethics in Government Act, disclosure does not affect an elected public official's authority to be counted for the

purpose of determining a quorum and to debate and to vote on the matter.

The public official may seek legal advice on whether a conflict of interest exists. If the legal advice is that a real or potential conflict may exist, generally, the public official must prepare a written statement describing the matter required to be acted upon and the nature of the potential conflict, and shall file such statement with the entity set forth in the statute pertaining to the appropriate elected or appointed office.

Disclosure of the conflict or consultation with counsel satisfies the requirements of the Ethics in Government Act. It does not, however, permit the public official to engage in acts prohibited by other provisions of the Idaho Code.

Question No. 11: Are there exceptions to the definition of conflict of interest in chapter 4 of title 74, Idaho Code, the Ethics in Government Act?

Answer: Yes. Under the Act, there is no conflict of interest if the pecuniary benefit received arises out of:

(a) An interest or membership in a particular business, industry, occupation or class required by law as a prerequisite to the holding by the person of the office or position;

(b) Any action in the person's official capacity which would affect to the same degree a class consisting of an industry or occupation group in which the person, or a member of the person's household or business with which the person is associated, is a member or is engaged;

(c) Any interest which the person has by virtue of his profession, trade or occupation where his interest would be affected to the same degree as that of a substantial group or class of others similarly engaged in the profession, trade or occupation;

(d) Any action by a public official upon any revenue measure, any appropriation measure or any measure imposing a tax, when similarly situated members of the general public are affected by the outcome of the action in a substantially similar manner and degree.

Question No. 12: What is the effect on a contract entered into in violation of the conflict of interest provisions of Idaho law?

Answer: The answer depends upon the specific statute and how the courts may have interpreted that statute. Violations of Idaho Code § 74-501 are voidable by any party, except the interested official, but not void from the beginning. Idaho Code § 74-504.

However, violations of other ethics statutes may cause the contract to be void. For instance, in Independent School Dist. No. 5 v. Collins, 15 Idaho 535, 98 P. 857 (1908), the court addressed violations of Idaho Code § 33-507, stating:

[S]uch contracts are absolutely void. If money is illegally paid on such void contract, the district may recover it back, and in case the district refuses to do so, any taxpayer of the district may, for and on behalf of the district, maintain an action for the recovery of the money so illegally paid. 15 Idaho at 541.

In any contract or transaction entered into which is ruled void, the public official would be required to refund any money he/she receives pursuant to a contract or transaction with the board. Such a challenge could be initiated by the board or by a taxpayer within the respective governmental entity.

Question No. 13: May the employer of a city council member contract with the city?

Answer: The answer is “yes,” under certain circumstances, such as when an interest is defined to be remote under Idaho Code § 74-502 and, therefore, not a conflict of interest. “Remote interest” means:

- (a) That of a non-salaried officer of a nonprofit corporation;
or
- (b) That of an employee or agent of a contracting party where the compensation of such employee or agent consists entirely of fixed wages or salary; or
- (c) That of a landlord or tenant of a contracting party; or

(d) That of a holder of less than one percent (1%) of the shares of a corporation or cooperative which is a contracting party.

However, even if the interest is remote, the public official must disclose the remote interest prior to the formation of the contract, and the governing body must approve the contract on a vote sufficient for that purpose without counting the vote of the officer having the remote interest. Furthermore, the public official cannot attempt to influence another officer of the board of which he is an officer to enter into the contract.

Question No. 14: Are there any circumstances where a public official can personally contract with a board of which he or she is a member?

Answer: In rare circumstances a public official can contract directly with the board of which he/she is a member whether or not he or she is an elected or appointed public official. Under Idaho Code § 18-1361, a public official or his/her relatives can contract with the board if:

(1) The contract is competitively bid and the public servant or his/her relative submits the low bid; and

(2) Neither the public servant nor his/her relative takes any part in the preparation of the contract or bid specifications, and the public servant takes no part in voting on or approving the contract or bid specifications; and

(3) The public servant makes full disclosure, in writing, to all members of the governing body, council or board of said public body of his/her interest or that of his/her relative and of his or his relative's intention to bid on the contract; and

(4) Neither the public servant nor his/her relative has violated any provision of Idaho law pertaining to competitive bidding or improper solicitation of business.

Question No. 15: May a school district conduct business with a business establishment whose owner is a spouse of a school board trustee?

Answer: Idaho has a long-standing tradition of forbidding school board trustees from doing any business with or receiving any

pecuniary benefit from the district they serve. Idaho Code § 33-507 states in relevant part:

It shall be unlawful for any trustee to have pecuniary interest, directly or indirectly, in any contract or other transaction pertaining to the maintenance or conduct of the school district or to accept any reward or compensation for services rendered as a trustee except as may be otherwise provided in this section.

Purchases by the district of material from an establishment owned by the spouse of a school board trustee provide a direct or indirect pecuniary benefit to the member of the school board. The school board trustee would certainly benefit from any transactions between the district and the business establishment. Even if there is not a written contract between the business establishment and the district, it does not take the situation outside the reach of Idaho Code § 33-507. There would still be a contractual relationship between the business and the district. Moreover, the contract would be void.

Idaho Code § 33-2106 incorporates Idaho Code § 33-507 and makes the limitations on the authority of school district trustees applicable to trustees of junior college districts.

Question No. 16: May a county employee purchase property that the county has for sale?

Answer: There is no express prohibition against a county employee purchasing county property, unless that individual is a county commissioner or other officer. *See* Idaho Code §§ 31-807A and 74-503. This rule applies to county employees generally. Sheriffs' deputies selling property at sheriffs' sales are prohibited from participating in the sale.

BRIBERY/CORRUPT INFLUENCE & GIFTS TO PUBLIC OFFICIALS

Question No. 17: Would a regional tour sponsored by a chamber of commerce to acquaint legislators with a region of the state, provided without charge to every member of the Idaho Legislature, violate the Bribery and Corrupt Influence Act?

Answer: Idaho Code § 18-1356 regulates gifts to public servants. Subsection (4) relates to legislative and executive officials:

No legislator or public servant shall solicit, accept or agree to accept any pecuniary benefit in return for action on a bill, legislation, proceeding or official transaction from any person known to be interested in a bill, legislation, official transaction or proceeding.

There have been no allegations, nor has it ever been suggested, that the efforts of the members of the chamber of commerce are made in return for legislative action on their behalf. Therefore, the tour in general does not violate Idaho Code § 18-1356(4).

Consideration must also be given to Idaho Code § 18-1359(1)(a), which provides:

No public servant shall:

(a) Without the specific authorization of the governmental entity for which he serves, use public funds or property to obtain a pecuniary benefit for himself.

It is the opinion of the Attorney General's Office that the legislature, by enacting Idaho Code § 18-1359(1)(a), did not intend to prohibit and criminalize participation in activities such as this tour. The combination of official business with conferences and social activities is a fact of modern life, and it is the opinion of this office that the legislature did not intend to eliminate that reality. This tour is a legitimate function of the legislature, and the expenses associated with the tour, if submitted on a voucher, could be financed by the state. As such, they are clearly not pecuniary benefits inuring to the legislators' personal or private benefit.

Question No. 18: Would a business trip by legislators for the purpose of viewing demonstrations of a product purchased by the state, in which airfare, food and lodging were paid for by the vendor, but not entertainment events, violate either the Ethics in Government Act or the Bribery and Corrupt Influences Act?

Answer: Idaho Code § 74-402, the Ethics in Government Act, is directed primarily towards improper activities of public officials in the course of their official duties. In this case it is apparent that the public officials would derive some pecuniary benefit from the trip. However, the pecuniary benefit does not appear personal in nature because the trip is for business purposes only, without any entertainment or

personal activities on the agenda. The facts do not reveal that any “official action” or any decision or recommendation has been made by the public officials to the benefit of the company sponsoring the trip. The trip does not relate to any upcoming bidding or contracting process in which the company stands to gain or lose. The trip does not seem to violate the Ethics in Government Act.

Idaho Code § 18-1359(1)(a) is also not an issue in this case. The officials are acting strictly in their official capacity, there will be no private or personal gain in the form of entertainment or other purely personal activities, and the business trip appears to be directed solely at a legitimate legislative function—gathering technical information relevant to the state’s interest in a product. This type of informational business trip does not call into question the type of private pecuniary gain or official action in return for such gain which Idaho’s ethics laws clearly and strongly outlaw. The trip would not violate either the Ethics in Government Act or the Bribery and Corrupt Influences Act.

Question No. 19: Can members of the Idaho Legislature accept gift packs from a marketing association in the state of Idaho in which the products are intended to promote the variety and quality of merchandise produced in Idaho?

Answer: According to Idaho Code § 74-403(4), a conflict of interest occurs when a legislative official takes official action or makes an official decision or recommendation, the effect being to the “private pecuniary benefit” of such person, the person’s household or business. Based on the facts in this case, it is difficult to foresee any legislator having a conflict of interest resulting from the acceptance of one of the complimentary gift packs. A conflict of interest requires some official action by the legislator. From the facts presented in this case, there is no indication the receipt of the gift pack was the result of any official action, decision or recommendation taken or proposed by any legislator. Mere acceptance of the gift pack does not violate the provisions of Idaho Code § 18-1359(1)(b). In addition, under Idaho Code § 18-1359(1)(b), trivial gifts or benefits, which do not exceed \$50.00 in value, are not prohibited if they are incidental to personal, professional or business contacts and do not affect official impartiality.

Question No. 20: If a major corporate officer of a firm which performs a great deal of work for one of the state departments should become a member of the Idaho Legislature, would there be any possibility of a “conflict of interest” arising out of his holding public

office and voting on appropriations while continuing to be a corporate officer of a private firm?

Answer: Yes. Idaho Code § 74-501, provides:

Members of the legislature, state, county, city, district and precinct officers, must not be interested in any contract made by them in their official capacity, or by any body or board of which they are members.

In addition to constitutional and statutory provisions, the rules of the senate or house of representatives may require that members declare their interest or abstain from voting in cases involving conflicting personal and public interests.

INCOMPATIBILITY OF OFFICE

Question No. 21: May an individual serve in the Idaho Legislature and as the mayor of a municipality at the same time?

Answer: Idaho has no constitutional or statutory provisions prohibiting a state legislator from concurrently holding another public office. However, the common law doctrine of incompatibility of office should be examined.

The common law doctrine of incompatibility as it relates to one person holding two public offices is based upon the public policy that public service requires the discharge of official duties with undivided loyalty. In the question presented, the two positions are not incompatible. The office of mayor is wholly independent from the state legislature and cannot in any sense be viewed as subordinate. The duties of the mayor do not conflict or clash with the duties of a state legislator.

Finally, it has been suggested that holding dual offices violates the distribution of powers clause of Idaho Constitution art. II, sec. 1. This section provides:

The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial; and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly

belonging to either of the others, except as in this constitution expressly directed or permitted.

In relation to the separation of powers between state and local governments (prohibiting a person from serving in an executive capacity on the local level and as a legislator in the state government), this office has been unable to find any authority indicating that the doctrine has any application.

The fact that a state legislator is also a municipal executive officer does not in any sense impinge or intrude upon the authority of the state judicial or executive branches. Similarly, the fact that a city mayor is also a state legislator does not intrude upon the authority of the respective city council. Thus, holding dual public offices, one municipal and one state, does not violate art. II, sec. 1 of the Idaho Constitution. This office can find no statutory or common law prohibition preventing a city mayor from serving in the Idaho Legislature.

Question No. 22: May a member of a county planning and zoning commission serve as a city councilman without creating a conflict of interest?

Answer: The Local Planning Act contains a conflict of interest provision:

A member or employee of a governing board, commission, or joint commission shall not participate in any proceeding or action when the member or employee or his employer, business partner, business associate, or any person related to him by affinity or consanguinity within the second degree has an economic interest in the procedure or action.

Idaho Code § 67-6506.

Because a city council member is an agent of the city he/she represents, this section would probably prevent him/her from participating in any county zoning decisions that may affect the city's economic interests. However, there is no provision requiring the council member to resign his/her position.

There is also present a question of incompatibility of office. The common law doctrine applies if there is a potential conflict between

the two offices such that one individual could not give absolute allegiance to both offices. Incompatibility is most often found where one office supervises the other or when the interests of the two offices are antagonistic to each other. 3 McQuillin on Municipal Corporations, §§ 12.111 *et seq.* (3rd ed. 2018).

In the area of zoning, the interests of the county and the city may frequently be at odds, and it is not uncommon for cities and counties to sue one another over zoning disputes. Under such circumstances one person could not fill both offices without a conflict of loyalty. If two offices are incompatible, one office should be vacated. The Attorney General's Office recommends that one office be vacated to eliminate the incompatibility problem.

Question No. 23: May a person serve as a chairman of a county political party and as a member of the Idaho State Board of Correction?

Answer: It appears that a person cannot serve as chairman of a county political party and retain a position on the Board of Correction. Idaho Code § 20-204 provides:

The members of the board of correction and its officers and employees shall not, at any time of appointment nor during their incumbency of office, serve as the representative, officer, or employee of any political party.

The language of this code section is clear and unambiguous. An individual cannot serve as a representative, officer or employee of a political party and also serve on the State Board of Correction.

PUBLIC INTEGRITY IN ELECTIONS

Question No. 24: Is it a violation of the Public Integrity in Elections Act for a public employee to campaign for or against a candidate or the outcome of a ballot measure to co-workers and/or the public while at work?

Answer: The legislative intent of this chapter provided in Idaho Code § 74-602 states:

The legislature finds that it is against the public policy of the state of Idaho for public funds,

resources or property to be used to advocate for or against a candidate or ballot measure.

Campaigning while at work is a violation of this Act because the employee is using the states' time, which is equivalent to funds and resources that should be dedicated to the states' work. While this statute clearly prohibits the advocacy of candidate or ballot measure by a public entity and/or state agency, exclusions to this Act are provided in Idaho Code § 74-605 that allow for advocacy for or against a candidate or ballot measure by a public official or employee so long as no public funds, property or resources are used.

Question No. 25: Can a state legislator distribute electronic information for or against a candidate or the outcome of a ballot measure from the legislator's office?

Answer: The Attorney General Guideline dated January 9, 2018, specifically addresses this question and states: "[t]his office has concluded that the use of public funds or resources to advocate for or against a candidate or a matter coming up for a vote is prohibited by the public purpose doctrine." 2018 Idaho Att'y Gen. Ann. Rpt. 43.

The guideline further states that distributing electronic information with the use of state issued equipment and access equates to the use of public funds. 2019 Idaho Att'y Gen. Ann. Rpt. 44.

Additional analysis provided in the Attorney General Guideline dated January 20, 1997 states:

The prohibition of the use of public funds in political campaigns is primarily based upon the public funds doctrine. The doctrine prohibits the expenditure of public moneys for purposes unrelated to the function of government. As noted by the New York Supreme Court in Stern v. Kramarsky, 375 N.Y.S. 2d 235 (1975):

Public funds are trust funds, and as such are sacred and are to be used for the operation of government. For government agencies to attempt to influence public opinion on such matters inhibits the democratic process through the misuse of government funds and prestige. Improper expenditure of funds, whether directly through promotional and advertising

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activities or indirectly through the use of government employees or facilities cannot be countenanced.

1997 Idaho Att'y Gen. Ann. Rpt. 35.

CONSANGUINITY CHART

			4 Great Great Grandparent
		4 Great Grand Uncle/Aunt	3 Great Grandparent
	3 Child of Great Uncle/Aunt	3 Great Uncle/ Aunt	2 Grandparent
3 Second Cousin	2 Cousin	2 Uncle/Aunt	1 Parent
3 Cousin's Child	2 Nephew/Niece	1 Sibling	1 Person 'A'
3 Grand Nephew/Niece			1 Child
			2 Grandchild
			3 Great Grandchild

RELEVANT STATUTES

BRIBERY AND CORRUPT INFLUENCE ACT

18-1351. Bribery and corrupt practices — Definitions. Unless a different meaning plainly is required in this chapter:

(1) “Benefit” means gain or advantage, or anything regarded by the beneficiary as gain or advantage, including benefit to any other person or entity in whose welfare he is interested, but not an advantage promised generally to a group or class of voters as a consequence of public measures which a candidate engages to support or oppose. “Benefit” does not include an award with economic significance of five hundred dollars (\$500) or less given to a nonelected public servant by a nonprofit organization whose membership is limited to public servants as part of a public servant recognition program that is designed to recognize innovation and achievement in the workplace, provided that the organization discloses in advance on its website the nature of the program, the amount of the award, the names of any persons or entities that contributed to the award and the recipient of the award.

(2) “Confidential information” means knowledge gained through a public office, official duty or employment by a governmental entity which is not subject to disclosure to the general public and which, if utilized in financial transactions would provide the user with an advantage over those not having such information or result in harm to the governmental entity from which it was obtained.

(3) “Government” includes any branch, subdivision or agency of the government of the state or any locality within it and other political subdivisions including, but not limited to, highway districts, planning and zoning commissions and cemetery districts, and all other governmental districts, commissions or governmental bodies not specifically mentioned in this chapter.

(4) “Harm” means loss, disadvantage or injury, including loss, disadvantage or injury to any other person or entity in whose welfare he is interested.

(5) “Official proceeding” means a proceeding heard or which may be heard before any legislative, judicial, administrative or other governmental agency or official authorized to take evidence under oath, including any referee, hearing examiner, commissioner, notary or other person taking testimony or deposition in connection with any such proceeding.

(6) “Party official” means a person who holds an elective or appointive post in a political party in the United States by virtue of which he directs or conducts, or participates in directing or conducting party affairs at any level of responsibility.

(7) “Pecuniary benefit” is any benefit to a public official or member of his household in the form of money, property or commercial interests, the primary significance of which is economic gain.

(8) “Public servant” means any officer or employee of government, including legislators and judges, and any person participating as juror, advisor, consultant or otherwise, in performing a governmental function; but the term does not include witnesses.

(9) “Administrative proceeding” means any proceeding, other than a judicial proceeding, the outcome of which is required to be based on a record or documentation prescribed by law, or in which law or regulation is particularized in application to individuals.

18-1352. Bribery in official and political matters. A person is guilty of bribery, a felony, if he offers, confers or agrees to confer upon another, or solicits, accepts or agrees to accept from another:

(1) Any pecuniary benefit as consideration for the recipient’s decision, opinion, recommendation, vote or other exercise of discretion as a public servant, party official or voter; or

(2) Any benefit as consideration for the recipient’s decision, vote, recommendation or other exercise of official discretion in a judicial or administrative proceeding; or

(3) Any benefit as consideration for a violation of a known legal duty as public servant or party official. It is no defense to prosecution under this section that a person whom the actor sought to influence was not qualified to act in the desired way whether because he had not yet assumed office, or lacked jurisdiction, or for any other reason.

18-1353. Threats and other improper influence in official and political matters.

(1) Offenses defined. A person commits an offense if he:

(a) threatens unlawful harm to any person with purpose to influence his decision, opinion, recommendation, vote or other

exercise of discretion as a public servant, party official or voter;
or

(b) threatens harm to any public servant with purpose to influence his decision, opinion, recommendation, vote or other exercise of discretion in a judicial or administrative proceeding;
or

(c) threatens harm to any public servant or party official with purpose to influence him to violate his known legal duty; or

(d) privately addresses to any public servant who has or will have an official discretion in a judicial or administrative proceeding any representation, entreaty, argument or other communication with purpose to influence the outcome on the basis of considerations other than those authorized by law.

It is no defense to prosecution under this section that a person whom the actor sought to influence was not qualified to act in the desired way, whether because he had not yet assumed office, or lacked jurisdiction, or for any other reason.

(2) Grading. An offense under this section is a misdemeanor unless the actor threatened to commit a crime or made a threat with purpose to influence a judicial or administrative proceeding, in which cases the offense is a felony.

18-1353A. Threats against state officials of the executive, legislative or judicial branch or elected officials of a county or city. Whoever knowingly and willfully deposits for conveyance in the mail or for a delivery from any post office or by any letter carrier, any letter, paper, writing, print, missive, or document containing any threat to take the life of or to inflict bodily harm upon any state elected official of the executive or legislative branch, or any justice, judge or magistrate of the judicial branch, or person appointed to fill the vacancy of a state elected official of the executive or legislative branch of the state of Idaho, or knowingly and willfully otherwise makes any such threat against a state elected official of the executive or legislative branch, or any justice, judge or magistrate of the judicial branch, or person appointed to fill the vacancy of a state elected official of the executive or legislative branch of the state of Idaho is guilty of a misdemeanor and upon conviction thereof shall be fined not to exceed one thousand dollars (\$1,000) and shall be sentenced to not to exceed one (1) year in the county jail. If such threat is made while the defendant exhibits a firearm or other dangerous or deadly weapon, the defendant shall be guilty of a felony. Upon a second or subsequent conviction of an

offense under this section, the defendant shall be guilty of a felony and shall be sentenced to a term of not to exceed five (5) years in the state penitentiary.

18-1354. Compensation for past official behavior. A person commits a misdemeanor if he solicits, accepts, or agrees to accept any pecuniary benefit as compensation for having as public servant, given a decision, opinion, recommendation or vote favorable to another, or for having otherwise exercised a discretion in his favor, or for having violated his duty. A person commits a misdemeanor if he offers, confers or agrees to confer, compensation, acceptance of which is prohibited by this section.

18-1355. Retaliation for past official action. A person commits a misdemeanor if he harms another by any unlawful acts in retaliation for anything lawfully done by the latter in the capacity of public servant.

18-1356. Gifts to public servants by persons subject to their jurisdiction.

(1) Regulatory and law enforcement officials. No public servant in any department or agency exercising regulatory functions, or conducting inspections or investigations, or carrying on civil or criminal litigation on behalf of the government, or having custody of prisoners, shall solicit, accept or agree to accept any pecuniary benefit from a person known to be subject to such regulation, inspection, investigation or custody, or against whom such litigation is known to be pending or contemplated.

(2) Officials concerned with government contracts and pecuniary transactions. No public servant having any discretionary function to perform in connection with contracts, purchases, payments, claims or other pecuniary transactions of the government shall solicit, accept or agree to accept any pecuniary benefit from any person known to be interested in or likely to become interested in any such contract, purchase, payment, claim or transaction.

(3) Judicial and administrative officials. No public servant having judicial or administrative authority and no public servant employed by or in a court or other tribunal having such authority, or participating in the enforcement of its decisions, shall solicit, accept or agree to accept any pecuniary benefit from a person known to be interested in or likely to become interested in any matter before such public servant or a tribunal with which he is associated.

(4) Legislative and executive officials. No legislator or public servant shall solicit, accept or agree to accept any pecuniary benefit in

return for action on a bill, legislation, proceeding or official transaction from any person known to be interested in a bill, legislation, official transaction or proceeding.

(5) Exceptions. This section shall not apply to:

(a) fees prescribed by law to be received by a public servant, or any other benefit for which the recipient gives legitimate consideration or to which he is otherwise legally entitled; or

(b) gifts or other benefits conferred on account of kinship or other personal, professional or business relationship independent of the official status of the receiver; or

(c) trivial benefits not to exceed a value of fifty dollars (\$50.00) incidental to personal, professional or business contacts and involving no substantial risk of undermining official impartiality; or

(d) benefits received as a result of lobbying activities that are disclosed in reports required by chapter 66, title 67, Idaho Code. This exception shall not apply to any activities prohibited by subsections (1) through (4) of this section.

(6) Offering benefits prohibited. No person shall knowingly confer, or offer or agree to confer, any benefit prohibited by the foregoing subsections.

(7) Grade of offense. An offense under this section is a misdemeanor and shall be punished as provided in this chapter.

18-1357. Compensating public servant for assisting private interests in relation to matters before him.

(1) Receiving compensation. A public servant commits a misdemeanor if he solicits, accepts or agrees to accept compensation for advice or other assistance in preparing or promoting a bill, contract, claim, or other transaction or proposal as to which he knows that he has or is likely to have an official discretion to exercise.

(2) Paying compensation. A person commits a misdemeanor if he pays or offers or agrees to pay compensation to a public servant with knowledge that acceptance by the public servant is unlawful.

18-1358. Selling political endorsement — Special influence.

(1) Selling political endorsement. A person commits a misdemeanor if he solicits, receives, agrees to receive, or agrees that any political party or other person shall receive any pecuniary benefit as consideration for approval or disapproval of an appointment or advancement in public service, or for approval or disapproval of any person or transaction for any benefit conferred by an official or agency of the government. “Approval” includes recommendations, failure to disapprove, or any other manifestation of favor or acquiescence. “Disapproval” includes failure to approve, or any other manifestation of disfavor or non-acquiescence.

(2) Other trading in special influence. A person commits a misdemeanor if he solicits, receives or agrees to receive any pecuniary benefit as consideration for exerting special influence upon a public servant or procuring another to do so. “Special influence” means power to influence through kinship, friendship, or other relationship apart from the merits of the transaction.

(3) Paying for endorsement or special influence. A person commits a misdemeanor if he offers, confers or agrees to confer any pecuniary benefit, receipt of which is prohibited by this section.

18-1359. Using public position for personal gain.

(1) No public servant shall:

(a) Without the specific authorization of the governmental entity for which he serves, use public funds or property to obtain a pecuniary benefit for himself.

(b) Solicit, accept or receive a pecuniary benefit as payment for services, advice, assistance or conduct customarily exercised in the course of his official duties. This prohibition shall not include trivial benefits not to exceed a value of fifty dollars (\$50.00) incidental to personal, professional or business contacts and involving no substantial risk of undermining official impartiality.

(c) Use or disclose confidential information gained in the course of or by reason of his official position or activities in any manner with the intent to obtain a pecuniary benefit for himself or any other person or entity in whose welfare he is interested or

with the intent to harm the governmental entity for which he serves.

(d) Be interested in any contract made by him in his official capacity, or by any body or board of which he is a member, except as provided in section 18-1361, Idaho Code.

(e) Appoint or vote for the appointment of any person related to him by blood or marriage within the second degree, to any clerkship, office, position, employment or duty, when the salary, wages, pay or compensation of such appointee is to be paid out of public funds or fees of office, or appoint or furnish employment to any person whose salary, wages, pay or compensation is to be paid out of public funds or fees of office, and who is related by either blood or marriage within the second degree to any other public servant when such appointment is made on the agreement or promise of such other public servant or any other public servant to appoint or furnish employment to anyone so related to the public servant making or voting for such appointment. Any public servant who pays out of any public funds under his control or who draws or authorizes the drawing of any warrant or authority for the payment out of any public fund of the salary, wages, pay, or compensation of any such ineligible person, knowing him to be ineligible, is guilty of a misdemeanor and shall be punished as provided in this chapter.

(f) Unless specifically authorized by another provision of law, commit any act prohibited of members of the legislature or any officer or employee of any branch of the state government by section 67-5726, Idaho Code, violations of which are subject to penalties as provided in section 67-5734, Idaho Code, which prohibition and penalties shall be deemed to extend to all public servants pursuant to the provisions of this section.

(2) No person related to any member of the legislature by blood or marriage within the second degree shall be appointed to any clerkship, office, position, employment or duty within the legislative branch of government or otherwise be employed by the legislative branch of government when the salary, wages, pay or compensation of such appointee or employee is to be paid out of public funds.

(3) No person related to a mayor or member of a city council by blood or marriage within the second degree shall be appointed to any clerkship, office, position, employment or duty with the mayor's or city

council's city when the salary, wages, pay or compensation of such appointee or employee is to be paid out of public funds.

(4) No person related to a county commissioner by blood or marriage within the second degree shall be appointed to any clerkship, office, position, employment or duty with the commissioner's county when the salary, wages, pay or compensation of such appointee or employee is to be paid out of public funds.

(5) (a) An employee of a governmental entity holding a position prior to the election of a local government official, who is related within the second degree, shall be entitled to retain his or her position and receive general pay increases, step increases, cost of living increases, and/or other across the board increases in salary or merit increases, benefits and bonuses or promotions.

(b) Nothing in this section shall be construed as creating any property rights in the position held by an employee subject to this section, and all authority in regard to disciplinary action, transfer, dismissal, demotion or termination shall continue to apply to the employee.

(6) The prohibitions contained within this section shall not include conduct defined by the provisions of section 74-403(4), Idaho Code.

(7) The prohibitions within this section and section 18-1356, Idaho Code, as it applies to part-time public servants, do not include those actions or conduct involving the public servant's business, profession or occupation and unrelated to the public servant's official conduct, and do not apply to a pecuniary benefit received in the normal course of a legislator's business, profession or occupation and unrelated to any bill, legislation, proceeding or official transaction.

18-1360. Penalties. Any public servant who violates the provisions of this chapter, unless otherwise provided, shall be guilty of a misdemeanor and may be punished by a fine not exceeding one thousand dollars (\$1,000), or by incarceration in the county jail for a period not exceeding one (1) year, or by both such fine and incarceration. In addition to any penalty imposed in this chapter, any person who violates the provisions of this chapter may be required to forfeit his office and may be ordered to make restitution of any benefit received by him to the governmental entity from which it was obtained.

18-1361. Self-interested contracts — Exception. Where there are less than three (3) suppliers of a good or a service within a fifteen (15) mile

radius of where the good or service is to be provided, it shall not constitute a violation of the provisions of subsection (1) (d) or (e) of section 18-1359, Idaho Code, for a public servant or for his relative to contract with the public body of which the public servant is a member if the contract is reasonably necessary to respond to a disaster as defined in chapter 10, title 46, Idaho Code, or if the procedures listed below are strictly observed. For purposes of this section, “relative” shall mean any person related to the public servant by blood or marriage within the second degree.

(1) The contract is competitively bid and the public servant or his relative submits the low bid; and

(2) Neither the public servant nor his relative takes any part in the preparation of the contract or bid specifications, and the public servant takes no part in voting on or approving the contract or bid specifications; and

(3) The public servant makes full disclosure, in writing, to all members of the governing body, council or board of said public body of his interest or that of his relative and of his or his relative’s intention to bid on the contract; and

(4) Neither the public servant nor his relative has violated any provision of Idaho law pertaining to competitive bidding or improper solicitation of business.

18-1361A. Non-compensated appointed public servant — Relatives of public servant — Exception. When a person is a public servant by reason of his appointment to a governmental entity board for which the person receives no salary or fees for his service on said board, it shall not constitute a violation of the provisions of subsection (1) (d) or (e) of section 18-1359, Idaho Code, for a public servant or for his relative to contract with the public body of which the public servant is a member if the procedures listed below are strictly observed. For purposes of this section, “relative” shall mean any person related to the public servant by blood or marriage within the second degree.

(1) The contract is competitively bid and the public servant or his relative submits the low bid; and

(2) Neither the public servant nor his relative takes any part in the preparation of the contract or bid specifications, and the public servant takes no part in voting on or approving the contract or bid specifications; and

(3) The public servant makes full disclosure, in writing, to all members of the governing body, council or board of said public body of his interest or that of his relative and of his or his relative's intention to bid on the contract; and

(4) Neither the public servant nor his relative has violated any provision of Idaho law pertaining to competitive bidding or improper solicitation of business.

18-1362. Cause of action. A prosecuting attorney or the attorney general may bring an action in the district court of the county in which a public servant resides to enjoin a violation of the provisions of this chapter and to require the public servant to make restitution to the government of any pecuniary gain obtained. The prevailing party shall be awarded his costs and reasonable attorney fees.

ETHICS IN GOVERNMENT ACT

74-401. Short title. This act shall be known and may be cited as the "Ethics in Government Act of 2015."

74-402. Policy and purpose. It is hereby declared that the position of a public official at all levels of government is a public trust and it is in the public interest to:

(1) Protect the integrity of government throughout the state of Idaho while at the same time facilitating recruitment and retention of personnel needed within government;

(2) Assure independence, impartiality and honesty of public officials in governmental functions;

(3) Inform citizens of the existence of personal interests which may present a conflict of interest between an official's public trust and private concerns;

(4) Prevent public office from being used for personal gain contrary to the public interest;

(5) Prevent special interests from unduly influencing governmental action; and

(6) Assure that governmental functions and policies reflect, to the maximum extent possible, the public interest.

74-403. Definitions. — For purposes of this chapter:

(1) “Official action” means any decision on, or proposal, consideration, enactment, defeat, or making of any rule, regulation, rate-making proceeding or policy action or nonaction by a governmental body or any other policy matter which is within the official jurisdiction of the governmental body.

(2) “Business” means any undertaking operated for economic gain, including, but not limited to, a corporation, partnership, trust, proprietorship, firm, association or joint venture.

(3) “Business with which a public official is associated” means any business of which the public official or member of his household is a director, officer, owner, partner, employee or holder of stock over five thousand dollars (\$5,000) or more at fair market value.

(4) “Conflict of interest” means any official action or any decision or recommendation by a person acting in a capacity as a public official, the effect of which would be to the private pecuniary benefit of the person or a member of the person’s household, or a business with which the person or a member of the person’s household is associated, unless the pecuniary benefit arises out of the following:

(a) An interest or membership in a particular business, industry, occupation or class required by law as a prerequisite to the holding by the person of the office or position;

(b) Any action in the person’s official capacity which would affect to the same degree a class consisting of an industry or occupation group in which the person, or a member of the person’s household or business with which the person is associated, is a member or is engaged;

(c) Any interest which the person has by virtue of his profession, trade or occupation where his interest would be affected to the same degree as that of a substantial group or class of others similarly engaged in the profession, trade or occupation;

(d) Any action by a public official upon any revenue measure, any appropriation measure or any measure imposing a tax, when similarly situated members of the general public are affected by the outcome of the action in a substantially similar manner and degree.

(5) “Economic gain” means increase in pecuniary value from sources other than lawful compensation as a public official.

(6) “Governmental entity” means:

(a) The state of Idaho and all agencies, commissions and other governmental bodies of the state; and

(b) Counties and municipalities of the state of Idaho, all other political subdivisions including, but not limited to, highway districts, planning and zoning commissions or governmental bodies not specifically mentioned in this chapter.

(7) “Members of a household” mean the spouse and dependent children of the public official and/or persons whom the public official is legally obligated to support.

(8) “Person” means an individual, proprietorship, partnership, association, trust, estate, business trust, group or corporation, whether operated for profit or not, and any other legal entity, or agent or servant thereof, or a governmental entity.

(9) “Public office” means any position in which the normal and usual duties are conducted on behalf of a governmental entity.

(10) “Public official” means any person holding public office in the following capacity:

(a) As an elected public official meaning any person holding public office of a governmental entity by virtue of an elected process, including persons appointed to a vacant elected office of a governmental entity, excluding members of the judiciary; or

(b) As an elected legislative public official meaning any person holding public office as a legislator; or

(c) As an appointed public official meaning any person holding public office of a governmental entity by virtue of formal appointment as required by law; or

(d) As an employed public official meaning any person holding public office of a governmental entity by virtue of employment, or a person employed by a governmental entity on a consultative basis.

74-404. Required action in conflicts. A public official shall not take any official action or make a formal decision or formal recommendation concerning any matter where he has a conflict of interest and has failed to disclose such conflict as provided in this section. Disclosure of a conflict does not affect an elected public official's authority to be counted for purposes of determining a quorum and to debate and to vote on the matter, unless the public official requests to be excused from debate and voting at his or her discretion. In order to determine whether a conflict of interest exists relative to any matter within the scope of the official functions of a public official, a public official may seek legal advice from the attorney representing that governmental entity or from the attorney general or from independent counsel. If the legal advice is that no real or potential conflict of interest exists, the public official may proceed and shall not be subject to the prohibitions of this chapter. If the legal advice is that a real or potential conflict may exist, the public official:

(1) If he is an elected legislative public official, he shall disclose the nature of the potential conflict of interest and/or be subject to the rules of the body of which he/she is a member and shall take all action required under such rules prior to acting on the matter. If a member requests to be excused from voting on an issue which involves a conflict or a potential conflict, and the body of which he is a member does not excuse him, such failure to excuse shall exempt that member from any civil or criminal liability related to that particular issue.

(2) If he is an elected state public official, he shall prepare a written statement describing the matter required to be acted upon and the nature of the potential conflict, and shall file such statement with the secretary of state prior to acting on the matter. A public official may seek legal advice from the attorney representing that agency or from the attorney general or from independent counsel. The elected public official may then act on the advice of the agency's attorney, the attorney general or independent counsel.

(3) If he is an appointed or employed state public official, he shall prepare a written statement describing the matter to be acted upon and the nature of the potential conflict, and shall deliver the statement to his appointing authority. The appointing authority may obtain an advisory opinion from the attorney general or from the attorney representing that agency. The public official may then act on the advice of the attorney general, the agency's attorney or independent counsel.

(4) If he is an elected public official of a county or municipality, he shall disclose the nature of a potential conflict of interest prior to acting

on a matter and shall be subject to the rules of the body of which he/she is a member and take all action required by the rules prior to acting on the matter. If a member requests to be excused from voting on an issue, which involves a conflict or a potential conflict, and the body of which he is a member, does not excuse him, such failure to excuse shall exempt that member from any civil or criminal liability related to that particular issue. The public official may obtain an advisory opinion from the attorney general or the attorney for the county or municipality or from independent counsel. The public official may then act on the advice of the attorney general or attorney for the county or municipality or his independent counsel.

(5) If he is an appointed or employed public official of a county or municipality, he shall prepare a written statement describing the matter required to be acted upon and the nature of the potential conflict, and shall deliver the statement to his appointing authority. The appointing authority may obtain an advisory opinion from the attorney for the appointing authority, or, if none, the attorney general. The public official may then act on the advice of the attorney general or attorney for the appointing authority or independent counsel.

(6) Nothing contained herein shall preclude the executive branch of state government or a political subdivision from establishing an ethics board or commission to perform the duties and responsibilities provided for in this chapter. Any ethics board or commission so established shall have specifically stated powers and duties including the power to:

(a) Issue advisory opinions upon the request of a public official within its jurisdiction;

(b) Investigate possible unethical conduct of public officials within its jurisdiction and conduct hearings, issue findings, and make recommendations for disciplinary action to a public official's appointing authority;

(c) Accept complaints of unethical conduct from the public and take appropriate action.

74-405. Noncompensated public official — Exception. When a person is a public official by reason of his appointment or election to a governing board of a governmental entity for which the person receives no salary or fee as compensation for his service on said board, he shall not be prohibited from having an interest in any contract made or entered into by the board of which he is a member, if he strictly observes the procedure set out in section 18-1361A, Idaho Code.

74-406. Civil penalty.

(1) Any public official who intentionally fails to disclose a conflict of interest as provided for in section 74-404, Idaho Code, shall be guilty of a civil offense, the penalty for which may be a fine not to exceed five hundred dollars (\$500), provided that the provisions of this subsection shall not apply to any public official where the governmental entity on which said official serves has put into operation an ethics commission or board described in section 74-404(6), Idaho Code.

(2) The penalty prescribed in subsection (1) of this section does not limit the power of either house of the legislature to discipline its own members, nor limit the power of governmental entities, including occupational or professional licensing bodies, to discipline their members or personnel. A violation of the provisions of this chapter shall not preclude prosecution and conviction for any criminal violation that may have been committed.

PROHIBITIONS AGAINST CONTRACTS WITH OFFICERS

74-501. Officers not to be interested in contracts. Members of the legislature, state, county, city, district and precinct officers, must not be interested in any contract made by them in their official capacity, or by any body or board of which they are members.

74-502. Remote interests.

(1) A public officer shall not be deemed to be interested in a contract, within the meaning of section 74-501, Idaho Code, if he has only a remote interest in the contract and if the fact and extent of such interest is disclosed to the body of which he is an officer and noted in the official minutes or similar records prior to the formation of the contract, and thereafter the governing body authorizes, approves, or ratifies the contract in good faith by a vote of its membership sufficient for the purpose without counting the vote or votes of the officer having the remote interest. As used in this section, "remote interest" means:

- (a) That of a nonsalaried officer of a nonprofit corporation;
or
- (b) That of an employee or agent of a contracting party where the compensation of such employee or agent consists entirely of fixed wages or salary; or
- (c) That of a landlord or tenant of a contracting party; or

(d) That of a holder of less than one percent (1%) of the shares of a corporation or cooperative which is a contracting party.

(2) Although a public official's interest in a contract may be only remote, a public official shall not influence or attempt to influence any other officer of the board of which he is an officer to enter into the contract. Violation of the provisions of this subsection shall be a misdemeanor as provided in section 74-509, Idaho Code. Any contract created or entered into in violation of the provisions of this subsection shall be void.

74-503. Officers not to be interested in sales. State, county, district, precinct and city officers must not be purchasers at any sale nor vendors at any purchase made by them in their official capacity.

74-504. Prohibited contracts voidable. Every contract made in violation of any of the provisions of this chapter may be avoided at the instance of any party except the officer interested therein.

74-505. Dealing in warrants prohibited. The state treasurer and state controller, the several county, city, district or precinct officers of this state, their deputies and clerks, are prohibited from purchasing or selling, or in any manner receiving to their own use or benefit, or to the use or benefit of any person or persons, whatever, any state, county, or city warrants, scrip, orders, demands, claims, or other evidences of indebtedness against the state, or any county or city thereof, except evidences of indebtedness issued to or held by them for services rendered as such officer, deputy or clerk, and evidences of the funded indebtedness of such state, county, city, district or corporation.

74-506. Affidavit of nonviolation a prerequisite to allowance of accounts. Every officer whose duty it is to audit and allow the accounts of other state, county, district, city or precinct officers, must, before allowing such accounts, require each of such officers to make and file with him an affidavit that he has not violated any of the provisions of this chapter.

74-507. Provisions of chapter violated — Disbursing officer not to pay warrants. Officers charged with the disbursement of public moneys must not pay any warrant or other evidence of indebtedness against the state, county, city or district, when the same has been purchased, sold, received or transferred contrary to any of the provisions of this chapter.

74-508. Suspension of settlement or payment — Prosecution of offenders. Every officer charged with the disbursement of public moneys,

who is informed by affidavit that any officer whose account is to be settled, audited, or paid by him, has violated any of the provisions of this chapter, must suspend such settlement or payment, and cause such officer to be prosecuted for such violation.

74-509. Violation. A violation of the provisions of this chapter, unless otherwise provided, is a misdemeanor and shall be punished by a fine not exceeding one thousand dollars (\$1,000), or incarceration in the county jail for a period not exceeding one (1) year, or by both such fine and incarceration.

74-510. Noncompensated public official — Exception. When a person is a public official by reason of his appointment or election to a governing board of a governmental entity for which the person receives no salary or fee as compensation for his service on said board, he shall not be prohibited from having an interest in any contract made or entered into by the board of which he is a member, if he strictly observes the procedure set out in section 18-1361A, Idaho Code.

74-511. Violation relating to public contracts. Officers shall not commit any act prohibited by section 67-9230, Idaho Code, violations of which are subject to penalties as provided in section 67-9231, Idaho Code, and which prohibitions and penalties shall be deemed to extend to all public officers governed by the provisions of this chapter.

PUBLIC INTEGRITY IN ELECTIONS ACT

74-601. Short title. This act shall be known and may be cited as the “Public Integrity in Elections Act.”

74-602. Legislative intent. The legislature finds that is against the public policy of the state of Idaho for public funds, resources or property to be used to advocate for or against a candidate or ballot measure.

74-603. Definitions. As used in this chapter:

(1) (a) “Advocate” means to campaign for or against a candidate or the outcome of a ballot measure.

(b) “Advocate” does not mean providing factual information about a ballot measure and the public entity’s reason for the ballot measure stated in a factually neutral manner. Factual information includes, but is not limited to, the cost of indebtedness, intended purpose, condition of property to be addressed, date and location of election, qualifications of

candidates or other applicable information necessary to provide transparency to electors.

(2) “Ballot measure” means constitutional amendments, bond measures or levy measures.

(3) “Candidate” means and includes every person for whom it is contemplated or desired that votes be cast at any political convention, primary, general, local or special election and who either tacitly or expressly consents to be so considered.

(4) “Expenditure” means:

(a) A purchase, payment, donation, distribution, loan, advance, deposit, gift of money, or anything of value; or

(b) A legally enforceable contract, promise or agreement to make any purchase, payment, donation, distribution, loan, advance, deposit, gift of money, or anything of value.

(5) “Property or resources” means goods, services, equipment, computer software and hardware, other items of intangible property, or facilities provided to or for the benefit of a candidate, a candidate’s personal campaign committee, a political issues committee for political purposes, or advocacy for or against a ballot measure or candidate. Public property or resources that are available to the general public are exempt from this exclusion.

(6) “Public entity” means the state, each state agency, county, municipality, school district or other taxing district or public corporation empowered to submit ballot measures to its electors.

(7) “Public funds” means any money received by a public entity from appropriations, taxes, fees, interest or other returns on investment.

(8) “Public official” means an elected or appointed member of a public entity who has:

(a) Authority to make or determine public policy;

(b) Supervisory authority over the personnel and affairs of a public entity; or

(c) Authority to approve the expenditure of funds for the public entity.

(9) “State agency” means each department, commission, board, council, agency, institution, officer, corporation, fund, division, office, committee, authority or other administrative unit of the state.

74-604. Public funds prohibited.

(1) Unless specifically required by law, and except as provided in this chapter, neither a public entity nor its employees shall make, nor shall a public official make or authorize, an expenditure from public funds to advocate for or against a candidate or a ballot measure.

(2) Neither a public entity nor any of its employees shall use, nor shall a public official authorize or use, public property or resources to advocate for or against a candidate or a ballot measure.

74-605. Exclusions. Nothing in this chapter shall prohibit:

(1) A public official or employee from speaking, campaigning, contributing personal money or otherwise exercising the public official’s or employee’s individual first amendment rights for political purposes, provided no public funds are used for expenditures supporting the public official or employee in such activity;

(2) A public entity, public official or employee from the neutral encouragement of voters to vote;

(3) An elected official or employee from personally campaigning or advocating for or against a ballot measure, provided no public funds, property or resources are used for supporting the elected official or employee in such activity;

(4) A public entity from preparing and distributing to electors an objective statement explaining the purpose and effect of the ballot measure, including in the case of bond or levy elections the cost per taxpayer or taxable value, or similar information based on reasonable estimates prepared in good faith;

(5) The formulation and publication of statements regarding proposed amendments to the state constitution, as authorized by section 67-453, Idaho Code;

(6) The publication of information described in section 34-439, 34-439A and 34-1406, Idaho Code, as applicable, or other provisions of law requiring notices and disclosures in connection with elections and ballot measures; or

(7) A balanced student classroom discussion or debate of current or pending election issues.

74-606. Violations — Remedies.

(1) Any public official or employee who conducts or participates in an activity that violates the provisions of this chapter shall be subject to a civil penalty not to exceed two hundred fifty dollars (\$250).

(2) Any public official or employee who knowingly violates the provisions of this chapter shall be subject to a civil penalty not to exceed one thousand five hundred dollars (\$1,500).

(3) Any public official or employee who knowingly violates any provision of this chapter and who has previously admitted to committing or has been previously determined to have committed a violation pursuant to subsection (2) of this section within the twelve (12) months preceding this subsequent violation shall be subject to a civil penalty not to exceed two thousand five hundred dollars (\$2,500).

(4) The attorney general shall have the duty to enforce this chapter in relation to public agencies of state government, and the prosecuting attorneys of the various counties shall have the duty to enforce this chapter in relation to local public agencies within their respective jurisdictions. In the event that there is reason to believe that a violation of the provisions of this act has been committed by members of a board of county commissioners or, for any other reason a county prosecuting attorney is deemed disqualified from proceeding to enforce this chapter, the prosecuting attorney or board of county commissioners shall seek to have a special prosecutor appointed for that purpose, as provided in section 31-2603, Idaho Code.

MISCELLANEOUS STATUTES

31-2606. Prohibitions. No prosecuting attorney must receive any fee or reward for or on behalf of any prosecutor or other individual, for services in any prosecution, or business to which it is his official duty to attend or discharge; nor be concerned as attorney or counsel for either party other than for the state, people or county, in any civil action depending upon the same state of facts, upon which any criminal prosecution commenced but not determined depends, and no law partner of any county attorney must be engaged in the defense of any suit, action or proceeding, in which said prosecuting attorney appears on behalf of the people, state or county.

33-507. Limitation upon authority of trustees.

(1) It shall be unlawful for any trustee to have pecuniary interest, directly or indirectly, in any contract or other transaction pertaining to the maintenance or conduct of the school district or to accept any reward or compensation for services rendered as a trustee except as may be otherwise provided in this section. The board of trustees of a school district may accept and award contracts involving the school district to businesses in which a trustee or a person related to him by blood or marriage within the second degree has a direct or indirect interest provided that the procedures set forth in section 18-1361 or 18-1361A, Idaho Code, are followed. The receiving, soliciting or acceptance of moneys of a school district for deposit in any bank or trust company, or the lending of money by any bank or trust company to any school district, shall not be deemed to be a contract pertaining to the maintenance or conduct of a school district within the meaning of this section; nor shall the payment by any school district board of trustees of compensation to any bank or trust company, for services rendered in the transaction of any banking business with such district board of trustees, be deemed the payment of any reward or compensation to any officer or director of any such bank or trust company within the meaning of this section.

(2) It shall be unlawful for the board of trustees of any class of school district to enter into or execute any contract with the spouse of any member of such board, the terms of which said contract requires or will require the payment or delivery of any school district funds, money or property to such spouse, except as provided in subsection (3) of this section or in section 18-1361 or 18-1361A, Idaho Code.

(3) No spouse or any trustee may be employed by a school district with a fall student enrollment population of greater of greater than one thousand two hundred (1,200) in the prior school year. For school districts with a fall student enrollment population of one thousand two hundred (1,200) or less in the prior school year and for schools funded pursuant to the provisions of section 33-1003 (2), Idaho Code, such spouse may be employed in a nonadministrative position for a school year if each of the following conditions has met:

(a) The position has been listed as open for application on the school district website or in a local newspaper, whichever is consistent with the district's current practice, and the position shall be listed for at least sixty (60) days, unless the opening occurred during the school year, in which case the position is

listed in a newspaper, the listing shall be made in a manner consistent with the provisions of section 60-106, Idaho Code;

(b) No applications were received that met the minimum certification, endorsement, education or experience requirements of the position other than such spouse;

(c) The trustee abstained from voting in the employment of the spouse and was absent from the meeting while in such employment was being considered and determined.

The school district or school may employ such spouse for further school years, provided that the conditions contained in this subsection are met for each school year in which such spouse is employed. The trustee shall abstain from voting in any decisions affecting the compensation, benefits, individual performance evaluation or disciplinary action related to the spouse and shall be absent from the meeting while such issues are being considered and determined. Such limitation shall include, but not be limited to: any matters relating to negotiations regarding compensation and benefits; discussion and negotiation with district benefits providers; and any matter relating to the spouse and letters of reprimand, direction, probation or termination. Such limitations shall not prohibit the trustee spouse from participating in deliberation and voting upon the district's annual fiscal budget or annual audit report. Any spouse of a trustee employed as a certificated employee pursuant to this subsection shall be employed under a category 1 contract pursuant to section 33-514A, Idaho Code.

(4) When any relative of any trustee or relative of the spouse of a trustee related by affinity or consanguinity within the second degree is considered for employment in a school district, such trustee shall abstain from voting in the election of such relative, and shall be absent from the meeting while such employment is being considered and determined.

59-102. Legislators disqualified from holding certain offices. It shall be unlawful for any member of the legislature, during the term for which he was elected, to accept or receive, or for the governor, or other officials or board, to appoint such member of the legislature to, any office of trust, profit, honor or emolument, created by any law passed by the legislature of which he is a member. Any appointment made in violation of this section shall be null and void and without force and effect, and any attempt to exercise the powers of such office by such appointee shall be a usurpation, and the appointee shall be deemed guilty of a misdemeanor, and, on conviction, shall be fined not less than \$500 nor more than \$5000.

67-9230. Prohibitions.

(1) No contract or any interest therein shall be transferred by the contractor to whom such contract is given to any other party without the approval in writing by the administrator and by the board of examiners pursuant to section 67-1027, Idaho Code. Transfer of a contract without approval shall cause the annulment of the contract so transferred, at the option of the state. All rights of action, however, for any breach of such contract by the contracting parties are reserved to the state.

(2) No member of the legislature or any officer or employee of any branch of the state government shall directly, himself, or by any other person in trust for him or for his use or benefit or on his account, undertake, execute, hold or enjoy, in whole or part, any contract made or entered into by or on behalf of the state of Idaho, if made by, through, or on behalf of the department in which he is an officer or employee; or if made by, through or on behalf of any other department unless the same is made after competitive bids.

(3) Except as provided in this chapter, no officer or employee shall influence or attempt to influence the award of a contract to a particular vendor, or to deprive or attempt to deprive any vendor of a contract.

(4) No officer or employee shall conspire with a vendor or its agent, and no vendor or its agent shall conspire with an officer or employee, to influence or attempt to influence the award of a contract, or to deprive or attempt to deprive a vendor of a contract.

(5) No officer or employee shall fail to use an open contract except as provided in this chapter.

(6) No officer or employee shall accept property knowing that the property does not meet specifications or other acceptance criteria set forth in the contract.

(7) Deprivation, influence or attempts thereat shall not include written reports, based upon substantial evidence, sent to the administrator concerning matters relating to the responsibility of vendors.

(8) No vendor or related party, or subsidiary, or affiliate of a vendor may submit a bid to obtain a contract to provide property to the state, if the vendor or related party, or affiliate or subsidiary was paid for services used in preparing the specifications or if the services influenced the procurement process.

67-6506. Conflict of interest prohibited. A governing board creating a planning, zoning, or planning and zoning commission, or joint commission shall provide that the area and interests within its jurisdiction are broadly represented on the commission. A member or employee of a governing board, commission, or joint commission shall not participate in any proceeding or action when the member or employee or his employer, business partner, business associate, or any person related to him by affinity or consanguinity within the second degree has an economic interest in the procedure or action. Any actual or potential interest in any proceeding shall be disclosed at or before any meeting at which the action is being heard or considered. For purposes of this section the term "participation" means engaging in activities which constitute deliberations pursuant to the open meeting act. No member of a governing board or a planning and zoning commission with a conflict of interest shall participate in any aspect of the decision-making process concerning a matter involving the conflict of interest. A knowing violation of this section shall be a misdemeanor.

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**Office of the
Attorney General**

Idaho Open Meeting Law Manual

Idaho Code §§ 74-201 through 74-208



JULY 2019

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INTRODUCTION

Open and honest government is fundamental to a free society. The Idaho Legislature formalized our state's commitment to open government by enacting the Idaho Open Meeting Law in 1974. The Open Meeting Law codifies a simple, but fundamental, Idaho value: The public's business ought to be done in public.

One of my duties as Attorney General is to ensure that state agencies and officials comply with the Idaho Open Meeting Law. The 44 elected county prosecuting attorneys have the same duty with regard to agencies and officials of local government.

My office is committed to assisting Idaho's state and local officials in complying with their obligation under this law. Toward that end, my office regularly conducts training sessions for state and local officials throughout Idaho.

My office has prepared this updated manual for your use and reference. This manual's purpose is to inform government agencies of their obligations, and citizens of their rights, under Idaho's Open Meeting Law.

Sincerely,

LAWRENCE G. WASDEN
Attorney General

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POLICY CONSIDERATIONS UNDERLYING THE OPEN MEETING LAW

The Idaho Open Meeting Law¹ was designed to ensure transparency of the legislative and administrative processes within state and local governments. The Legislature articulated this policy in the Act's first section:

The people of the state of Idaho in creating the instruments of government that serve them, do not yield their sovereignty to the agencies so created. Therefore, the legislature finds and declares that it is the policy of this state that the formation of public policy is public business and shall not be conducted in secret.²

Open meetings offer the public a chance to observe the way their government operates and to influence their government in positive and important ways. Closed meetings often can lead to distrust of governmental decisions and acts.

Those who conduct meetings must remember this policy above all when deciding whether a meeting should be open. If a meeting is closed, there must be a compelling reason, supported by the statute itself, or by subsequent court rulings.

Remember, when in doubt, open the meeting.

¹ Idaho Code §§ 74-201 to 74-208.

² *Id.* at § 74-201.

QUESTIONS AND ANSWERS

PUBLIC BODIES OR AGENCIES COVERED BY THE OPEN MEETING LAW

Question No. 1: What public bodies or agencies are subject to the Open Meeting Law?

Answer: The Open Meeting Law provides: “[A]ll meetings of a *governing body* of a *public agency* shall be open to the public and all persons shall be permitted to attend any meeting except as otherwise provided by this act. . . .”³ “Governing body” is defined to mean the members of any public agency “with the authority to make decisions for or recommendations to a public agency regarding any matter.”⁴ “Public agency” is defined to encompass various categories of governmental entities and subdivisions at all levels of government.⁵ The governing bodies of public agencies that are created by or pursuant to statute, as well as public agencies that are created by the Idaho Constitution, are subject to the Open Meeting Law.⁶ The only public agencies that are statutorily exempt from the Open Meeting Law are the courts and their agencies and divisions, the judicial council and the district magistrates commission.⁷ Deliberations of the Board of Tax Appeals, the Public Utilities Commission and the Industrial Commission, in a fully submitted contested case proceeding, are also exempted from the requirement that they take place in an open public meeting.⁸

Question No. 2: Does the Open Meeting Law apply to a public agency headed by a single individual as contrasted with a multi-member body?

Answer: No. Section 74-202(5) defines a governing body to mean “the members of any public agency *that consists of two (2) or more members*, with the authority to make decisions for or recommendations to a public agency regarding any matter.” (Emphasis added.) By definition, the Open Meeting Law applies only to a governing body which consists of two or more members and thus

³ Idaho Code § 74-203(1) (emphasis added).

⁴ Idaho Code § 74-202(5).

⁵ Idaho Code § 74-202(4).

⁶ Attorney General Opinion No. 77-30, 1977 Idaho Att’y Gen. Ann. Rpt. 180.

⁷ Idaho Code § 74-202(4)(a).

⁸ Idaho Code § 74-203.

does not apply to a public agency headed by a single individual.

This also extends to *employees* of a public agency headed by a single individual; meetings held by employees of a department headed by a single individual (or multiple parties, for that matter) do not have to be open to the public. An illustrative example of this principle arose in the 2008 case of Safe Air For Everyone v. Idaho State Dep't of Agriculture.⁹ There, the Idaho State Department of Agriculture (ISDA) invited representatives from federal, state, and tribal agencies to a meeting to discuss issues surrounding crop residue burning. The meeting was closed to the public. Several employees of the ISDA attended the meeting, but the director did not.

An environmental group sued the ISDA, arguing that the employees' participation in the meeting constituted a violation of the Open Meeting Law because the director had delegated decision-making authority to the employees, thus making the employees a "governing body." The Supreme Court disagreed, stating that:

By definition, a 'governing body' [under the Act] must have 'the authority to make decisions for or recommendations to a public agency regarding any matter.' The employees do not have '*the* authority' to make decisions for or recommendations to the ISDA. Any decision they make can be countermanded by a supervisor, and their supervisor can likewise deny them permission to make recommendations. . . . [T]he authority to make decisions for an agency or recommendations to an agency must be statutorily based.¹⁰

Of course, it should be noted that under the Idaho Administrative Procedure Act (IDAPA) various state agencies must hold open public meetings when they adopt rules or when they determine certain contested cases.¹¹ The open public meeting requirements of the IDAPA apply regardless of whether the public agency is headed by a single individual or by a multi-member body.

⁹ 145 Idaho 164, 177 P.3d 378 (2008).

¹⁰ *Id.* at 168, 177 P.3d at 382.

¹¹ Idaho Code §§ 67-5201 to 67-5292.

Question No. 3: When is a subagency of a public agency subject to the Open Meeting Law?

Answer: A subagency of a public agency is subject to the Open Meeting Law if the subagency itself “is created by or pursuant to statute or executive order of the governor, ordinance or other legislative act.”¹² In Cathcart v. Anderson, the Washington Supreme Court interpreted a Washington statute similar to section 74-202(4)(d). The court held that, under the language “created by or pursuant to,” it is not necessary that a statute, ordinance or other legislative act expressly create a subagency so long as there is an enabling provision which allows that subagency to come into existence at some future time.

Question No. 4: Are advisory committees, boards and commissions subject to the Open Meeting Law?

Answer: The Open Meeting Law defines “public agency” to include “any subagency of a public agency which is created by or pursuant to statute or executive order of the governor, ordinance, or other legislative act,”¹³ and “governing body” to include any body “with the authority to make decisions for or *recommendations* to a public agency regarding any matter.”¹⁴ Thus, advisory committees, boards and commissions are subject to the Open Meeting Law if the body is created by or pursuant to statute, ordinance, or other legislative act and if the body has authority to make recommendations to a public agency.

In contrast, an administrative committee, board or commission is not subject to the Open Meeting Law if it is not entrusted with the formation of public policy, but merely carries out the public policy established by a governing body, and if its activities do not constitute the making of “decisions for or recommendations to” a public agency.¹⁵ Likewise, the Open Meeting Law does not apply to voluntary, internal staff meetings if the group is not created by or pursuant to statute, ordinance or other legislative act, even though the

¹² Idaho Code § 74-202(4)(d); Cathcart v. Anderson, 85 Wash. 2d 102, 530 P.2d 313 (1975); Attorney General Opinion No. 7-75, 1975 Idaho Att’y Gen. Ann. Rpt. 22.

¹³ Idaho Code § 74-202(4)(d).

¹⁴ Idaho Code § 74-202(5) (emphasis added).

¹⁵ Idaho Water Resources Board v. Kramer, 97 Idaho 535, 572, 548 P.2d 45, 72 (1976).

discussions may lead to recommendations to the governing body.¹⁶ Generally, however, if you are ever unsure of whether a meeting should be open, it is this Office's recommendation to err on the side of opening the meeting.

Question No. 5: Does the Open Meeting Law apply to the governor?

Answer: The Open Meeting Law has no application to the governor when he is acting in his official executive capacity, since the Open Meeting Law does not apply to a public agency headed by a single individual.

**CHARITABLE ORGANIZATIONS (501C(3)) AND
HOMEOWNER'S ASSOCIATIONS**

Question No. 6: Do charitable organizations have to comply with the Idaho Open Meeting Law?

Answer: The Open Meeting Law applies only to governmental entities. Typically, charitable organizations are private. Generally, nonprofit organizations are governed by their chartering documents and bylaws. Additionally, title 30, chapter 3 of the Idaho Code, provides the legal foundation for Idaho nonprofits. Consult the chartering documents, bylaws and Idaho Code, title 30, chapter 3, to determine the requirements of corporate records and meetings.

Question No. 7: Do homeowner's associations have to comply with the Idaho Open Meeting Law?

Answer: No. The Open Meeting Law applies only to governmental entities. Homeowner's associations are private entities. Homeowner's associations are generally governed by agreements between the members and the association and their bylaws. Members should consult their association documents and bylaws to determine the association rules for meetings.

¹⁶ See Safe Air For Everyone v. Idaho State Dep't of Agriculture, 145 Idaho 164, 177 P.3d 378 (2008); People v. Carlson, 328 N.E.2d 675 (Ill. App. Ct. 1975); Bennett v. Warden, 333 So.2d 97 (Fla. 1976).

PUBLIC ACTIONS OR ACTIVITIES COVERED BY THE OPEN MEETING LAW

Question No. 8: What constitutes a meeting under the Open Meeting Law?

Answer: The Open Meeting Law defines “meeting” to mean “the convening of a governing body of a public agency *to make a decision or to deliberate toward a decision* on any matter.”¹⁷ “Decision” is then defined to include “any determination, action, vote or final disposition upon a motion, proposal, resolution, order, ordinance or measure on which a vote of a governing body is required, *at any meeting at which a quorum is present. . .*”¹⁸

The term “deliberation” is also a defined term and means “the receipt or exchange of information or opinion relating to a decision, but shall not include informal or impromptu discussions of a general nature that do not specifically relate to a matter then pending before the public agency for decision.”¹⁹ Note that this does not require any discussion or preliminary decision making. Even the receipt of information relating to a “decision”—i.e., a measure on which the governing body will have to vote—amounts to deliberation, and therefore triggers the definition and requirements of a “meeting” under the Open Meeting Law.

Question No. 9: Does the term “meeting” include such things as informal gatherings, briefing sessions, informal discussions, attendance at social functions, etc.?

Answer: As noted above, a “meeting” is the convening of a governing body to make a decision or deliberate toward a decision. Additionally, a quorum must be present.²⁰

The California Court of Appeals discussed the dual facets of deliberation and action in Sacramento Newspaper Guild v. Sacramento County Board of Supervisors:

It [California’s open meeting law] declares the law’s intent that deliberation as well as action

¹⁷ Idaho Code § 74-202(6) (emphasis added).

¹⁸ Idaho Code § 74-202(1) (emphasis added).

¹⁹ Idaho Code § 74-202(2).

²⁰ Idaho Water Resources Board v. Kramer, 97 Idaho 535, 571, 548 P.2d 45, 71 (1976).

occur openly and publicly. Recognition of deliberation and action as dual components of the collective decision-making process brings awareness that the meeting concept cannot be split off and confined to one component only, but rather comprehends both and either. To “deliberate” is to examine, weigh and reflect upon the reasons for or against the choice Deliberation thus connotes not only collective discussion, but the collective acquisition and exchange of facts preliminary to the ultimate decision.²¹

The California court then reasoned and ruled:

An informal conference or caucus permits crystallization of secret decisions to a point just short of ceremonial acceptance. There is rarely any purpose to a non-public pre-meeting conference except to conduct some part of the decisional process behind closed doors. Only by embracing the collective inquiry in discussion stages, as well as the ultimate step of official action, can an open meeting regulation frustrate these evasive devices. As operative criteria, formality and informality are alien to the law’s design, exposing it to the very evasions it was designed to prevent. Construed in light of the Brown Act’s objectives, the term “meeting” extends to informal sessions or conferences of board members designed for the discussion of public business.²²

A similar result was reached by the Florida Supreme Court in the case of City of Miami v. Berns wherein the Florida court ruled that public officials violate Florida’s open meeting law when they meet privately or secretly and transact or agree to transact public business at a future time in a certain manner.²³ The Florida court went on to state that, regardless of whether a meeting or gathering is formal or informal, “[i]t is the law’s intent that any meeting, relating to any

²¹ Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors, 69 Cal. Rptr. 480, 485 (Cal. Ct. App. 1968).

²² *Id.* at 487.

²³ City of Miami v. Berns, 245 So.2d 38 (Fla. 1971).

matter on which foreseeable action will be taken, occur openly and publicly.”²⁴

The same considerations must be applied with respect to the Idaho Open Meeting Law. Therefore, it is the opinion of the Attorney General that the provisions of the Open Meeting Law must be complied with whenever a quorum of the members of the governing body of a public agency meets to decide or deliberate on matters which are within the ambit of official business. Those meetings can be formal, informal, or social. So long as a quorum is present and the intent is to deliberate or make a decision, then the meeting must be open.

The requirement that the Open Meeting Law be complied with whenever a quorum of a governing body meets to deliberate or to make a decision should not be evaded by holding smaller meetings with less than a quorum present or by having a go-between contact each of the governing body members to ascertain his/her sentiment.

Question No. 10: Since any meeting of two county commissioners constitutes a quorum under Idaho law, are county commissioners prohibited from having any contact with each other outside of a duly organized open meeting?

Answer: While it is the opinion of the Attorney General that the Open Meeting Law must be complied with whenever a quorum of the members of a governing body of a public agency meet to decide or deliberate on matters which are within the ambit of official business, this Office does not believe that the Legislature intended for the Open Meeting Law to act as a bar to all communications between individual county commissioners outside of open meetings.

Question No. 11: Are adjudicatory deliberations exempt from the Open Meeting Law?

Answer: Only for those agencies expressly exempted. The Open Meeting Law excludes the deliberations of certain agencies (the Board of Tax Appeals, the Public Utilities Commission and the Industrial Commission), in fully submitted adjudicatory proceedings, from the requirement of open public meeting.²⁵ In creating this exemption for

²⁴ *Id.* at 41; *see also* Canney v. Bd. of Pub. Instruction of Alachua Cnty, 278 So.2d 260 (Fla. 1973); Bd. of Pub. Instruction of Broward Cnty v. Doran, 224 So.2d 693 (Fla. 1969).

²⁵ Idaho Code § 74-203(2).

adjudicatory deliberations by only these three agencies, it appears the Legislature intended that non-adjudicatory deliberations at these agencies, and all deliberations at all other agencies—i.e., except for the above-described informal or impromptu discussions of a general nature—must be conducted in a public meeting. Of course, the subject matter under adjudication may be separately identified under the Open Meeting Law as justifying a closed executive session.

Question No. 12: Can I still address questions and comments to a commissioner or board member individually related to a pending matter?

Answer: In other words, as representatives, can I still contact members of a governing body with unsolicited “information or opinion relating to a decision” that is pending before the public agency?²⁶ The Idaho Supreme Court has addressed this specific question.

In Idaho Historic Preservation Council v. City Council of Boise, a divided Court overturned a Boise City Council decision that allowed a corporation to demolish a building in Boise.²⁷ In reviewing an appeal from the City’s Preservation Commission, members of the City Council stated at the public [open] meeting that they had received numerous telephone calls concerning the issue. Although the Court framed the issue in terms of due process, it may also raise open meeting questions.

In overturning the City’s decision, the Court stated:

[W]hen a governing body sits in a quasi-judicial capacity, it must confine its decision to the record produced at the public hearing, and that failing to do so violates procedural due process of law. This Court has also observed that when a governing body deviates from the public record, it essentially conducts a second fact-gathering session without proper notice, a clear violation of due process. Since the substance of the telephone calls received by the members of the City Council was not recorded or disclosed at the public hearing, the Commission had no opportunity to rebut any

²⁶ Idaho Code § 74-202(2).

²⁷ Idaho Historic Pres. Council v. City Council of Boise, 134 Idaho 651, 8 P.3d 646 (2000).

evidence or arguments the City Council may have received from the callers.

Id. at 654, 8 P.3d at 649 (internal citations omitted).

The Court concluded:

This decision does not hold the City Council to a standard of judicial disinterestedness. As explained above, members of the City Council are free to take phone calls from concerned citizens and listen to their opinions and arguments prior to a quasi-judicial proceeding. In order to satisfy due process, however, the identity of the callers must be disclosed, as well as a general description of what each caller said.²⁸

Therefore, in the event that unsolicited information is received and considered by a governing board member, the appropriate action is to disclose the source of the information and the substance of the information so that it may be included within the public record. In sum, any information that you wish to use to form the basis of your decision must be made a part of the public record.

PROCEDURAL REQUIREMENTS OF THE OPEN MEETING LAW

Question No. 13: What are the notice requirements of the Open Meeting Law?

Answer: The Open Meeting Law requires two types of notice: (1) meeting notice and (2) agenda notice. The notice requirements are satisfied by posting meeting notices and agendas in a prominent place at the principal office of the public agency, or, if no such office exists, at the building where the meeting is to be held. The notice for meetings and agendas shall also be posted electronically if the entity maintains an online presence through a website or a social media platform. The Open Meeting Law does not require publication of the notice in a newspaper or advertisement. However, other statutes governing particular entities may require publication of notice.

The Open Meeting Law also requires that notice be posted at specific minimum times prior to the meeting. These times vary,

²⁸ *Id.* at 656, 8 P.3d at 651.

depending on the type of meeting being held. The notice of an executive session must state the authorizing provision of law.

Question No. 14: What are the notice and agenda requirements for a regular meeting?

Answer: For “regular meetings,” the Open Meeting Law requires no less than a five (5) calendar day meeting notice and a forty-eight (48) hour agenda notice, unless otherwise provided by statute.²⁹ Any public agency that holds meetings at regular intervals at least once per calendar month, which are scheduled in advance over the course of the year, may satisfy this notice requirement by posting meeting notices at least once each year of its regular meeting schedule. Agenda notice must still be posted at least 48 hours before the meeting.

Question No. 15: What are the notice and agenda requirements for a special meeting or executive session only meeting?

Answer: For “special meetings,” or when only an “executive session” will be held, meeting and agenda notice must be posted at least twenty-four (24) hours before the meeting, unless an emergency exists. An emergency is a situation which involves injury or damage to persons or property, or immediate financial loss, or the likelihood of such injury, damage or loss, when the notice requirements of the section would make such notice impractical, or increase the likelihood or severity of such injury, damage or loss, and the reason for the emergency is stated at the outset of the meeting. This notice and an accompanying agenda must be given by the secretary or other designee of each public agency to any representative of the news media who has requested notification of such meetings and the secretary must make a good faith effort to provide such advance notification to them of the time and place of each meeting.³⁰

Question No. 16: What must an agenda contain?

Answer: What constitutes an “agenda” to satisfy the posting requirement is not set forth in the Open Meeting Law. However, an “agenda” is defined in Black’s Law Dictionary (9th ed.) as a “list of things to be done, as items to be considered at a meeting, [usually] arranged in order of consideration.” The agenda notice requirement is not satisfied by merely posting a weekly schedule of the governing

²⁹ Idaho Code § 74-204.

³⁰ Idaho Code § 74-204(2) and (3).

board which sets forth the time, place of the meetings, and who is participating. Rather, the notice must specifically set forth the purpose of the meeting and “items of business.” Agenda items should be listed with specificity and not buried in catchall categories such as “director’s report.” An agenda item that requires a vote shall be identified on the agenda as an “action item” to provide notice that action may be taken on that item. Identifying an item as an action item on the agenda does not require a vote to be taken on that item.

Question No. 17: May an agenda be amended after posting?

Answer: Yes. The procedure depends on when the agenda is amended.

More than 48 hours before the start of a meeting (or more than 24 hours before a special meeting), the agenda may be amended simply by posting a new agenda.

Less than 48 hours before the meeting (or less than 24 hours before a special meeting), but before the meeting has started, the agenda may be amended by: (1) posting the new agenda, and (2) making and passing a motion at the meeting to amend the original agenda and stating the good faith reason the new items were not included in the original agenda notice.

After commencement of the meeting, the agenda may be amended to accommodate unforeseen issues, provided that: (1) there is a motion made that states the good faith reason the new item was not on the original agenda, and (2) the motion to amend is adopted by the governing body. Final action may not be taken on an agenda item added after the start of the meeting unless an emergency is declared necessitating action at that meeting. The declaration and justification shall be reflected in the minutes.

To sum up, amending an agenda during a meeting or less than 48 hours before the start of a meeting (24 hours for a special meeting) requires: (1) a motion, (2) a good faith reason why the item was not included in the original agenda, (3) a vote adopting the amended agenda, and (4) a record of the motion and vote in the minutes of the meeting.

Question No. 18: May qualifications or restrictions be placed on the public’s attendance at an open meeting?

Answer: A public agency may adopt reasonable rules and regulations

to ensure the orderly conduct of a public meeting and to ensure orderly behavior on the part of those persons attending the meeting. In Nevens v. City of Chino, a California appellate court nullified a city council measure, which prohibited the use of any tape recorders at city council proceedings.³¹ While acknowledging that the city council had an absolute right to adopt and enforce rules and regulations necessary to protect its public meetings, the court held that the rule prohibiting tape recorders was too arbitrary, capricious, restrictive and unreasonable. A similar holding might be reached if a governing body prohibits the use of cameras if their presence is not in fact disruptive of the conduct of the meeting.

Another limitation is that the body cannot make it practically impossible for the public to be present at a meeting. For example, in Noble v. Kootenai County, a board of commissioners conducted a site visit to a proposed subdivision. When arriving at the site, the board intentionally avoided a group that was gathered near the entrance to the site location and conducted its site visit outside the group's hearing. The court held that this was a violation, stating that "Idaho's open meeting laws are designed to allow the public to be present during agency hearings. At the very least this means that the public must be permitted to get close enough to the hearing body to hear what is being said."³²

In any event, the governing standard is the reasonableness of the rules and regulations. Use of a timed agenda, "heavy gavel" and/or compliance with Robert's Rules of Order or some other procedural guideline may serve to facilitate the orderly conduct of a public meeting.

Question No. 19: Does the Open Meeting Law require the governing body of a public agency to accept public comments and testimony during meetings?

Answer: No. While other statutes, such as the Local Planning Act, may require the solicitation of public comments, the Open Meeting Law does not expressly require the opportunity for public comment.³³

³¹ Nevens v. City of Chino, 44 Cal. Rptr. 50 (Cal. Ct. App. 1965).

³² Noble v. Kootenai County, 148 Idaho 937, 943, 231 P.3d 1034, 1040 (2010) (internal citations omitted).

³³ See Coalition for Responsible Government v. Bonner County, First Judicial District, Bonner County Case No. CV-97-00107 (May 15, 1997) (on file with the Office of the Attorney General).

Question No. 20: May the members of a governing body vote by secret ballot at an open meeting?

Answer: No decision at any meeting of a governing body of a public agency may be made by secret ballot.³⁴

Question No. 21: If a voice vote is used, must the minutes of the meeting reflect the vote of each member of a governing body by name?

Answer: If a voice vote is taken, the minutes of the meeting must reflect the results of all votes, but the minutes need not indicate how each member voted, unless a member of the governing body requests such an indication.³⁵

Question No. 22: May a vote be conducted by written ballots?

Answer: A vote may be conducted by written ballot, but written ballots would not comply with the Open Meeting Law unless the ballots are made available to the public on request and unless the members casting the ballots are identifiable by signature or other discernible means.³⁶ The reason identification of the vote of individual members is treated differently between voice votes and votes by written ballot is that, with respect to voice votes, members of the public in attendance can readily ascertain the vote of individual members of the governing body. In contrast, a vote by written ballot is tantamount to a secret vote, unless such ballot is signed or identifies the name of the voting member.

Question No. 23: What types of records must be maintained under the Open Meeting Law?

Answer: The Open Meeting Law requires that the governing body of a public agency must provide for the taking of written minutes of all of its meetings, but it is not necessary to make a full transcript or recording of the meeting, except as otherwise provided by law.³⁷ These minutes are public records and must be made available to the general public within a reasonable time after the meeting. The minutes must include, at a minimum, the following information:

³⁴ Idaho Code § 74-203(1).

³⁵ Idaho Code § 74-205(1)(c).

³⁶ Attorney General Opinion No. 77-13, 1977 Idaho Att’y Gen. Ann. Rpt. 115.

³⁷ Idaho Code § 74-205(1).

- (a) All members of the governing body present;
- (b) All motions, resolutions, orders, or ordinances proposed and their disposition;
- (c) The results of all votes and, upon the request of a member of the governing body, the vote of each member by name.

Other statutes may provide more specific requirements for particular entities.

In addition, section 74-205(2) provides that minutes of executive sessions must be kept, but they need contain only sufficient detail to identify the purpose and topic of the executive session and do not need to include the disclosure of material or matters that compromise the purpose of the executive session. The minutes pertaining to the executive session, however, must include a reference to the specific statutory subsection authorizing the session.

Question No. 24: Are there any prohibitions on where a public meeting may be held?

Answer: Yes. Section 74-203(3) specifically provides: “A governing body shall not hold a meeting at any place where discrimination on the basis of race, creed, color, sex, age or national origin is practiced.” Thus, for example, a public meeting may not be held at a private club if the private club excludes women from membership, even if women are allowed entrance for the purpose of attending the meeting.

Question No. 25: Does the Open Meeting Law permit holding a meeting by telephone conference call?

Answer: Yes. The Open Meeting Law specifically authorizes the holding of a meeting by telephone conference call. However, at least one member of the governing body or the director or chief administrative officer must be physically present at the meeting location designated in the meeting notice.³⁸ Additionally, the communications among the members of the governing body must be audible to all persons attending the meeting. Care should also be taken to ensure that votes are not made in such a way to permit an illegal secret ballot or vote.

³⁸ Idaho Code § 74-203(5).

Question No. 26: Are discussions conducted via telephones, computers, cell phones (including texting) or other electronic means exempted from the Open Meeting Law?

Answer: As discussed in this manual, the Open Meeting Law applies to the deliberations and discussions between two or more members of a board or commission on some matter which foreseeably will come before that board or commission for action. The use of a telephone to conduct such discussions does not remove the conversation from the requirements of the Open Meeting Law.

Similarly, members of a public board may not use computers or texting to conduct private conversations among themselves about board business. A one-way e-mail or text communication from one city council member to another, when it does not result in the exchange of council members' comments or responses on subjects requiring council action, does not constitute a meeting subject to the Open Meeting Law; however, such e-mail or text communications are public records and must be maintained by the records custodian for public inspection and copying.

SPECIFIC STATUTORY EXEMPTIONS: EXECUTIVE SESSIONS

Question No. 27: What types of meetings may be closed under the Open Meeting Law?

Answer: A closed meeting—that is, an “executive session”—may be held for the reasons listed in § 74-206(1):

- (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; or

(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.

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

This provision enumerates specific and not general statutory exemptions to the requirement of conducting an open meeting. It is the Attorney General's opinion that a public agency cannot conduct an executive session to consider general personnel matters, but can only meet in executive session to consider those specifically enumerated personnel matters found at section 74-206(1)(a) and (b); that is, "to consider hiring a public officer, employee, staff member or individual agent" or "to consider the evaluation, dismissal or disciplining of, or to hear complaints or charges brought against, a public officer, employee, staff member, individual agent or public school student." Additionally, Idaho Code section 74-206(2) specifically directs that the exceptions be construed narrowly. No entity should try to "shoehorn" an issue into an executive session exception.

An executive session may be held to consider acquiring an

interest in real property that is not owned by a public agency. However, an executive session cannot be held for the purpose of acquiring an interest in real property owned by a public agency.³⁹

It should be noted that the Open Meeting Law establishes circumstances where executive sessions are permissible. In other words, the act authorizes, but does not require, closed meetings. In addition, even though certain enumerated matters may be “considered” in an executive session, it must be emphasized that: “[N]o executive session may be held for the purpose of taking any final action or making any final decision.”⁴⁰

It is important to remember that section 74-206(1) sets forth specific procedural steps to be followed to have a valid executive session. *Failure to do so will invalidate any action taken as a result of the executive session. Additionally, it may subject the board members to liability for those actions.* Procedurally, the presiding officer must identify the specific authorization under the Open Meeting Law for the holding of an executive session and at least a two-thirds ($\frac{2}{3}$) vote in favor of the executive session must be recorded in the minutes of the meeting by individual vote.

Question No. 28: What procedure must be followed before an executive session, closed to the public, may be held?

Answer: It must be noted that executive sessions take place only at meetings. Before any executive session may be held, there must be a valid open meeting and a vote to hold an executive session. Every such “meeting” must satisfy the Open Meeting Law’s notice and agenda requirements.⁴¹ If the governing body of a public agency then wishes to consider matters which may legally be considered in a closed meeting, an executive session may be held if two-thirds ($\frac{2}{3}$) of the members vote to hold an executive session. Prior to such vote, the presiding officer must identify the authorization under the Open Meeting Law for the holding of an executive session. Then, when the vote is taken, the individual vote of each member of the governing body must be recorded in the minutes.⁴²

³⁹ Attorney General Opinion No. 81-15, 1981 Idaho Att’y Gen. Ann. Rpt. 161.

⁴⁰ Idaho Code § 74-206(3); Attorney General Opinion No. 77-44, 1977 Idaho Att’y Gen. Ann. Rpt. 226; Attorney General Opinion No. 81-15, 1981 Idaho Att’y Gen. Ann. Rpt. 161.

⁴¹ Idaho Code § 74-204.

⁴² Idaho Code § 74-206(1).

Question No. 29: May legal counsel meet privately with the governing body of a public agency to discuss threatened or pending litigation?

Answer: Yes. Section 74-206(f) expressly provides that an executive session may be held “[t]o 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.”

Question No. 30: Must the governing body’s attorney be present during an executive session?

Answer: Generally, the governing body’s attorney need not be present when the governing body meets in executive session. An exception is an executive session authorized under Idaho Code section 74-206(1)(f): “To communicate with legal counsel for the public agency to discuss the legal ramifications of and legal options for pending litigation, or controversies not yet being litigated but imminently likely to be litigated. The mere presence of legal counsel at an executive session does not satisfy this requirement.” (Of course, the attorney’s “presence” may be facilitated via a telecommunications device.) An executive session under this subsection is solely for the purpose of communicating with legal counsel on pending or probable litigation.

Question No. 31: If a more specific statute requires open meetings and has no provision for executive sessions, is the executive session provision of the Open Meeting Law still applicable?

Answer: Yes. The executive session provision takes precedence over other statutes that may apply to a particular entity. Thus, even if a statute requires all meetings of a governing body to be open, executive sessions may still be held.⁴³

PENALTIES FOR NONCOMPLIANCE

Question No. 32: What is the validity of action taken in violation of the Open Meeting Law?

Answer: If an action, or any deliberation or decision making that leads to an action, occurs at any meeting that fails to comply with the

⁴³ Nelson v. Boundary County, 109 Idaho 205, 706 P.2d 94 (Ct. App. 1985).

provisions of the Open Meeting Law, such an action may be declared null and void by a court.⁴⁴

Any member of the governing body taking such an action, who participates in any such deliberation, decision making, or meeting, is subject to a civil penalty not to exceed two hundred fifty dollars (\$250).⁴⁵ The maximum civil penalty for a subsequent violation is two thousand five hundred dollars (\$2,500).⁴⁶

Any governing body member who knowingly violates a provision of the Open Meeting Law is subject to a civil penalty of not more than one thousand five hundred dollars (\$1,500).⁴⁷

It is the opinion of the Attorney General that the Idaho Legislature intended that such fines be paid by the individual member of the governing body, not the governing body itself.

Question No. 33: Who enforces the Open Meeting Law?

Answer: The Attorney General enforces the Open Meeting Law in relation to the public agencies of state government. County prosecuting attorneys enforce the Open Meeting Law in relation to the local public agencies within their respective jurisdictions.⁴⁸

Any person affected by a violation of the Open Meeting Law is entitled to bring a lawsuit in the magistrates' division of the county in which the public agency normally meets for the purpose of requiring compliance with the provisions of the Open Meeting Law. The lawsuit would ask the court to declare any improper actions void and to enjoin the governing body from violating the Open Meeting Law in the future. Such a lawsuit must be commenced within thirty (30) days of the time of the decision or action that results, in whole or in part, from a meeting that failed to comply with the provisions of the Open Meeting Law. Any other lawsuit must be commenced within one hundred eighty (180) days of the time of the violation.⁴⁹

⁴⁴ Idaho Code § 74-208(1).

⁴⁵ Idaho Code § 74-208(2).

⁴⁶ Idaho Code § 74-208(4).

⁴⁷ Idaho Code § 74-208(3).

⁴⁸ Idaho Code § 74-208(5).

⁴⁹ Idaho Code § 74-208(6).

Question No. 34: If there is a violation of the Open Meeting Law at an early stage in the process, will all subsequent actions be null and void?

Answer: Yes. Section 74-208(1) clearly indicates that an action or any deliberation or decision making that leads to an action, which occurs at any meeting not in compliance with the provisions of the Open Meeting Law, will be null and void. The 1992 Legislature added the “deliberation or decision making that leads to an action” language to the provisions of section 74-208(1). This language clarifies the consequences of a violation under the previous requirement.

The Idaho Supreme Court has held that the procedure for voiding actions taken in violation of the Open Meeting Law must be read literally. Thus, any action may not be declared void if it is not challenged within the thirty-day time limit established by section 74-208(6).⁵⁰

Question No. 35: If a violation of the Open Meeting Law occurs, what can a governing body do to correct the error?

Answer: The governing body should follow the steps outlined in Idaho Code § 74-208(7) to “cure” the violation. A violation is cured by repealing any action taken at an illegal meeting or disregarding deliberations made in violation of the Open Meeting Law. Should it choose to, a governing body may, in a properly noticed meeting, repeat the deliberation or decision that occurred at the illegal meeting.

Question No. 36: Are members of the governing body of a public agency criminally liable for violations of the Open Meeting Law in which they knowingly participate?

Answer: The Open Meeting Law specifically provides civil monetary penalties for violations. The Open Meeting Law does not expressly provide for criminal liability for knowing violations. Nonetheless, it is possible that a member of a governing body may be guilty of a misdemeanor for violations of the Open Meeting Law in which he or she knowingly participates.

Idaho Code Section 18-315 provides:

Every willful omission to perform any duty

⁵⁰ Petersen v. Franklin County, 130 Idaho 176, 938 P.2d 1214 (1997).

enjoined by law upon any public officer, or person holding any public trust or employment, where no special provision shall have been made for the punishment of such delinquency, is punishable as a misdemeanor.

Idaho Code Section 18-317 states:

When an act or omission is declared by a statute to be a public offense and no penalty for the offense is prescribed in any statute, the act or omission is punishable as a misdemeanor.

In Alder v. City Council of City of Culver City, the court considered the California Open Meeting Law (the Brown Act), which included no penalty provisions or provisions for enforcement when violations occur.⁵¹ Relying on two California statutes identical to Idaho Code sections 18-315 and 18-317, the California court ruled that violations of the Open Meeting Law were punishable as misdemeanors even though the Open Meeting Law did not expressly make violations punishable as misdemeanors.

Question No. 37: Do school boards have to comply with the Open Meeting Law?

Answer: Yes. Each school district is governed by a board of trustees or “board”⁵² and all school districts in Idaho, including specially chartered school districts, are under the supervision and control of the State Board of Education.⁵³ State boards and school districts are defined in the Open Meeting Law as a “public agency,”⁵⁴ and as such, are subject to the Open Meeting Laws.⁵⁵

⁵¹ Alder v. City Council of City of Culver City, 7 Cal. Rptr. 805 (Cal. Ct. App. 1960).

⁵² Idaho Code § 33-501.

⁵³ Idaho Code § 33-101.

⁵⁴ Idaho Code §§ 74-202(4)(a) and 74-202(4)(c).

⁵⁵ Idaho Code § 74-203(1).

THE STATUTE

(Idaho Code §§ 74-201 to 74-208)

74-201. Formation of public policy at open meetings. The people of the state of Idaho in creating the instruments of government that serve them, do not yield their sovereignty to the agencies so created. Therefore, the legislature finds and declares that it is the policy of this state that the formation of public policy is public business and shall not be conducted in secret.

74-202. Open public meetings – Definitions. As used in this chapter:

(1) “Decision” means any determination, action, vote or final disposition upon a motion, proposal, resolution, order, ordinance or measure on which a vote of a governing body is required, at any meeting at which a quorum is present, but shall not include those ministerial or administrative actions necessary to carry out a decision previously adopted in a meeting held in compliance with this chapter.

(2) “Deliberation” means the receipt or exchange of information or opinion relating to a decision, but shall not include informal or impromptu discussions of a general nature that do not specifically relate to a matter then pending before the public agency for decision.

(3) “Executive session” means any meeting or part of a meeting of a governing body that is closed to any persons for deliberation on certain matters.

(4) “Public agency” means:

(a) Any state board, committee, council, commission, department, authority, educational institution or other state agency created by or pursuant to statute or executive order of the governor, other than courts and their agencies and divisions, and the judicial council, and the district magistrates commission;

(b) Any regional board, commission, department or authority created by or pursuant to statute;

(c) Any county, city, school district, special district, or other municipal corporation or political subdivision of the state of Idaho;

(d) Any subagency of a public agency created by or

pursuant to statute or executive order of the governor, ordinance, or other legislative act; and

(e) Notwithstanding the language of this subsection, the cybersecurity task force or a committee awarding the Idaho medal of achievement shall not constitute a public agency.

(5) “Governing body” means the members of any public agency that consists of two (2) or more members, with the authority to make decisions for or recommendations to a public agency regarding any matter.

(6) “Meeting” means the convening of a governing body of a public agency to make a decision or to deliberate toward a decision on any matter.

(a) “Regular meeting” means the convening of a governing body of a public agency on the date fixed by law or rule, to conduct the business of the agency.

(b) “Special meeting” is a convening of the governing body of a public agency pursuant to a special call for the conduct of business as specified in the call.

74-203. Governing bodies – Requirement for open public meetings.

(1) Except as provided below, all meetings of a governing body of a public agency shall be open to the public and all persons shall be permitted to attend any meeting except as otherwise provided by this act. No decision at a meeting of a governing body of a public agency shall be made by secret ballot.

(2) Deliberations of the board of tax appeals created in chapter 38, title 63, Idaho Code, the public utilities commission and the industrial commission in a fully submitted adjudicatory proceeding in which hearings, if any are required, have been completed, and in which the legal rights, duties or privileges of a party are to be determined are not required by this act to take place in a meeting open to the public. Such deliberations may, however, be made and/or conducted in a public meeting at the discretion of the agency.

(3) Meetings of the Idaho life and health insurance guaranty association established under chapter 43, title 41, Idaho Code, the Idaho insurance guaranty association established under chapter 36, title 41, Idaho Code, and the surplus line association approved by the director of the Idaho department of insurance as authorized under chapter 12, title 41, Idaho

Code, are not required by this act to take place in a meeting open to the public.

(4) A governing body shall not hold a meeting at any place where discrimination on the basis of race, creed, color, sex, age or national origin is practiced.

(5) All meetings may be conducted using telecommunications devices which enable all members of a governing body participating in the meeting to communicate with each other. Such devices may include, but are not limited to, telephone or video conferencing devices and similar communications equipment. Participation by a member of the governing body through telecommunications devices shall constitute presence in person by such member at the meeting; provided however, that at least one (1) member of the governing body, or the director of the public agency, or the chief administrative officer of the public agency shall be physically present at the location designated in the meeting notice, as required under section 74-204, Idaho Code, to ensure that the public may attend such meeting in person. The communications among members of a governing body must be audible to the public attending the meeting in person and the members of the governing body.

74-204. Notice of meetings – Agendas.

(1) Regular meetings. No less than a five (5) calendar day meeting notice and a forty-eight (48) hour agenda notice shall be given unless otherwise provided by statute. Provided however, that any public agency that holds meetings at regular intervals of at least once per calendar month scheduled in advance over the course of the year may satisfy this meeting notice by giving meeting notices at least once each year of its regular meeting schedule. The notice requirement for meetings and agendas shall be satisfied by posting such notices and agendas in a prominent place at the principal office of the public agency or, if no such office exists, at the building where the meeting is to be held. The notice for meetings and agendas shall also be posted electronically if the entity maintains an online presence through a website or a social media platform.

(2) Special meetings. No special meeting shall be held without at least a twenty-four (24) hour meeting and agenda notice, unless an emergency exists. An emergency is a situation involving injury or damage to persons or property, or immediate financial loss, or the likelihood of such injury, damage or loss, when the notice requirements of this section would make such notice impracticable or increase the likelihood or severity of such injury, damage or loss, and the reason for the emergency is stated at the outset of the meeting. The notice required under this section

shall include at a minimum the meeting date, time, place and name of the public agency calling for the meeting. The secretary or other designee of each public agency shall maintain a list of the news media requesting notification of meetings and shall make a good faith effort to provide advance notification to them of the time and place of each meeting.

(3) Executive sessions. If only an executive session will be held, a twenty-four (24) hour meeting and agenda notice shall be given according to the notice provisions stated in subsection (2) of this section and shall state the reason and the specific provision of law authorizing the executive session.

(4) An agenda shall be required for each meeting. The agenda shall be posted in the same manner as the notice of the meeting. An agenda may be amended, provided that a good faith effort is made to include, in the original agenda notice, all items known to be probable items of discussion. An agenda item that requires a vote shall be identified on the agenda as an “action item” to provide notice that action may be taken on that item. Identifying an item as an action item on the agenda does not require a vote to be taken on that item.

(a) If an amendment to an agenda is made after an agenda has been posted but forty-eight (48) hours or more prior to the start of a regular meeting, or twenty-four (24) hours or more prior to the start of a special meeting, then the agenda is amended upon the posting of the amended agenda.

(b) If an amendment to an agenda is proposed after an agenda has been posted and less than forty-eight (48) hours prior to a regular meeting or less than twenty-four (24) hours prior to a special meeting but prior to the start of the meeting, the proposed amended agenda shall be posted but shall not become effective until a motion is made at the meeting and the governing body votes to amend the agenda.

(c) An agenda may be amended after the start of a meeting upon a motion that states the reason for the amendment and states the good faith reason the agenda item was not included in the original agenda posting. Final action may not be taken on an agenda item added after the start of a meeting unless an emergency is declared necessitating action at that meeting. The declaration and justification shall be reflected in the minutes.

74-205. Written minutes of meetings.

(1) The governing body of a public agency shall provide for the taking of written minutes of all its meetings. Neither a full transcript nor a recording of the meeting is required, except as otherwise provided by law. All minutes shall be available to the public within a reasonable time after the meeting, and shall include at least the following information:

- (a) All members of the governing body present;
- (b) All motions, resolutions, orders, or ordinances proposed and their disposition;
- (c) The results of all votes, and upon the request of a member, the vote of each member, by name.

(2) Minutes pertaining to executive sessions. Minutes pertaining to an executive session shall include a reference to the specific statutory subsection authorizing the executive session and shall also provide sufficient detail to identify the purpose and topic of the executive session but shall not contain information sufficient to compromise the purpose of going into executive session.

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 ($\frac{2}{3}$) 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 which is 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 74-206 (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 majority vote.

74-206A. Negotiations in open session.

(1) All negotiations between a governing body and a labor organization shall be in open session and shall be available for the public to attend. This requirement also applies to negotiations between the governing body's designated representatives and representatives of the labor organization. This requirement shall also apply to meetings with any labor negotiation arbitrators, fact finders, mediators or similar labor dispute meeting facilitators when meeting with both parties to the negotiation at the same time. Provided, however, a governing body or its designated representatives may hold an executive session for the specific purpose of:

(a) Deliberating on a labor contract offer or to formulate a counteroffer; or

(b) Receiving information about a specific employee, when the information has a direct bearing on the issues being negotiated and a reasonable person would conclude that the release of that information would violate that employee's right to privacy.

(2) All documentation exchanged between the parties during negotiations, including all offers, counteroffers and meeting minutes, shall be subject to public writings disclosure laws.

(3) Any other provision of law notwithstanding, including any other provisions to the contrary in sections 33-402 and 74-204, Idaho Code, the governing body shall post notice of all negotiation sessions at the earliest possible time practicable. This shall be done by the governing body by immediately posting notice of the negotiation session on the front page of its official website. If time permits, the governing body shall also post notice within twenty-four (24) hours at its regular meeting physical posting locations.

(4) Public testimony, if any, shall be posted as an agenda item.

74-207. Open legislative meetings required. All meetings of any standing, special or select committee of either house of the legislature of the state of Idaho shall be open to the public at all times, except in extraordinary circumstances as provided specifically in the rules of procedure in either house, and any person may attend any meeting of a standing, special or select committee, but may participate in the committee only with the approval of the committee itself.

74-208. Violations.

(1) If an action, or any deliberation or decision making that leads to an action, occurs at any meeting which fails to comply with the provisions of this chapter, such action shall be null and void.

(2) Any member of the governing body governed by the provisions of this chapter, who conducts or participates in a meeting which violates the provisions of this act shall be subject to a civil penalty not to exceed two hundred fifty dollars (\$250).

(3) Any member of a governing body who knowingly violates the provisions of this chapter shall be subject to a civil penalty not to exceed one thousand five hundred dollars (\$1,500).

(4) Any member of a governing body who knowingly violates any provision of this chapter and who has previously admitted to committing or has been previously determined to have committed a violation pursuant to subsection (3) of this section within the twelve (12) months preceding this subsequent violation shall be subject to a civil penalty not to exceed two thousand five hundred dollars (\$2,500).

(5) The attorney general shall have the duty to enforce this chapter in relation to public agencies of state government, and the prosecuting attorneys of the various counties shall have the duty to enforce this act in relation to local public agencies within their respective jurisdictions. In the event that there is reason to believe that a violation of the provisions of this act has been committed by members of a board of county commissioners or, for any other reason a county prosecuting attorney is deemed disqualified from proceeding to enforce this act, the prosecuting attorney or board of county commissioners shall seek to have a special prosecutor appointed for that purpose as provided in section 31-2603, Idaho Code.

(6) Any person affected by a violation of the provisions of this chapter may commence a civil action in the magistrate division of the district court of the county in which the public agency ordinarily meets, for the purpose of requiring compliance with provisions of this act. No private action brought pursuant to this subsection shall result in the assessment of a civil penalty against any member of a public agency and there shall be no private right of action for damages arising out of any violation of the provisions of this chapter. Any suit brought for the purpose of having an action declared or determined to be null and void pursuant to subsection (1) of this section shall be commenced within thirty (30) days of the time of the decision or action that results, in whole or in part, from a meeting that failed to comply with the provisions of this act. Any other

suit brought under the provisions of this section shall be commenced within one hundred eighty (180) days of the time of the violation or alleged violation of the provisions of this act.

(7) [Curing a violation.]

(a) A violation may be cured by a public agency upon:

(i) The agency's self-recognition of a violation; or

(ii) Receipt by the secretary or clerk of the public agency of written notice of an alleged violation. A complaint filed and served upon the public agency may be substituted for other forms of written notice. Upon notice of an alleged open meeting violation, the governing body shall have fourteen (14) days to respond publicly and either acknowledge the open meeting violation and state an intent to cure the violation or state that the public agency has determined that no violation has occurred and that no cure is necessary. Failure to respond shall be treated as a denial of any violation for purposes of proceeding with any enforcement action.

(b) Following the public agency's acknowledgment of a violation pursuant to paragraph (a)(i) or (a)(ii) of this subsection, the public agency shall have fourteen (14) days to cure the violation by declaring that all actions taken at or resulting from the meeting in violation of this act void.

(c) All enforcement actions shall be stayed during the response and cure period but may recommence at the discretion of the complainant after the cure period has expired.

(d) A cure as provided in this section shall act as a bar to the imposition of the civil penalty provided in subsection (2) of this section. A cure of a violation as provided in subsection (7)(a)(i) of this section shall act as a bar to the imposition of any civil penalty provided in subsection (4) of this section.

**SUMMARY OF DECISIONS INTERPRETING THE IDAHO
OPEN MEETING STATUTE**

IDAHO ATTORNEY GENERAL'S OFFICE

REPORTED DECISIONS

1. Petersen v. Franklin County, 130 Idaho 176, 938 P.2d 1214 (1997) (actions that violate Open Meeting Law that are not challenged within the time limit established by Idaho Code § 67-2347(4) are not void).
2. Student Loan Fund of Idaho, Inc. v. Payette County, 125 Idaho 824, 875 P.2d 236 (Ct. App. 1994) (merely alleging violation of Open Meeting Law, without additionally alleging a specific “palpable injury,” is insufficient to confer standing).
3. Gardner v. Evans, 110 Idaho 925, 719 P.2d 1185 (1986) (an aggrieved party will not prevail in a claim for improper notice under the Open Meeting Law when they cannot demonstrate any disadvantage stemming from the deficient notice).
4. Nelson v. Boundary County, 109 Idaho 205, 706 P.2d 94 (Ct. App. 1985) (Open Meeting Law’s provisions authorizing executive sessions preempt Idaho Code § 31-713’s requirement that all meetings of county commissioners must be public).
5. Gardner v. School Dist. No. 55, 108 Idaho 434, 700 P.2d 56 (1985).
6. Baker v. Ind. School Dist. of Emmett, 107 Idaho 608, 691 P.2d 1223 (1984).
7. State v. City of Hailey, 102 Idaho 511, 633 P.2d 576 (1981).
8. Idaho Water Resources Board v. Kramer, 97 Idaho 535, 548 P.2d 35 (1976).
9. Nelson v. Boundary County, 109 Idaho 205, 706 P.2d 94 (Ct. App. 1985).
10. Idaho Historic Preservation Council v. City Council of Boise, 134 Idaho 651, 8 P.3d 646 (2000).

11. Farrell v. Lemhi County Board of Commissioners, 138 Idaho 378; 64 P.3d 304 (2002).
12. State v. Yzaguirre, 144 Idaho 471, 163 P.3d 1183 (2007).
13. Safe Air For Everyone v. Idaho State Dep't. of Agri., 145 Idaho 164, 177 P.3d 378 (2008).
14. City of McCall v. Buxton, 146 Idaho 656, 201 P.3d 629 (2009).
15. Idaho Press Club, Inc. v. State Legislature of the State, 142 Idaho 640, 132 P.3d 397 (2006).
16. Fox v. Estep, 118 Idaho 454, 797 P.2d 854 (1990).
17. Acheson v. Klauser, 139 Idaho 156, 75 P.3d 210 (Idaho Ct. App. 2003).
18. Noble v. Kootenai County ex rel. Kootenai County Bd. of Comm'rs, 148 Idaho 937, 231 P.3d 1034 (2010), reh'g denied (May 19, 2010).

UNREPORTED DECISIONS

(On File with the Office of Attorney General)

1. Coalition for Responsible Government v. Bonner County, First Judicial District, No. CV-97-00107 (1997)
2. State v. Thorne, et al.; Idaho Fourth Judicial District No. 3L-97763 (1994).
3. Playfair v. S. Lemhi Sch. Dist. 292 Bd. of Trustees, CIV. 09-375, 2010 WL 1138958 (D. Idaho Mar. 20, 2010).
4. Kline v. Power County Board of Commissioners, Idaho Sixth Judicial District No. CV-2011-0248 & CV-2011-0279 (2012).

ATTORNEY GENERAL'S OFFICE ANALYSES

1. Attorney General Opinion No. 08-3, 2008 Idaho Att'y Gen. Ann. Rpt. 42, 2008 WL 4360202.
2. Attorney General Opinion 85-9, 1985 Idaho Att'y Gen. Ann. Rpt. 50, (December 31, 1985) 1985 WL 167852.
3. Attorney General Opinion 89-7, 1989 Idaho Att'y Gen. Ann. Rpt. 61, 1989 WL 4084.

State of Idaho
Office of the Attorney General
OPEN MEETING LAW CHECKLIST
Regular Meetings

Meeting Date and Time: _____

Meeting Location: _____

[Idaho Code § 74-203(4) and (5)]

Before Meeting

- ☐ Meeting Notice posted 5 or more calendar days prior to the meeting date.
[Idaho Code § 74-204(1)]
- ☐ Agenda Notice posted at least 48 hours prior to the meeting.
[Idaho Code § 74-204(1)]
- ☐ Posting of Amended Agenda [Idaho Code § 74-204(4)]

During Meeting

- ☐ First: Any agenda amendments? [Idaho Code § 74-204(4)(b) and (c)]
- ☐ Secretary or other person appointed to take minutes.
[Idaho Code § 74-205(1)]

After Meeting

- ☐ Minutes available to the public within a reasonable time after the meeting.
[Idaho Code § 74-205(1)]

State of Idaho
Office of the Attorney General
OPEN MEETING LAW CHECKLIST
Special Meetings

Meeting Date and Time: _____

Meeting Location: _____

[Idaho Code § 74-203(4) and (5)]

Before Meeting

- ☐ Meeting and Agenda Notice posted **at least 24 hours** prior to the meeting.
[Idaho Code § 74-204(2)]
- ☐ Notification provided to the news media. [Idaho Code § 74-204(2)]
- ☐ Posting of Amended Agenda [Idaho Code § 74-204(4)]

During Meeting

- ☐ First: Any agenda amendments? [Idaho Code § 74-204(4)(b) and (c)]
- ☐ Secretary or other person appointed to take minutes.
[Idaho Code § 74-205(1)]

After Meeting

- ☐ Minutes available to the public within a reasonable time after the meeting.
[Idaho Code § 74-205(1)]

State of Idaho
Office of the Attorney General
OPEN MEETING LAW CHECKLIST
Executive Sessions

Session Date and Time: _____

Session Location: _____

[Idaho Code § 74-203(4) and (5)]

Executive Session Only

- ☐ Meeting and Agenda Notice posted **at least 24 hours** prior to the session.
[Idaho Code § 74-204(3)]
- ☐ Posting of Amended Agenda [Idaho Code § 74-204(4)]

Executive Session During Regular or Special Meeting

- ☐ Motion to enter Executive Session to discuss one of the exemptions listed in Idaho Code § 74-206.
- ☐ $\frac{2}{3}$ vote to enter Executive Session reflected in regular/special meeting minutes. [Idaho Code § 74-206(1)]

During Session

- ☐ First: Any agenda amendments? [Idaho Code § 74-204(4)(b) and (c)]
- ☐ Secretary or other person appointed to take minutes.
[Idaho Code § 74-205(1)]

After Session

- ☐ Minutes must reference statutory subsection authorizing executive session and identify purpose and topic of session. [Idaho Code § 74-205(2)]
- ☐ Minutes available to the public within a reasonable time after the meeting.
[Idaho Code § 74-205(1)]

>> **SAMPLE FORM** <<

Public Agency: _____, Idaho
(name of county, city, district, etc.)

Governing Body: _____
(i.e., "Board of County Commissioners", "City Council", etc.)

Meeting Date, Time and Location: _____

EXECUTIVE SESSION MOTION AND ORDER

_____ (print name), _____ (print title),
MOVES THAT THE BOARD, PURSUANT TO IDAHO CODE § 74-206, CONVENE
IN EXECUTIVE SESSION TO: (identify one or more of the following)

- ☐ Consider personnel matters [Idaho Code § 74-206(1)(a) & (b)]
- ☐ Deliberate regarding an acquisition of an interest in real property [Idaho Code § 74-206(1)(c)]
- ☐ Consider records that are exempt from public disclosure [Idaho Code § 74-206(1)(d)]
- ☐ Consider preliminary negotiations involving matters of trade or commerce in which this governing body is in competition with another governing body [Idaho Code § 74-206(1)(e)]
- ☐ Communicate with legal counsel regarding pending/imminently-likely litigation [Idaho Code § 74-206(1)(f)]
- ☐ Communicate with risk manager/insurer regarding pending/imminently-likely claims [Idaho Code § 74-206(1)(i)]

Purpose/Topic summary (required): _____
AND THE VOTE TO DO SO BY ROLL CALL.

CONVENE AT: _____ ADJOURN AT: _____

	<u>YES</u>	<u>NO</u>	<u>ABSTAIN</u>
_____, Chair (print name)	_____	_____	_____
_____, Member (print name)	_____	_____	_____
_____, Member (print name)	_____	_____	_____

Clerk/Deputy Clerk: _____
(Signature)

>> **SAMPLE FORM** <<

Public Agency: _____, Idaho
(name of county, city, district, etc.)

Governing Body: _____
(i.e., "Board of County Commissioners", "City Council", etc.)

Meeting Date, Time and Location: _____

MOTION AND ORDER TO AMEND AGENDA

(less than 48 hours before regular meeting or 24 hours before special meeting)

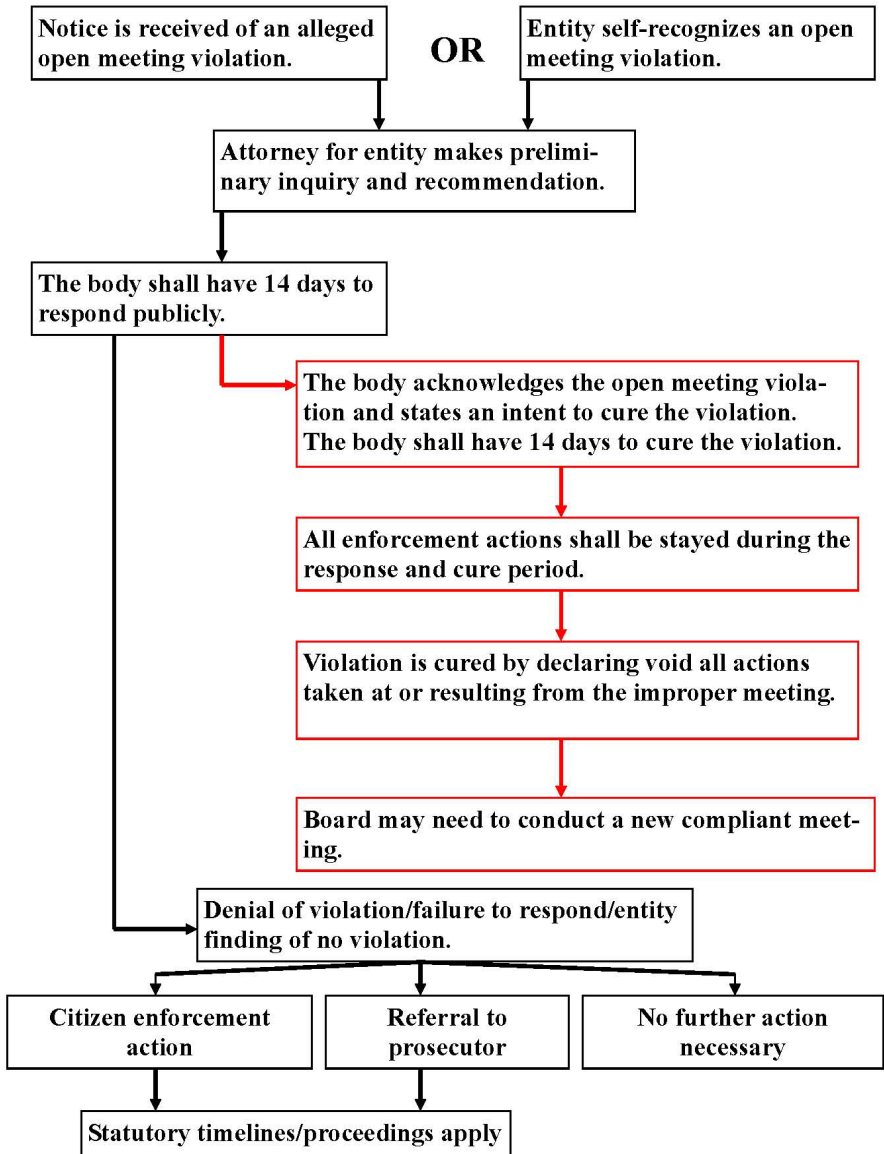
_____, (print name), _____ (print title),
MOVES THAT THIS GOVERNING BODY, PURSUANT TO IDAHO CODE § 74-204,
AMEND THE AGENDA FOR THIS MEETING AS FOLLOWS:

Good faith reason item not included in posted agenda (required):

	<u>YES</u>	<u>NO</u>	<u>ABSTAIN</u>
_____, Chair (print name)	_____	_____	_____
_____, Member (print name)	_____	_____	_____
_____, Member (print name)	_____	_____	_____

Clerk/Deputy Clerk: _____
(Signature)

Curing Process – Idaho Code § 74-208(7)



**Office of the
Attorney General**

Idaho Public Records Law Manual

Idaho Code §§ 74-101 through 74-126



JULY 2020

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State of Idaho Office of Attorney General Lawrence Wasden

INTRODUCTION

Open government is the cornerstone of a free society. The Idaho Legislature affirmed Idaho's commitment to open government by enacting the Idaho public records law in 1990. The public records law protects each citizen's right to monitor the actions of state and local government entities by providing access to government records. The Legislature is continually balancing the competing interests of public access and an individual's right to privacy, through its adoption and amendments to Idaho's public records law. This balance is achieved by exempting (from the disclosure requirement) certain records, or portions thereof.

In 2015, the Legislature re-codified the public records law to provide one place for citizens to find laws relating to government transparency. Those changes are incorporated in this new edition of the Idaho Public Records Law Manual.

One of my duties as Attorney General is to encourage compliance with the Idaho public records law by agencies and officials of state government. The 44 elected county prosecuting attorneys have the same duty with regard to agencies and officials of local government. I am committed to ensuring that public documents are accessible to the public. Toward that end, my office regularly conducts training sessions for state and local officials throughout Idaho.

The Idaho public records law provides for private enforcement. Where an individual or organization is improperly denied access to public records, it is up to the individual to challenge the government agency's refusal to provide access to the record.

Effective private enforcement can occur only when citizens understand their rights. My office has prepared this manual to educate citizens, the news media and government employees about the public

records law. I hope this manual helps in avoiding misunderstandings and protecting the public's legitimate access to government records.

If you have further questions, feel free to call your city or county prosecuting attorney.

Sincerely,

LAWRENCE G. WASDEN
Attorney General

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IDAHO PUBLIC RECORDS LAW

QUESTIONS AND ANSWERS

PURPOSE

Question No. 1: What is the purpose of the Idaho public records law?

Answer: The intent of the law is that all records maintained by state and local government entities be available for public access and copying. At the same time, the Legislature recognized the need to balance this policy of openness against the equally important need for privacy of certain information provided by citizens and businesses that is necessary for the conduct of the government's business.¹ This balance is contained in Idaho Code § 74-102, which states that "all public records in Idaho are open at all reasonable times for inspection except as otherwise expressly provided by statute."

THE STRUCTURE OF THE IDAHO PUBLIC RECORDS LAW

Question No. 2: What does the Idaho public records law provide?

Answer: The law includes definitions and a simple, uniform procedure for inspection and copying of records. Sections 74-104 through 74-111 list the records that are exempt from disclosure.² Finally, more than one hundred sections of existing Idaho Code relating to confidentiality of records are cross-referenced to the law.

PUBLIC BODIES OR AGENCIES COVERED BY THE PUBLIC RECORDS LAW

Question No. 3: What government entities are subject to the public records law?

Answer: The law applies to all "public agencies." Public agency is defined as any state or local agency.³

"Local agency," includes "a county, city, school district, municipal corporation, district, public health district, political

¹ Idaho Code § 74-102.

² Idaho Code §§ 74-104 to 74-111.

³ Idaho Code § 74-101(11).

subdivision, or any agency thereof, or any committee of a local agency, or any combination thereof.”⁴

“State agency,” includes “every state officer, department, division, bureau, commission and board or any committee of a state agency including those in the legislative or judicial branch, except the state militia and the Idaho state historical society library and archives.”⁵

Thus, essentially every entity of state and local government is expected to comply with the Idaho public records law.

Question No. 4: Does the public records law apply to the Governor, the Legislature, and the Judiciary?

Answer: Yes. The definition of “state agency” includes all of the above. The only state entity omitted from coverage of the law is the military division of the governor’s office.⁶

Question No. 5: Are law enforcement entities treated differently by the public records law?

Answer: Yes, to some extent. Section 74-124, relating to the investigatory records of law enforcement agencies, has been in effect since 1986 and is incorporated into the Public Records Law.⁷ It contains the standards under which certain information may be released to the public. Sections 74-124(1) through 74-124(4) provide:

74-124. Exemptions from disclosure – Confidentiality.

(1) Notwithstanding any statute or rule of court to the contrary, nothing in this chapter nor chapter 10, title 59, Idaho Code, shall be construed to require disclosure of investigatory records compiled for law enforcement purposes by a law enforcement agency, but such exemption from disclosure applies only to the extent that the production of such records would:

- (a) Interfere with enforcement proceedings;

⁴ Idaho Code § 74-101(8).

⁵ Idaho Code § 74-101(15).

⁶ *Id.*

⁷ Idaho Code § 74-105(1).

(b) Deprive a person of a right to a fair trial or an impartial adjudication;

(c) Constitute an unwarranted invasion of personal privacy;

(d) Disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement agency in the course of a criminal investigation, confidential information furnished only by the confidential source;

(e) Disclose investigative techniques and procedures;

(f) Endanger the life or physical safety of law enforcement personnel; or

(g) Disclose the identity of a reporting party maintained by any law enforcement entity or the department of health and welfare relating to the investigation of child abuse, neglect or abandonment unless the reporting party consents in writing to the disclosure or the disclosure of the reporting party's identity is required in any administrative or judicial proceeding.

(2) Notwithstanding subsection (1) of this section, any person involved in a motor vehicle collision which is investigated by a law enforcement agency, that person's authorized legal representative and the insurer shall have a right to a complete, unaltered copy of the impact report, or its successors, and the final report prepared by the agency.

(3) An inactive investigatory record shall be disclosed unless the disclosure would violate the provisions of subsection (1)(a) through (g) of this section. Investigatory record as used herein means information with respect to an identifiable person or group of persons compiled by a law enforcement agency in the course of conducting an investigation of a specific act or omission and shall not include the following information:

(a) The time, date, location, and nature and description of a reported crime, accident or incident;

(b) The name, sex, age, and address of a person arrested, except as otherwise provided by law;

(c) The time, date, and location of the incident and of the arrest;

(d) The crime charged;

(e) Documents given or required by law to be given to the person arrested;

(f) Informations and indictments except as otherwise provided by law; and

(g) Criminal history reports.

As used herein, the term “law enforcement agency” means the office of the attorney general, the office of the state controller, the Idaho state police, the office of any prosecuting attorney, sheriff or municipal police department.

(4) Whenever it is made to appear by verified petition to the district court of the county where the records or some part thereof are situated that certain investigative records are being improperly withheld from a member of the public, the court shall order the officer or person charged with withholding the records to disclose the investigative record or show cause why he should not do so. The court shall decide the case after examining the record in camera, papers filed by the parties, and such oral argument and additional evidence as the court may allow.

If the court finds that the public official’s decision to refuse disclosure is not justified, he shall order the public official to make the record public. If the judge determines that the public official was justified in refusing to make the record public, he shall return the item to the public official without disclosing its content with an order supporting the decision refusing disclosure. Any person who fails to obey the order of the court shall be cited to show cause why he is not in contempt of court. The court may, in its discretion, award costs and fees to the prevailing party.⁸

Other entities with law enforcement responsibilities, such as the Department of Fish and Game, have the same confidentiality standards.⁹ “Law enforcement agency” is defined as any state or local agency that is “given law enforcement powers or which has

⁸ Idaho Code §§ 74-124(1-4).

⁹ Idaho Code § 74-105(1).

authority to investigate, enforce, prosecute or punish violations of state or federal criminal statutes, ordinances or regulations.”¹⁰ For further discussion of this topic, *see* Attorney General Opinion No. 86-7.¹¹

Idaho Code now allows the Department of Health and Welfare to disclose records of investigations associated with actions pursuant to the provisions of title 16, chapter 16. This disclosure may occur if it is for reasons of health and safety, in the best interests of the child, or in the public interest. Records dealing with adoptions, however, remain exempt from disclosure.¹²

RECORDS COVERED BY THE LAW

Question No. 6: What are public records?

Answer: “Public record,” as defined by the Idaho Code, is an extremely broad concept.¹³ It “includes, but is not limited to, any writing containing information relating to the conduct or administration of the public’s business prepared, owned, used or retained by any state agency, independent public body corporate and politic or local agency regardless of physical form or characteristics. Provided, however, that personal notes created by a public official solely for his own use shall not be a public record as long as such personal notes are not shared with any other person or entity.”¹⁴

“Writing” means information maintained in many forms, including typewritten or hand written documents as well as pictures, maps, tapes, magnetic or punched cards, and computer media.¹⁵

In 1990, the Idaho Supreme Court held that the Boundary County clerk’s handwritten notes taken during commission meetings were not “a personal notation for random observations or memoranda concerning events undertaken at a meeting,” but were part of her statutory duty to record all proceedings of the commissioners.¹⁶ “Working papers,” “raw notes,” “preliminary

¹⁰ Idaho Code § 74-101(7).

¹¹ 1986 Idaho Att’y Gen. Ann. Rpt. 40.

¹² Idaho Code § 74-105(7).

¹³ Idaho Code § 74-101(13).

¹⁴ *Id.*

¹⁵ Idaho Code § 74-101(16).

¹⁶ Fox v. Estep, 118 Idaho 454 (1990).

drafts” and the like are not necessarily exempt from disclosure.¹⁷

To date, e-mail (electronic mail) and text messaging have not been separately addressed by the Legislature. E-mail and texts are considered public records and are subject to the same laws as any other public record.

Question No. 7: Who are the custodians of public records?

Answer: “Custodian” is defined as the “person having personal custody and control of the public records in question.”¹⁸ “Public agencies shall designate at least one (1) person as custodian to receive public records requests and shall provide an alternate custodian or alternative custodians for contingencies.”¹⁹

Question No. 8: What responsibility does the public agency have for providing access to records?

Answer: The right to inspect and to receive a copy of public records at all reasonable times is absolute unless the record is exempt from disclosure by law.²⁰ In addition, public agencies are required to extend reasonable comfort and facility to the individual requesting public records.²¹

The concept of a “copy” of a public record is comprehensive, including “transcribing by handwriting, photocopying, duplicating machine and reproducing by any other means so long as the public record is not altered or damaged.”²² Additionally, a certified copy, if feasible to produce, must be provided upon request.²³

A public agency may not refuse access to records “by contracting with a nongovernmental body to perform any of its duties or functions.”²⁴ Furthermore, public agencies are required, without exception, to separate exempt information from records when a request is made, and to provide access to the nonexempt

¹⁷ *Id.* at 456.

¹⁸ Idaho Code § 74-101(3).

¹⁹ Idaho Code § 74-119.

²⁰ Idaho Code § 74-102(1).

²¹ Idaho Code § 74-102(6).

²² Idaho Code § 74-101(2).

²³ Idaho Code § 74-102(3).

²⁴ Idaho Code § 74-102(13).

material.²⁵ Agencies are prohibited from denying requests because a record contains both exempt and nonexempt information.²⁶

The law does not require the agency to provide copies of records in a format not used by the agency in the normal course of business.²⁷ For example, the agency need not alphabetize information upon request, or engage the services of a computer programmer to provide the information in a format desired by the requesting party.

Question No. 9: Does the public agency have a responsibility to protect the integrity of records?

Answer: Yes. In Adams County Abstract Co. v. Fisk, a title company wanted to set up its own copier in the county offices in order to make its own records of title documents. There was also a dispute about allowing the title company to copy original documents with its own equipment prior to the microfilming of the records. The Idaho Court of Appeals held that the county recorder could not be compelled to allow private photocopying of public records in the courthouse, that he could reasonably restrict the physical handling of original documents, and he could require that the county's copying equipment be used.²⁸

The concepts of the Adams County case were preserved in the public records law.²⁹ The Idaho Code provides the right to examine public records "at all reasonable times," and the right to receive photographs or other copies "using equipment provided by the public agency or independent public body corporate and politic or using equipment designated by the custodian."³⁰ By this language, the Legislature determined that the public agency may decide, for example, what degree of access would be allowed to its computer system. The Idaho Code also provides that, "[n]othing herein contained shall prevent the custodian from maintaining such vigilance as is required to prevent alteration of any public record while it is being examined."³¹

²⁵ Idaho Code § 74-112.

²⁶ *Id.*

²⁷ Idaho Code § 74-103(1).

²⁸ Adams County Abstract Co. v. Fisk, 117 Idaho 513 (Ct.App. 1990).

²⁹ Idaho Code §§ 74-102(1-2).

³⁰ *Id.*

³¹ Idaho Code § 74-102(7).

Question No. 10: For how long must a public record be retained?

Answer: Idaho's cities³² and counties³³ are governed by statutes that define how records should be classified and retained, as well as the procedure for destruction of public records. State agencies should adopt policies that are consistent with best business practices and generally accepted principles of accounting to classify and retain records. Record retention policies and procedures shall remain consistent with the principles of the Idaho public records law.

Question No. 11: How do I make a public records request?

Answer: A public agency or independent public body corporate and politic may require that a request for public records be submitted to it in writing that specifically describes the subject matter and records sought, including a specific date range for when the records sought were created. The requesting party shall be as specific as possible and provide sufficient detail when requesting records to enable the public body to locate such records with reasonable effort. This writing typically must provide the requester's name, mailing address, e-mail address and telephone number. A request for public records and delivery of the public records may be made by electronic mail.³⁴

Question No. 12: When I make a public records request, what type of response should I expect?

Answer: The public agency or independent public body corporate and politic may provide the requester information to help the requester narrow the scope of the request or to help the requester make the request more specific when the response to the request is likely to be voluminous or require payment as provided in section 74-102(10), Idaho Code.³⁵

Question No. 13: What fees may be charged for the cost of copying public records?

Answer: The concept of the law is that examination and copying of public records is part of the public business, already funded by taxpayers. An agency may establish a copying fee schedule, which "may not exceed the actual cost to the agency of copying the record .

³² Idaho Code § 50-907.

³³ Idaho Code § 31-871.

³⁴ Idaho Code § 74-102(4).

³⁵ Idaho Code § 74-102(9).

. . .”³⁶ The section contains an exception to preserve fees already established by other laws, such as recorders’ fees and fees for court records.³⁷

Some state and local agencies provide information in the form of computer tapes and disks. The law permits charging for the “direct cost of copying the information in that form.”³⁸ The language of the law regarding the cost of providing computer or similar records is rendered somewhat unclear, however, by language, which also allows the agency to collect “the standard cost, if any, for selling the same information in the form of a publication.”³⁹ It is the belief of the attorney general’s office that this language permits a public agency to offer the requested information in an already-printed publication, and to charge the standard cost of selling the publication.

Question No. 14: May the agency recover the cost of mailing or faxing copies of public records?

Answer: The law requires an agency to provide public records to members of the public; the agency is not required to send the records to the person making the request. The law does not prevent the recovery of actual mailing or telecommunications costs if there is a request to mail or fax information to someone.

Question No. 15: What fees may be charged for any labor costs incurred in locating, redacting, copying, and providing access to public records?

Answer: Agencies may establish a fee to recover such labor costs for voluminous or complex requests, or requests that involve locating archival information.⁴⁰

In addition, if an agency must incur additional expense to provide access to records during other than normal working hours, or requires the services of outside contract copying companies, or

³⁶ Idaho Code § 74-102(10)(c).

³⁷ Idaho Code § 74-102(10)(e).

³⁸ Idaho Code § 74-102(10)(d)(i).

³⁹ Idaho Code § 74-102(10)(d)(ii).

⁴⁰ Idaho Code § 74-102(10).

overtime on the part of its own employees, the agency may require advance payment to compensate for this additional expense.⁴¹

Question No. 16: Are all members of the public required to pay copying fees and labor costs?

Answer: Agencies are allowed to waive any cost or fee for copies or labor when the requester demonstrates an inability to pay, when the request “[i]s not primarily in the individual interest of the requester including, but not limited to, the requester’s interest in litigation in which the requester is or may become a party,” and “demonstrates that the requester’s examination and/or copying of public records [i]s likely to contribute significantly to the public’s understanding of the operations or activities of the government.”⁴²

Question No. 17: May the agency require advance payment of fees?

Answer: Agencies are allowed to require advance payment of the costs of copying and labor costs.⁴³

RECORDS EXEMPT FROM DISCLOSURE

Question No. 18: What information is exempt from disclosure under the law?

Answer: With the exception of section 74-124, relating to law enforcement records, most exemptions from disclosure in the public records law are contained in Idaho Code sections 74-104 through 74-111. Even if an exemption applies to a record, the law does not prevent the disclosure of statistical information that identifies a particular person, unless such disclosure is otherwise prohibited by law.⁴⁴

It must be noted that nothing in the law limits the availability of documents and records for discovery in the normal course of judicial or administrative adjudicatory proceedings, subject to the law and rules of evidence and of discovery governing such proceedings.⁴⁵

Personal information such as property values, personal and business addresses, phone numbers, dates of birth, social security

⁴¹ Idaho Code § 74-102(8).

⁴² Idaho Code § 74-102(10)(f).

⁴³ Idaho Code § 74-102(8).

⁴⁴ Idaho Code § 74-102(14).

⁴⁵ Idaho Code § 74-115(3).

and driver's license numbers, or any other identifying numbers or information maintained by the administrator of the unclaimed property law set forth in title 14, chapter 5 is exempt from disclosure. This, however, does not prevent the release of names, last known city of residence, property value ranges and general property information for the purpose of reuniting unclaimed property with its owner.⁴⁶

Also, all information exchanged between the Idaho Transportation Department and insurance companies, any database created, all information contained in the verification system and all reports, responses or other information generated for the purposes of the verification system are now exempt from disclosure.⁴⁷

Question No. 19: What are the law's requirements relating to employee or personnel records?

Answer: There is one standard for disclosure of personnel information for all public employers: required disclosure of a current or former employee's or public official's "employment history, classification, pay grade and step, longevity, gross salary and salary history, including bonuses, severance packages, other compensation or vouchered and unvouchered expenses for which reimbursement was paid, status, workplace and employing agency."⁴⁸ The Legislature acknowledges that there is some loss of privacy when one accepts a position supported by public money.

All other information in an employee's or applicant's personnel file is not available to the public without the written consent of the individual to whom the file pertains. Thus, information of a more personal nature, including home addresses, phone numbers, social security and driver's license numbers, grievance information and the like is not normally disclosed.

All information in an employee's file is accessible to the employee or a designated representative, except for "material used to screen and test for employment."⁴⁹ A similar exemption relating to test questions in licensing, employment, academic or other

⁴⁶ Idaho Code § 74-106(33).

⁴⁷ Idaho Code § 74-106(31).

⁴⁸ Idaho Code § 74-106(1).

⁴⁹ *Id.*

examination situations is in place to protect the integrity of the test results.⁵⁰

In addition, there is a section of the Idaho Code that pertains only to school district employees.⁵¹ This section contradicts, to some extent, the provisions of the public records law on employee records, and provides, in part:

Personnel files are declared to be confidential and excepted from public access under any provision of the Idaho Code, including, but not limited to, sections 74-102 and 59-1009, Idaho Code, provided that each employee or designated representative shall be given access to his own personnel file upon request and shall be provided copies of materials contained therein, with the exception of recommendation letters, in a timely manner upon request.⁵²

Question No. 20: Does the exemption restricting disclosure of most information in a public employee's personnel file apply to applicants for public employment?

Answer: It depends. The exemption covers “[a]ll other personnel information relating to a public employee or applicant”⁵³

In Federated Publications v. Boise City, the Idaho Supreme Court distinguished the terms “public official” and “public employee,” holding that applications and résumés submitted by applicants for a vacant city council seat are subject to disclosure.⁵⁴ However, in Federated Publications, Inc. v. City of Meridian, the Fourth District ruled that the résumés of applicants for an appointed public office do not need to be disclosed under the public records law.⁵⁵ Thus, résumés for a vacant elected office are likely subject to disclosure while those for an unelected employee may not be.

⁵⁰ Idaho Code § 74-108(6).

⁵¹ Idaho Code § 33-518.

⁵² *Id.*

⁵³ Idaho Code § 74-106(1).

⁵⁴ Federated Publications v. Boise City, 128 Idaho 459 (1996).

⁵⁵ Federated Publications v. City of Meridian, Case No. CV OC 97 06708D.

Question No. 21: What are the law's requirements regarding distributing, selling or using lists of persons for mailing or telephone number lists?

Answer: Agencies are prohibited from distributing or selling, for use as a mailing or telephone number list, any list of persons without first securing the permission of those on the list.⁵⁶ Moreover, no list of persons prepared by an agency can be used as a mailing or telephone number list except by the agency or another agency, without first securing permission of those on the list.⁵⁷

Individuals, however, are not prevented from compiling a mailing or telephone number list through their own research by copying public records, original documents or applications, which are otherwise open to public inspection.⁵⁸

Certain agencies and types of records do not fall within the general prohibition: (1) lists of registered electors and lists of names of employees who are within the state of Idaho personnel systems; (2) agencies that issue occupational or professional licenses; (3) public records dealing with motor vehicle registration; (4) certain corporate information lists developed by the secretary of state, business information lists developed by the department of agriculture used to promote food and agricultural products produced in Idaho; (5) lists used for ordinary utility purposes which are requested by a supplier of utility services in the state; (6) lists to be used to give notice required by any statute, ordinance, rule, law or by any governing agency; (7) student directory information used for military recruiting purposes.⁵⁹

There are civil penalties in an amount not in excess of one thousand dollars (\$1,000) to be awarded against a person or public official who has deliberately and in bad faith violated the provisions of section 74-120(1)(a) or 74-120(1)(b).⁶⁰

⁵⁶ Idaho Code § 74-120(1)(a).

⁵⁷ Idaho Code § 74-120(1)(b).

⁵⁸ Idaho Code § 74-120(2).

⁵⁹ Idaho Code §§ 74-120(3-9).

⁶⁰ Idaho Code § 74-120(11).

Question No. 22: May a governmental entity refuse to disclose administrative investigative reports prepared in anticipation of litigation at the direction of its attorney?

Answer: Yes.⁶¹ The Idaho Supreme Court, however, recognized that if the report is merely summarized information that is available in other disclosed public records, it may not be protected from disclosure. If, on the other hand, the record contains information regarding personnel information exempt under Idaho law, or is compiled at the direction of the agency's attorney in anticipation of litigation, the entire record may be exempt from disclosure.

PROCEDURE FOR REQUESTING PUBLIC RECORDS

Question No. 23: Must an individual fill out a written request for inspection or copying of public records?

Answer: Agencies are permitted to require requests for access to public documents be made in writing that specifically describes the subject matter and records sought, including a specific date range for when the records sought were created.⁶² If a written request is required by the public agency, the individual may be required to provide a mailing address and telephone number.⁶³ This information may assist the public agency to clarify a request and provide a document as soon as possible.

Question No. 24: May the agency ask the purpose of the request?

Answer: Public agencies generally are not allowed to ask why a person wants public records.⁶⁴ Moreover, "[t]he custodian shall not review, examine or scrutinize any copy, photograph or memoranda in the possession of any such person. . . ."⁶⁵

Nevertheless, legislators did expect that requests for documents could be discussed. For example, without inquiring why an individual is making a request, a custodian could explain exactly what information is available and allow the person to examine nonexempt documents, so that the person would be better able to

⁶¹ Idaho Code § 74-105(8).

⁶² Idaho Code § 74-102(4).

⁶³ *Id.*

⁶⁴ Idaho Code § 74-102(5).

⁶⁵ Idaho Code § 74-102(6).

describe the requested records.⁶⁶ Further, an inquiry by the agency is allowed in order to make sure its information is not to be used as a mailing or phone list.⁶⁷

Question No. 25: What are the time limits for a public agency to respond to a request for information?

Answer: The intent of the law is that documents be provided upon request whenever possible. A public agency has three (3) working days from the date of the receipt of the request to grant or deny the information.⁶⁸ However, public agencies should not delay three days to provide information that is readily available.

Employees of the public agency are allowed to determine that a longer period of time is needed to locate or retrieve information, notify the individual in writing that more time is needed, and then grant or deny the request in whole or in part within ten (10) working days following the request.⁶⁹ The Legislature believed that these time periods would be adequate in the vast majority of cases, and that individuals would understand that agencies might occasionally need additional time to respond.

Question No. 26: What happens if the agency does not respond?

Answer: If there is no response to the request, it shall be deemed to be denied within ten (10) working days following the request.⁷⁰ The 180-day period to seek court relief begins at that point.⁷¹

DENIAL OF A REQUEST FOR PUBLIC RECORDS

Question No. 27: Who determines if a request for records must be denied?

Answer: “[T]he person legally responsible for administering the public agency or independent public body corporate and politic or that person’s designee” will determine if a request is to be denied in whole or in part.⁷² The public agency is also encouraged to have an

⁶⁶ Idaho Code § 74-102(9).

⁶⁷ Idaho Code § 74-102(5)(b).

⁶⁸ Idaho Code § 74-103(1).

⁶⁹ *Id.*

⁷⁰ Idaho Code § 74-103(2).

⁷¹ Idaho Code § 74-115(1).

⁷² Idaho Code § 74-103(3).

attorney review the request if the information appears to be exempt from disclosure.⁷³

Question No. 28: Must a public agency provide a written denial?

Answer: Yes. It is required that a written denial be provided to the individual requesting the information.⁷⁴ However, failure to respond in writing does not extend the time period for response. It is deemed denied after 10 days.⁷⁵

Question No. 29: What information must a public agency provide if a request is denied?

Answer: The written denial for all or part of a request for information must state the statutory authority for the denial, and include a clear statement of the right to appeal and the time for doing so.⁷⁶

In addition, it is also required that the public agency state “that the attorney for the public agency or independent public body corporate and politic has reviewed the request or shall state that the public agency or independent public body corporate and politic has had an opportunity to consult with an attorney regarding the request for examination or copying of a record and has chosen not to do so.”⁷⁷

It is the opinion of the attorney general’s office that the only legitimate reason for the agency not to consult with an attorney is that the exemption from disclosure is clear. If that is the case, the letter of denial should so state. Above all, if there is *any* doubt about whether the information is exempt from disclosure, it is imperative that the public agency seek legal advice.

Question No. 30: What happens to the requested records if access has been denied?

Answer: The public agency must retain the documents in question until the end of the 180-day period, until a decision has been issued

⁷³ Idaho Code § 74-103(4).

⁷⁴ Idaho Code § 74-103(3).

⁷⁵ Idaho Code § 74-103(2).

⁷⁶ Idaho Code § 74-103(4).

⁷⁷ *Id.*

by the court on an appeal, or for a longer period if required by any other law.⁷⁸

Question No. 31: When a public agency or public official is a party to a proceeding governed by the rules of discovery, may another party to the litigation use the public records law to obtain records instead of complying with the discovery process?

Answer: No. The public records law is not “available to supplement, augment, substitute or supplant discovery procedures” in any criminal appeal, post-conviction civil action, federal or state civil action, or other administrative process governed by the rules of discovery.⁷⁹

PROTEST OF A DENIAL OF A REQUEST FOR PUBLIC RECORDS

Question No. 32: What recourse does an individual have if a request for public records is denied?

Answer: A person aggrieved by the denial of a request for records is authorized to file a petition in the district court of the county where the records or some part of them are located. The petition to compel disclosure of the records must be filed within 180 days from the date of mailing of the denial notice.⁸⁰

Question No. 33: Must public agency appeal processes also be followed?

Answer: No. Some public agencies have internal administrative appeal processes that must normally be followed before an appeal can be taken to court. However, the Legislature determined that there should be one uniform appeal procedure regarding public records. The “sole remedy” for denial of a request is the court process described in the public records law.⁸¹

⁷⁸ Idaho Code § 74-115(2).

⁷⁹ Idaho Code § 74-115(3).

⁸⁰ Idaho Code § 74-115(1).

⁸¹ *Id.*

Question No. 34: What happens once a petition is filed?

Answer: The court must set a time for the public agency to file a response and for a hearing at the earliest possible time, not later than twenty-eight (28) calendar days after the petition is filed.⁸²

The court then has the discretion to examine the documents in chambers, and shall consider the written and oral presentations from the individual requesting the record, as well as those from the public agency.

If the court finds that the records are not exempt from disclosure, the public agency will be required to make them available. If the court finds in favor of the public agency, the records will be returned to the public agency without being disclosed to the individual requesting them.

Question No. 35: May attorney fees and costs be awarded by the court?

Answer: Yes, under certain circumstances. The award of reasonable costs and attorney fees is provided to whichever party prevails, if the court “finds that the request or refusal to provide records was frivolously pursued.”⁸³

INSPECTION AND AMENDMENT OF RECORDS PERTAINING TO AN INDIVIDUAL

Question No. 36: Do individuals have a right to inspect records that pertain to themselves?

Answer: Yes, with some exceptions. Inspection and copying of records pertaining to oneself is permitted, “even if the record is otherwise exempt from public disclosure.” However, there exist some limitations on that access: otherwise exempt investigatory records of a public agency or independent public body corporate and politic if the investigation is ongoing; information that is compiled in reasonable anticipation of a civil action or proceeding, which is not otherwise discoverable; the information relates to adoption records; information which is otherwise exempt from disclosure by statute or court rule; and records of a prisoner maintained by the state or local

⁸² *Id.*

⁸³ Idaho Code § 74-116(2).

agency having custody of the prisoner or formerly having custody of the prisoner or by the commission of pardons and parole.⁸⁴

Question No. 37: What right does an individual involved in a motor vehicle collision have to an unaltered copy of the accident report prepared by a law enforcement agency?

Answer: Individuals involved, as well as their attorney, or insurance company, have the right to a complete, unaltered copy of the impact report and any subsequent final report prepared.⁸⁵

Question No. 38: May individuals request correction of records that pertain to themselves?

Answer: Yes. An individual can make a written request to correct or amend any record maintained by a public agency about that person. Within ten (10) days of the request, the public agency must make the correction, or explain in writing why the request is not granted.⁸⁶

Question No. 39: What happens if a request for correction of a record is denied?

Answer: An individual has the right to protest the denial by using the same appeal procedure as for denial of access to a record, which is to file a petition in district court as described in Questions 30-33.⁸⁷

PENALTIES FOR BAD FAITH NONCOMPLIANCE; IMMUNITY

Question No. 40: Is there any penalty for a public official who refuses to provide a public record?

Answer: A civil penalty of up to \$1,000 can be assessed against a public official who the court finds has deliberately and in bad faith improperly refused a legitimate request for inspection or copying of a public record.⁸⁸

Question No. 41: Is there any protection for a public official who attempts to comply in good faith with the public records law?

⁸⁴ Idaho Code §§ 74-113(3)(a-e).

⁸⁵ Idaho Code § 74-124(2).

⁸⁶ Idaho Code §§ 74-113(2)(a-b).

⁸⁷ Idaho Code § 74-113(2)(b).

⁸⁸ Idaho Code § 74-117.

Answer: Yes. The statute provides immunity for any public agency, public official or custodian from liability for any loss or damage based upon the release of a public record if the individual acted in good faith in attempting to comply with the law. Good faith compliance is best demonstrated by consulting with an attorney whenever there is any doubt whether the information can be disclosed.⁸⁹

⁸⁹ Idaho Code § 74-118.

THE STATUTE

(Idaho Code §§ 74-101 through 74-126)

74-101. Definitions. As used in this chapter:

(1) “Applicant” means any person formally seeking a paid or volunteer position with a public agency. “Applicant” does not include any person seeking appointment to a position normally filled by election.

(2) “Copy” means transcribing by handwriting, photocopying, duplicating machine and reproducing by any other means so long as the public record is not altered or damaged.

(3) “Custodian” means the person or persons having personal custody and control of the public records in question.

(4) “Independent public body corporate and politic” means the Idaho housing and finance association as created in chapter 62, title 67, Idaho Code.

(5) “Inspect” means the right to listen, view and make notes of public records as long as the public record is not altered or damaged.

(6) “Investigatory record” means information with respect to an identifiable person, group of persons or entities compiled by a public agency or independent public body corporate and politic pursuant to its statutory authority in the course of investigating a specific act, omission, failure to act, or other conduct over which the public agency or independent public body corporate and politic has regulatory authority or law enforcement authority.

(7) “Law enforcement agency” means any state or local agency given law enforcement powers or which has authority to investigate, enforce, prosecute or punish violations of state or federal criminal statutes, ordinances or regulations.

(8) “Local agency” means a county, city, school district, municipal corporation, district, public health district, political subdivision, or any agency thereof, or any committee of a local agency, or any combination thereof.

(9) “Person” means any natural person, corporation, partnership, firm, association, joint venture, state or local agency or

any other recognized legal entity.

(10) “Prisoner” means a person who has been convicted of a crime and is either incarcerated or on parole for that crime or who is being held in custody for trial or sentencing.

(11) “Public agency” means any state or local agency as defined in this section.

(12) “Public official” means any state, county, local district, independent public body corporate and politic or governmental official or employee, whether elected, appointed or hired.

(13) “Public record” includes, but is not limited to, any writing containing information relating to the conduct or administration of the public’s business prepared, owned, used or retained by any state agency, independent public body corporate and politic or local agency regardless of physical form or characteristics. Provided, however, that personal notes created by a public official solely for his own use shall not be a public record as long as such personal notes are not shared with any other person or entity.

(14) “Requester” means the person requesting examination and/or copying of public records pursuant to section 74-102, Idaho Code.

(15) “State agency” means every state officer, department, division, bureau, commission and board or any committee of a state agency including those in the legislative or judicial branch, except the state militia and the Idaho state historical society library and archives.

(16) “Writing” includes, but is not limited to, handwriting, typewriting, printing, photostating, photographing and every means of recording, including letters, words, pictures, sounds or symbols or combination thereof, and all papers, maps, magnetic or paper tapes, photographic films and prints, magnetic or punched cards, discs, drums or other documents.

74-102. Public records – Right to examine.

(1) Every person has a right to examine and take a copy of any public record of this state and there is a presumption that all public records in Idaho are open at all reasonable times for inspection except as otherwise expressly provided by statute.

(2) The right to copy public records shall include the right to make photographs or photographic or other copies while the records are in the possession of the custodian of the records using equipment provided by the public agency or independent public body corporate and politic or using equipment designated by the custodian.

(3) Additionally, the custodian of any public record shall give the person, on demand, a certified copy of it if the record is of a nature permitting such copying or shall furnish reasonable opportunity to inspect or copy such record.

(4) A public agency or independent public body corporate and politic may require that a request for public records be submitted to it in a writing that specifically describes the subject matter and records sought, including a specific date range for when the records sought were created. The requesting party shall be as specific as possible when requesting records. A request shall describe records sought in sufficient detail to enable the public body to locate such records with reasonable effort. A request shall also provide the requester's name, mailing address, e-mail address and telephone number. A request for public records and delivery of the public records may be made by electronic mail.

(5) The custodian shall make no inquiry of any person who requests a public record, except:

(a) To verify the identity of the requester in accordance with section 74-113, Idaho Code; or

(b) To ensure that the requested record or information will not be used for purposes of a mailing or telephone list prohibited by section 74-120, Idaho Code, or as otherwise provided by law; or

(c) As required for purposes of protecting personal information from disclosure under chapter 2, title 49, Idaho Code, and federal law.

(6) The custodian shall not review, examine or scrutinize any copy, photograph or memoranda in the possession of any such person and shall extend to the person all reasonable comfort and facility for the full exercise of the right granted under this act.

(7) Nothing herein contained shall prevent the custodian from maintaining such vigilance as is required to prevent alteration of any public record while it is being examined.

(8) Examination of public records under the authority of this section must be conducted during regular office or working hours unless the custodian shall authorize examination of records in other than regular office or working hours. In this event, the persons designated to represent the custodian during such examination shall be entitled to reasonable compensation to be paid to them by the public agency or independent public body corporate and politic having custody of such records, out of funds provided in advance by the person examining such records, at other than regular office or working hours.

(9) The public agency or independent public body corporate and politic may provide the requester information to help the requester narrow the scope of the request or to help the requester make the request more specific when the response to the request is likely to be voluminous or require payment as provided in subsection (10) of this section.

(10) (a) Except for fees that are authorized or prescribed under other provisions of Idaho law, no fee shall be charged for the first two (2) hours of labor in responding to a request for public records, or for copying the first one hundred (100) pages of paper records that are requested.

(b) A public agency or independent public body corporate and politic or public official may establish fees to recover the actual labor and copying costs associated with locating and copying documents if:

(i) The request is for more than one hundred (100) pages of paper records; or

(ii) The request includes records from which nonpublic information must be deleted; or

(iii) The actual labor associated with responding to requests for public records in compliance with the provisions of this chapter exceeds two (2) person hours.

(c) A public agency or independent public body corporate and politic or public official may establish a copying fee schedule. The fee may not exceed the actual cost to the agency of copying the record if another fee is not otherwise provided by law.

(d) For providing a duplicate of a computer tape, computer disc, microfilm or similar or analogous record system containing public record information, a public agency or independent public body corporate and politic or public official may charge a fee, uniform to all persons that does not exceed the sum of the following:

(i) The agency's direct cost of copying the information in that form;

(ii) The standard cost, if any, for selling the same information in the form of a publication;

(iii) The agency's cost of conversion, or the cost of conversion charged by a third party, if the existing electronic record is converted to another electronic form.

(e) Fees shall not exceed reasonable labor costs necessarily incurred in responding to a public records request. Fees, if charged, shall reflect the personnel and quantity of time that are reasonably necessary to process a request. Fees for labor costs shall be charged at the per hour pay rate of the lowest paid administrative staff employee or public official of the public agency or independent public body corporate and politic who is necessary and qualified to process the request. If a request requires redactions to be made by an attorney who is employed by the public agency or independent public body corporate and politic, the rate charged shall be no more than the per hour rate of the lowest paid attorney within the public agency or independent public body corporate and politic who is necessary and qualified to process the public records request. If a request is submitted to a public agency or independent public body corporate and politic that does not have an attorney on staff, and requires redactions by an attorney, the rate shall be no more than the usual and customary rate of the attorney who is retained by the public agency or independent public body corporate and politic for that purpose.

(f) The public agency or independent public body corporate and politic shall not charge any cost or fee for copies or labor when the requester demonstrates that the requester's examination and/or copying of public records:

(i) Is likely to contribute significantly to the public's understanding of the operations or activities of the government;

(ii) Is not primarily in the individual interest of the requester including, but not limited to, the requester's interest in litigation in which the requester is or may become a party; and

(iii) Will not occur if fees are charged because the requester has insufficient financial resources to pay such fees.

(g) Statements of fees by a public agency or independent public body corporate and politic shall be itemized to show the per page costs for copies, and hourly rates of employees and attorneys involved in responding to the request, and the actual time spent on the public records request. No lump sum costs shall be assigned to any public records request.

(11) A requester may not file multiple requests for public records solely to avoid payment of fees. When a public agency or independent public body corporate and politic reasonably believes that one (1) or more requesters is segregating a request into a series of requests to avoid payment of fees authorized pursuant to this section, the public agency or independent public body corporate and politic may aggregate such requests and charge the appropriate fees. The public agency or independent public body corporate and politic may consider the time period in which the requests have been made in its determination to aggregate the related requests. A public agency or independent public body corporate and politic shall not aggregate multiple requests on unrelated subjects from one (1) requester.

(12) The custodian may require advance payment of fees authorized by this section. Any money received by the public agency or independent public body corporate and politic shall be credited to the account for which the expense being reimbursed was or will be charged, and such funds may be expended by the agency as part of its appropriation from that fund. Any portion of an advance payment in excess of the actual costs of labor and copying incurred by the agency in responding to the request shall be returned to the requester.

(13) A public agency or independent public body corporate and politic shall not prevent the examination or copying of a public record by

contracting with a nongovernmental body to perform any of its duties or functions.

(14) Nothing contained herein shall prevent a public agency or independent public body corporate and politic from disclosing statistical information that is descriptive of an identifiable person or persons, unless prohibited by law.

(15) Nothing contained herein shall prevent a public agency or independent public body corporate and politic from providing a copy of a public record in electronic form if the record is available in electronic form and if the person specifically requests an electronic copy.

(16) A public agency, elected official or independent public body corporate and politic shall designate a custodian or custodians for all public records, which includes any public official having custody of, control of, or authorized access to public records and also includes all delegates of such officials, employees or representatives.

74-103. Response to request for examination of public records.

(1) A public agency or independent public body corporate and politic shall either grant or deny a person's request to examine or copy public records within three (3) working days of the date of the receipt of the request for examination or copying. If it is determined by employees of the public agency or independent public body corporate and politic that a longer period of time is needed to locate or retrieve the public records, the public agency or independent public body corporate and politic shall so notify in writing the person requesting to examine or copy the records and shall provide the public records to the person no later than ten (10) working days following the person's request. Provided however, if it is determined the existing electronic record requested will first have to be converted to another electronic format by the agency or by a third party and that such conversion cannot be completed within ten (10) working days, the agency shall so notify in writing the person requesting to examine or copy the records. The agency shall provide the converted public record at a time mutually agreed upon between the agency and the requester, with due consideration given to any limitations that may exist due to the process of conversion or due to the use of a third party to make the conversion.

(2) If the public agency or independent public body corporate and politic fails to respond, the request shall be deemed to be denied within ten (10) working days following the request.

(3) If the public agency or independent public body corporate and politic denies the person's request for examination or copying the public records or denies in part and grants in part the person's request for examination and copying of the public records, the person legally responsible for administering the public agency or independent public body corporate and politic or that person's designee shall notify the person in writing of the denial or partial denial of the request for the public record.

(4) The notice of denial or partial denial shall state that the attorney for the public agency or independent public body corporate and politic has reviewed the request or shall state that the public agency or independent public body corporate and politic has had an opportunity to consult with an attorney regarding the request for examination or copying of a record and has chosen not to do so. The notice of denial or partial denial also shall indicate the statutory authority for the denial and indicate clearly the person's right to appeal the denial or partial denial and the time periods for doing so.

74-104. Records exempt from disclosure — Exemptions in federal or state law – Court files of judicial proceedings. The following records are exempt from disclosure:

(1) Any public record exempt from disclosure by federal or state law or federal regulations to the extent specifically provided for by such law or regulation.

(2) Records contained in court files of judicial proceedings, the disclosure of which is prohibited by or under rules adopted by the Idaho supreme court, but only to the extent that confidentiality is provided under such rules, and any drafts or other working memoranda related to judicial decision-making, provided the provisions of this subsection making records exempt from disclosure shall not apply to the extent that such records or information contained in those records are necessary for a background check on an individual that is required by federal law regulating the sale of firearms, guns or ammunition.

74-105. Records exempt from disclosure — Law enforcement records, investigatory records of agencies, evacuation and emergency response plans, worker's compensation. The following records are exempt from disclosure:

(1) Investigatory records of a law enforcement agency, as defined in section 74-101(7), Idaho Code, under the conditions set forth in section 74-124, Idaho Code.

(2) Juvenile records of a person maintained pursuant to chapter 5, title 20, Idaho Code, except that facts contained in such records shall be furnished upon request in a manner determined by the court to persons and governmental and private agencies and institutions conducting pertinent research studies or having a legitimate interest in the protection, welfare and treatment of the juvenile who is thirteen (13) years of age or younger. If the juvenile is petitioned or charged with an offense which would be a criminal offense if committed by an adult, the name, offense of which the juvenile was petitioned or charged and disposition of the court shall be subject to disclosure as provided in section 20-525, Idaho Code. Additionally, facts contained in any records of a juvenile maintained under chapter 5, title 20, Idaho Code, shall be furnished upon request to any school district where the juvenile is enrolled or is seeking enrollment.

(3) Records of the custody review board of the Idaho department of juvenile corrections, including records containing the names, addresses and written statements of victims and family members of juveniles, shall be exempt from public disclosure pursuant to section 20-533A, Idaho Code.

(4) (a) The following records of the department of correction:

(i) Records of which the public interest in confidentiality, public safety, security and habilitation clearly outweighs the public interest in disclosure as identified pursuant to the authority of the Idaho board of correction under section 20-212, Idaho Code;

(ii) Records that contain any identifying information, or any information that would lead to the identification of any victims or witnesses;

(iii) Records that reflect future transportation or movement of a prisoner;

(iv) Records gathered during the course of the presentence investigation;

(v) Records of a prisoner, as defined in section 74-101(10), Idaho Code, or probationer shall not be disclosed to any other prisoner or probationer.

(b) Records, other than public expenditure records, related to proposed or existing critical infrastructure held by or in the

custody of any public agency only when the disclosure of such information is reasonably likely to jeopardize the safety of persons, property or the public safety. Such records may include emergency evacuation, escape or other emergency response plans, vulnerability assessments, operation and security manuals, plans, blueprints or security codes. For purposes of this paragraph, “system” includes electrical, computer and telecommunication systems, electric power, (including production, generating, transportation, transmission and distribution), heating, ventilation, and air conditioning. For purposes of this subsection, “critical infrastructure” means any system or asset, whether physical or virtual, so vital to the state of Idaho, including its political subdivisions, that the incapacity or destruction of such system or asset would have a debilitating impact on state or national economic security, state or national public health or safety or any combination of those matters.

(c) Records of the commission of pardons and parole shall be exempt from public disclosure pursuant to section 20-213A, Idaho Code, and section 20-223, Idaho Code. Records exempt from disclosure shall also include those containing the names, addresses and written statements of victims.

(5) Voting records of the sexual offender management board. The written record of the vote to classify an offender as a violent sexual predator by each board member in each case reviewed by that board member shall be exempt from disclosure to the public and shall be made available upon request only to the governor, the chairman of the senate judiciary and rules committee, and the chairman of the house of representatives judiciary, rules and administration committee, for all lawful purposes.

(6) Records of the sheriff or Idaho state police received or maintained pursuant to sections 18-3302, 18-3302H and 18-3302K, Idaho Code, relating to an applicant or licensee except that any law enforcement officer and law enforcement agency, whether inside or outside the state of Idaho, may access information maintained in the license record system as set forth in section 18-3302K(16), Idaho Code.

(7) Records of investigations prepared by the department of health and welfare pursuant to its statutory responsibilities dealing with the protection of children, the rehabilitation of youth, adoptions and the commitment of mentally ill persons. For reasons of health and safety, best interests of the child or public interest, the department of health and

welfare may provide for the disclosure of records of investigations associated with actions pursuant to the provisions of chapter 16, title 16, Idaho Code, prepared by the department of health and welfare pursuant to its statutory responsibilities dealing with the protection of children except any such records regarding adoptions shall remain exempt from disclosure.

(8) Records including, but not limited to, investigative reports, resulting from investigations conducted into complaints of discrimination made to the Idaho human rights commission unless the public interest in allowing inspection and copying of such records outweighs the legitimate public or private interest in maintaining confidentiality of such records. A person may inspect and copy documents from an investigative file to which he or she is a named party if such documents are not otherwise prohibited from disclosure by federal law or regulation or state law. The confidentiality of this subsection will no longer apply to any record used in any judicial proceeding brought by a named party to the complaint or investigation, or by the Idaho human rights commission, relating to the complaint of discrimination.

(9) Records containing information obtained by the manager of the Idaho state insurance fund pursuant to chapter 9, title 72, Idaho Code, from or on behalf of employers or employees contained in underwriting and claims for benefits files.

(10) The worker's compensation records of the Idaho industrial commission provided that the industrial commission shall make such records available:

(a) To the parties in any worker's compensation claim and to the industrial special indemnity fund of the state of Idaho; or

(b) To employers and prospective employers subject to the provisions of the Americans with disabilities act, 42 U.S.C. 12112, or other statutory limitations, who certify that the information is being requested with respect to a worker to whom the employer has extended an offer of employment and will be used in accordance with the provisions of the Americans with disabilities act, 42 U.S.C. 12112, or other statutory limitations; or

(c) To employers and prospective employers not subject to the provisions of the Americans with disabilities act, 42 U.S.C. 12112, or other statutory limitations, provided the employer

presents a written authorization from the person to whom the records pertain; or

(d) To others who demonstrate that the public interest in allowing inspection and copying of such records outweighs the public or private interest in maintaining the confidentiality of such records, as determined by a civil court of competent jurisdiction; or

(e) Although a claimant's records maintained by the industrial commission, including medical and rehabilitation records, are otherwise exempt from public disclosure, the quoting or discussing of medical or rehabilitation records contained in the industrial commission's records during a hearing for compensation or in a written decision issued by the industrial commission shall be permitted; provided further, the true identification of the parties shall not be exempt from public disclosure in any written decision issued and released to the public by the industrial commission.

(11) Records of investigations compiled by the commission on aging involving vulnerable adults, as defined in section 18-1505, Idaho Code, alleged to be abused, neglected or exploited.

(12) Criminal history records and fingerprints, as defined in section 67-3001, Idaho Code, and compiled by the Idaho state police. Such records shall be released only in accordance with chapter 30, title 67, Idaho Code.

(13) Records furnished or obtained pursuant to section 41-1019, Idaho Code, regarding termination of an appointment, employment, contract or other insurance business relationship between an insurer and a producer.

(14) Records of a prisoner or former prisoner in the custody of any state or local correctional facility, when the request is made by another prisoner in the custody of any state or local correctional facility.

(15) Except as provided in section 72-1007, Idaho Code, records of the Idaho industrial commission relating to compensation for crime victims under chapter 10, title 72, Idaho Code.

(16) Records or information identifying a complainant maintained by the department of health and welfare pursuant to section 39-3556, Idaho Code, relating to certified family homes, unless the complainant

consents in writing to the disclosure or the disclosure of the complainant's identity is required in any administrative or judicial proceeding.

(17) Records of any certification or notification required by federal law to be made in connection with the acquisition or transfer of a firearm, including a firearm as defined in 26 U.S.C. 5845(a).

(18) The following records of the state public defense commission:

(a) Records containing information protected or exempted from disclosure under the rules adopted by the Idaho supreme court, attorney work product, attorney-client privileged communication, records containing confidential information from an individual about his criminal case or performance of his attorney, or confidential information about an inquiry into an attorney's fitness to represent indigent defendants.

(b) Records related to the administration of the extraordinary litigation fund by the state public defense commission, pursuant to section 19-850(2)(e), Idaho Code, to the extent that such records contain information protected or exempted from disclosure under rules adopted by the Idaho supreme court, attorney work product or attorney-client privileged communication. This exemption does not include the amount awarded based upon an application for extraordinary litigation funds.

(19) Records and information received by the office of the state controller from any local government, state agency and department, or volunteer nongovernmental entity for purposes of entry into the criminal justice integrated data system pursuant to section 19-4803, Idaho Code, and all records created by persons authorized to research and analyze information entered into the criminal justice integrated data system, regardless of whether such records were previously exempted from disclosure or redacted pursuant to state or federal law or court order. This exemption does not apply to projects, reports, and data analyses approved for release by the data oversight council and issued by persons authorized to conduct research and analysis as set forth in chapter 48, title 19, Idaho Code. Records and information relating to the management of the criminal justice integrated data system shall not be exempt from disclosure except as otherwise provided in law.

74-106. Records exempt from disclosure — Personnel records, personal information, health records, professional discipline. The following records are exempt from disclosure:

(1) Except as provided in this subsection, all personnel records of a current or former public official other than the public official's public service or employment history, classification, pay grade and step, longevity, gross salary and salary history, including bonuses, severance packages, other compensation or vouchered and unvouchered expenses for which reimbursement was paid, status, workplace and employing agency. All other personnel information relating to a public employee or applicant including, but not limited to, information regarding sex, race, marital status, birth date, home address and telephone number, social security number, driver's license number, applications, testing and scoring materials, grievances, correspondence and performance evaluations, shall not be disclosed to the public without the employee's or applicant's written consent. Names of applicants to classified or merit system positions shall not be disclosed to the public without the applicant's written consent. Disclosure of names as part of a background check is permitted. Names of the five (5) final applicants to all other positions shall be available to the public. If such group is less than five (5) finalists, then the entire list of applicants shall be available to the public. A public official or authorized representative may inspect and copy his personnel records, except for material used to screen and test for employment.

(2) Retired employees' and retired public officials' home addresses, home telephone numbers and other financial and nonfinancial membership records; active and inactive member financial and membership records and mortgage portfolio loan documents maintained by the public employee retirement system. Financial statements prepared by retirement system staff, funding agents and custodians concerning the investment of assets of the public employee retirement system of Idaho are not considered confidential under this chapter.

(3) Information and records submitted to the Idaho state lottery for the performance of background investigations of employees, lottery retailers and major procurement contractors; audit records of lottery retailers, vendors and major procurement contractors submitted to or performed by the Idaho state lottery; validation and security tests of the state lottery for lottery games; business records and information submitted pursuant to sections 67-7412(8) and (9) and 67-7421(8) and (9), Idaho Code, and such documents and information obtained and held for the purposes of lottery security and investigative action as determined

by lottery rules unless the public interest in disclosure substantially outweighs the private need for protection from public disclosure.

(4) Records of a personal nature as follows:

(a) Records of personal debt filed with a public agency or independent public body corporate and politic pursuant to law;

(b) Personal bank records compiled by a public depositor for the purpose of public funds transactions conducted pursuant to law;

(c) Records of ownership of financial obligations and instruments of a public agency or independent public body corporate and politic, such as bonds, compiled by the public agency or independent public body corporate and politic pursuant to law;

(d) Records, with regard to the ownership of, or security interests in, registered public obligations;

(e) Vital statistics records;

(f) Military records as described in and pursuant to section 65-301, Idaho Code.

(g) Social security numbers; and

(h) The following personal data identifiers for an individual may be disclosed only in the following redacted format:

(i) The initials of any minor children of the individual;

(ii) A date of birth in substantially the following format: “XX/XX/birth year”;

(iii) The last four (4) digits of a financial account number in substantially the following format: “XXXXX1234”;

(iv) The last four (4) digits of a driver’s license number or state-issued personal identification card number in substantially the following format: “XXXXX350F”; and

(v) The last four (4) digits of an employer identification number or business's taxpayer identification number.

(5) Information in an income or other tax return measured by items of income or sales, which is gathered by a public agency for the purpose of administering the tax, except such information to the extent disclosed in a written decision of the tax commission pursuant to a taxpayer protest of a deficiency determination by the tax commission, under the provisions of section 63-3045B, Idaho Code.

(6) Records of a personal nature related directly or indirectly to the application for and provision of statutory services rendered to persons applying for public care for people who are elderly, indigent or have mental or physical disabilities, or participation in an environmental or a public health study, provided the provisions of this subsection making records exempt from disclosure shall not apply to the extent that such records or information contained in those records are necessary for a background check on an individual that is required by federal law regulating the sale of firearms, guns or ammunition.

(7) Employment security information, except that a person may agree, through written, informed consent, to waive the exemption so that a third party may obtain information pertaining to the person, unless access to the information by the person is restricted by subsection (3)(a), (3)(b) or (3)(d) of section 74-113, Idaho Code. Notwithstanding the provisions of section 74-113, Idaho Code, a person may not review identifying information concerning an informant who reported to the department of labor a suspected violation by the person of the employment security law, chapter 13, title 72, Idaho Code, under an assurance of confidentiality. As used in this section and in chapter 13, title 72, Idaho Code, "employment security information" means any information descriptive of an identifiable person or persons that is received by, recorded by, prepared by, furnished to or collected by the department of labor or the industrial commission in the administration of the employment security law.

(8) Any personal records, other than names, business addresses and business phone numbers, such as parentage, race, religion, sex, height, weight, tax identification and social security numbers, financial worth or medical condition submitted to any public agency or independent public body corporate and politic pursuant to a statutory requirement for licensing, certification, permit or bonding.

(9) Unless otherwise provided by agency rule, information obtained as part of an inquiry into a person's fitness to be granted or retain a license, certificate, permit, privilege, commission or position, private association peer review committee records authorized in title 54, Idaho Code. Any agency that has records exempt from disclosure under the provisions of this subsection shall annually make available a statistical summary of the number and types of matters considered and their disposition.

(10) The records, findings, determinations and decisions of any prelitigation screening panel formed under chapters 10 and 23, title 6, Idaho Code.

(11) Complaints received by the board of medicine and investigations and informal proceedings, including informal proceedings of any committee of the board of medicine, pursuant to chapter 18, title 54, Idaho Code, and rules adopted thereunder.

(12) Records of the department of health and welfare or a public health district that identify a person infected with a reportable disease.

(13) Records of hospital care, medical records, including prescriptions, drug orders, records or any other prescription information that specifically identifies an individual patient, prescription records maintained by the board of pharmacy under sections 37-2726 and 37-2730A, Idaho Code, records of psychiatric care or treatment and professional counseling records relating to an individual's condition, diagnosis, care or treatment, provided the provisions of this subsection making records exempt from disclosure shall not apply to the extent that such records or information contained in those records are necessary for a background check on an individual that is required by federal law regulating the sale of firearms, guns or ammunition.

(14) Information collected pursuant to the directory of new hires act, chapter 16, title 72, Idaho Code.

(15) Personal information contained in motor vehicle and driver records that is exempt from disclosure under the provisions of chapter 2, title 49, Idaho Code.

(16) Records of the financial status of prisoners pursuant to subsection (2) of section 20-607, Idaho Code.

(17) Records of the Idaho state police or department of correction received or maintained pursuant to section 19-5514, Idaho Code, relating to DNA databases and databanks.

(18) Records of the department of health and welfare relating to a survey, resurvey or complaint investigation of a licensed nursing facility shall be exempt from disclosure. Such records shall, however, be subject to disclosure as public records as soon as the facility in question has received the report, and no later than the fourteenth day following the date that department of health and welfare representatives officially exit the facility pursuant to federal regulations. Provided however, that for purposes of confidentiality, no record shall be released under this section which specifically identifies any nursing facility resident.

(19) Records and information contained in the registry of immunizations against childhood diseases maintained in the department of health and welfare, including information disseminated to others from the registry by the department of health and welfare.

(20) Records of the Idaho housing and finance association (IHFA) relating to the following:

(a) Records containing personal financial, family, health or similar personal information submitted to or otherwise obtained by the IHFA;

(b) Records submitted to or otherwise obtained by the IHFA with regard to obtaining and servicing mortgage loans and all records relating to the review, approval or rejection by the IHFA of said loans;

(c) Mortgage portfolio loan documents;

(d) Records of a current or former employee other than the employee's duration of employment with the association, position held and location of employment. This exemption from disclosure does not include the contracts of employment or any remuneration, including reimbursement of expenses, of the executive director, executive officers or commissioners of the association. All other personnel information relating to an association employee or applicant including, but not limited to, information regarding sex, race, marital status, birth date, home address and telephone number, applications, testing and scoring materials, grievances, correspondence, retirement plan information and performance evaluations, shall not be disclosed

to the public without the employee's or applicant's written consent. An employee or authorized representative may inspect and copy that employee's personnel records, except for material used to screen and test for employment or material not subject to disclosure elsewhere in the Idaho public records act.

(21) Records of the department of health and welfare related to child support services in cases in which there is reasonable evidence of domestic violence, as defined in chapter 63, title 39, Idaho Code, that can be used to locate any individuals in the child support case except in response to a court order.

(22) Records of the Idaho state bar lawyer assistance program pursuant to chapter 49, title 54, Idaho Code, unless a participant in the program authorizes the release pursuant to subsection (4) of section 54-4901, Idaho Code.

(23) Records and information contained in the time sensitive emergency registry created by chapter 20, title 57, Idaho Code, together with any reports, analyses and compilations created from such information and records.

(24) Records contained in the court files, or other records prepared as part of proceedings for judicial authorization of sterilization procedures pursuant to chapter 39, title 39, Idaho Code.

(25) The physical voter registration application on file in the county clerk's office; however, a redacted copy of said application shall be made available consistent with the requirements of this section. Information from the voter registration card maintained in the statewide voter registration database, including age, will be made available except for the voter's driver's license number, date of birth and, upon a showing that the voter comes within the provisions of subsection (30) of this section or upon showing of good cause by the voter to the county clerk in consultation with the county prosecuting attorney, the physical residence address of the voter. For the purposes of this subsection, good cause shall include the protection of life and property and protection of victims of domestic violence and similar crimes.

(26) File numbers, passwords and information in the files of the health care directive registry maintained by the secretary of state under section 39-4515, Idaho Code, are confidential and shall not be disclosed to any person other than to the person who executed the health care directive or the revocation thereof and that person's legal representatives, to the person who registered the health care directive or revocation

thereof, and to physicians, hospitals, medical personnel, nursing homes, and other persons who have been granted file number and password access to the documents within that specific file.

(27) Records in an address confidentiality program participant's file as provided for in chapter 57, title 19, Idaho Code, other than the address designated by the secretary of state, except under the following circumstances:

(a) If requested by a law enforcement agency, to the law enforcement agency; or

(b) If directed by a court order, to a person identified in the order.

(28) Except as otherwise provided by law relating to the release of information to a governmental entity or law enforcement agency, any personal information including, but not limited to, names, personal and business addresses and phone numbers, sex, height, weight, date of birth, social security and driver's license numbers, or any other identifying numbers and/or information related to any Idaho fish and game licenses, permits and tags unless written consent is obtained from the affected person.

(29) Documents and records related to alternatives to discipline that are maintained by the Idaho board of veterinary medicine under the provisions of section 54-2118(1)(b), Idaho Code, provided the requirements set forth therein are met.

(30) The Idaho residential street address and telephone number of an eligible law enforcement officer and such officer's residing household member(s) as provided for in chapter 58, title 19, Idaho Code, except under the following circumstances:

(a) If directed by a court order, to a person identified in the court order;

(b) If requested by a law enforcement agency, to the law enforcement agency;

(c) If requested by a financial institution or title company for business purposes, to the requesting financial institution or title company; or

(d) If the law enforcement officer provides written permission for disclosure of such information.

(31) All information exchanged between the Idaho transportation department and insurance companies, any database created, all information contained in the verification system and all reports, responses or other information generated for the purposes of the verification system, pursuant to section 49-1234, Idaho Code.

(32) Nothing in this section shall prohibit the release of information to the state controller as the state social security administrator as provided in section 59-1101A, Idaho Code.

(33) Personal information including, but not limited to, property values, personal and business addresses, phone numbers, dates of birth, social security and driver's license numbers or any other identifying numbers or information maintained by the administrator of the unclaimed property law set forth in chapter 5, title 14, Idaho Code. Nothing in this subsection shall prohibit the release of names, last known city of residence, property value ranges and general property information by the administrator for the purpose of reuniting unclaimed property with its owner.

(34) Any personal information collected by the secretary of state, pursuant to section 67-906(1)(b), Idaho Code, for the purpose of allowing individuals to access the statewide electronic filing system authorized in section 67-906, Idaho Code, and any notification e-mail addresses submitted as part of a lobbyist's registration under section 67-6617, Idaho Code, of an employer, client, or designated contact for the purpose of electronic notification of that employer, client, or designated contact of a report filed under section 67-6619, Idaho Code.

74-107. Records exempt from disclosure — Trade secrets, production records, appraisals, bids, proprietary information, tax commission, unclaimed property, petroleum clean water trust fund. The following records are exempt from disclosure:

(1) Trade secrets including those contained in response to public agency or independent public body corporate and politic requests for proposal, requests for clarification, requests for information and similar requests. "Trade secrets" as used in this section means information, including a formula, pattern, compilation, program, computer program, device, method, technique, process, or unpublished or in progress research that:

(a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use; and

(b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

(2) Production records, housing production, rental and financing records, sale or purchase records, catch records, mortgage portfolio loan documents, or similar business records of a private concern or enterprise required by law to be submitted to or inspected by a public agency or submitted to or otherwise obtained by an independent public body corporate and politic. Nothing in this subsection shall limit the use which can be made of such information for regulatory purposes or its admissibility in any enforcement proceeding.

(3) Records relating to the appraisal of real property, timber or mineral rights prior to its acquisition, sale or lease by a public agency or independent public body corporate and politic.

(4) Any estimate prepared by a public agency or independent public body corporate and politic that details the cost of a public project until such time as disclosed or bids are opened, or upon award of the contract for construction of the public project.

(5) Examination, operating or condition reports and all documents relating thereto, prepared by or supplied to any public agency or independent public body corporate and politic responsible for the regulation or supervision of financial institutions including, but not limited to, banks, savings and loan associations, regulated lenders, business and industrial development corporations, credit unions, and insurance companies, or for the regulation or supervision of the issuance of securities.

(6) Records gathered by a local agency or the Idaho department of commerce, as described in chapter 47, title 67, Idaho Code, for the specific purpose of assisting a person to locate, maintain, invest in, or expand business operations in the state of Idaho.

(7) Shipping and marketing records of commodity commissions used to evaluate marketing and advertising strategies and the names and addresses of growers and shippers maintained by commodity commissions.

(8) Financial statements and business information and reports submitted by a legal entity to a port district organized under title 70, Idaho Code, in connection with a business agreement, or with a development proposal or with a financing application for any industrial, manufacturing, or other business activity within a port district.

(9) Names and addresses of seed companies, seed crop growers, seed crop consignees, locations of seed crop fields, variety name and acreage by variety. Upon the request of the owner of the proprietary variety, this information shall be released to the owner. Provided however, that if a seed crop has been identified as diseased or has been otherwise identified by the Idaho department of agriculture, other state departments of agriculture, or the United States department of agriculture to represent a threat to that particular seed or commercial crop industry or to individual growers, information as to test results, location, acreage involved and disease symptoms of that particular seed crop, for that growing season, shall be available for public inspection and copying. This exemption shall not supersede the provisions of section 22-436, Idaho Code, nor shall this exemption apply to information regarding specific property locations subject to an open burning of crop residue pursuant to section 39-114, Idaho Code, names of persons responsible for the open burn, acreage and crop type to be burned, and time frames for burning.

(10) Information obtained from books, records and accounts required in chapter 47, title 22, Idaho Code, to be maintained by the Idaho oilseed commission and pertaining to the individual production records of oilseed growers.

(11) Records of any risk retention or self-insurance program prepared in anticipation of litigation or for analysis of or settlement of potential or actual money damage claims against a public entity and its employees or against the industrial special indemnity fund except as otherwise discoverable under the Idaho or federal rules of civil procedure. These records shall include, but are not limited to, claims evaluations, investigatory records, computerized reports of losses, case reserves, internal documents and correspondence relating thereto. At the time any claim is concluded, only statistical data and actual amounts paid in settlement shall be deemed a public record unless otherwise ordered to be sealed by a court of competent jurisdiction. Provided however, nothing in this subsection is intended to limit the attorney-client privilege or attorney work product privilege otherwise available to any public agency or independent public body corporate and politic.

(12) Records of laboratory test results provided by or retained by the Idaho food quality assurance laboratory. Nothing in this subsection shall limit the use which can be made, or availability of such information if used, for regulatory purposes or its admissibility in any enforcement proceeding.

(13) Reports required to be filed under chapter 13, title 62, Idaho Code, identifying electrical or natural or manufactured gas consumption data for an individual customer or account.

(14) Voluntarily prepared environmental audits, and voluntary disclosures of information submitted on or before December 31, 1997, to an environmental agency, which are claimed to be confidential business information.

(15) Computer programs developed or purchased by or for any public agency or independent public body corporate and politic for its own use. As used in this subsection, “computer program” means a series of instructions or statements which permit the functioning of a computer system in a manner designed to provide storage, retrieval and manipulation of data from the computer system, and any associated documentation and source material that explain how to operate the computer program. Computer program does not include:

(a) The original data including, but not limited to, numbers, text, voice, graphics and images;

(b) Analysis, compilation and other manipulated forms of the original data produced by use of the program; or

(c) The mathematical or statistical formulas that would be used if the manipulated forms of the original data were to be produced manually.

(16) Active investigative records and trademark usage audits of the Idaho potato commission specifically relating to the enforcement of chapter 12, title 22, Idaho Code, until the commencement of formal proceedings as provided by rules of the commission; purchase and sales information submitted to the Idaho potato commission during a trademark usage audit, and investigation or enforcement proceedings. Inactive investigatory records shall be disclosed unless the disclosure would violate the standards set forth in subsections (1)(a) through (f) of section 74-124, Idaho Code. Nothing in this subsection shall limit the use which can be made, or availability of such information if used, for regulatory purposes or its admissibility in any enforcement proceeding.

(17) All records copied or obtained by the director of the department of agriculture or his designee as a result of an inspection pursuant to section 25-3806, Idaho Code, except:

(a) Records otherwise deemed to be public records not exempt from disclosure pursuant to this chapter; and

(b) Inspection reports, determinations of compliance or noncompliance and all other records created by the director or his designee pursuant to section 25-3806, Idaho Code.

(18) All data and information collected by the division of animal industries or the state brand board pursuant to the provisions of section 25-207B, Idaho Code, or rules promulgated thereunder.

(19) Records disclosed to a county official by the state tax commission pursuant to subsection (4)(c) of section 63-3029B, Idaho Code.

(20) Records, data, information and materials collected, developed, generated, ascertained or discovered during the course of academic research at public institutions of higher education if the disclosure of such could reasonably affect the conduct or outcome of the research, or the ability of the public institution of higher education to patent or copyright the research or protect intellectual property.

(21) Records, data, information and materials collected or utilized during the course of academic research at public institutions of higher education provided by any person or entity other than the public institution of higher education or a public agency.

(22) The exemptions from disclosure provided in subsections (20) and (21) of this section shall apply only until the academic research is publicly released, copyrighted or patented, or until the academic research is completed or terminated. At such time, the records, data, information, and materials shall be subject to public disclosure unless: (a) another exemption in this chapter applies; (b) such information was provided to the institution subject to a written agreement of confidentiality; or (c) public disclosure would pose a danger to persons or property.

(23) The exemptions from disclosure provided in subsections (20) and (21) of this section do not include basic information about a particular research project that is otherwise subject to public disclosure, such as the nature of the academic research, the name of the researcher, and the amount and source of the funding provided for the project.

(24) Records of a county assessor, the state tax commission, a county board of equalization or the state board of tax appeals containing the following information: (i) lists of personal property required to be filed pursuant to section 63-302, Idaho Code, and operating statements required to be filed pursuant to section 63-404, Idaho Code; and (ii) confidential commercial or financial information including trade secrets. Except with respect to lists of personal property required to be filed pursuant to section 63-302, Idaho Code, and the operator statements required to be filed pursuant to section 63-404, Idaho Code, it shall be the responsibility of the taxpayer to give notice of its claim to exemption by stamping or marking each page or the first page of each portion of documents so claimed. No records that are exempt pursuant to this subsection shall be disclosed without the consent of the taxpayer except as follows:

(a) To any officer, employee or authorized representative of the state or the United States, under a continuing claim of confidentiality, as necessary to carry out the provisions of state or federal law or when relevant to any proceeding thereunder.

(b) In the publication of statistics or reports as long as the statistics or reports do not reasonably lead to the identification of the specific taxpayer or information submitted by taxpayers exempt pursuant to this subsection.

(c) To the board of tax appeals or the district court as evidence or otherwise in connection with an appeal of the taxpayer's property tax assessment, but only if the board or the court, as applicable, has entered a protective order specifying that the taxpayer information may not be disclosed by any person conducting or participating in the action or proceeding, except as authorized by the board or the court in accordance with applicable law.

(d) Nothing in this subsection shall prevent disclosure of the following information:

(i) Name and mailing address of the property owner;

(ii) A parcel number;

(iii) A legal description of real property;

(iv) The square footage and acreage of real property;

- (v) The assessed value of taxable property;
- (vi) The tax district and the tax rate; and
- (vii) The total property tax assessed.

(25) Results of laboratory tests which have no known adverse impacts to human health conducted by the Idaho state department of agriculture animal health laboratory, related to diagnosis of animal diseases of individual animals or herds, on samples submitted by veterinarians or animal owners unless:

(a) The laboratory test results indicate the presence of a state or federally reportable or regulated disease in animals;

(b) The release of the test results is required by state or federal law; or

(c) The test result is identified as representing a threat to animal or human health or to the livestock industry by the Idaho state department of agriculture or the United States department of agriculture. Nothing in this subsection shall limit the use which can be made, or availability of such information if used, for regulatory purposes or its admissibility in any enforcement proceeding, or the duty of any person to report contagious or infectious diseases as required by state or federal law.

(26) Results of laboratory tests conducted by the Idaho state department of agriculture seed laboratory on samples submitted by seed producers or seed companies. Nothing in this subsection shall limit the use which can be made, or availability of such information pursuant to the provisions of subsections (9) and (10) of section 22-418, Idaho Code.

(27) For policies that are owned by private persons, and not by a public agency of the state of Idaho, records of policies, endorsements, affidavits and any records that discuss policies, endorsements and affidavits that may be required to be filed with or by a surplus line association pursuant to chapter 12, title 41, Idaho Code.

(28) Individual financial statements of a postsecondary educational institution or a proprietary school submitted to the state board of education, its director or a representative thereof, for the purpose of registering the postsecondary educational institution or proprietary school pursuant to section 33-2402 or 33-2403, Idaho Code, or provided

pursuant to an administrative rule of the board adopted pursuant to such sections.

(29) Information submitted by insurance companies pursuant to section 41-612(17), Idaho Code.

(30) Documents, materials or other information submitted to the director of the department of insurance as provided in chapter 64, title 41, Idaho Code.

(31) Reports, information and other materials exempted by chapter 63, title 41, Idaho Code.

(32) Records that identify the method by which the Idaho state tax commission selects tax returns for audit review.

(33) Records that identify the method by which the administrator of the unclaimed property law set forth in chapter 5, title 14, Idaho Code, selects reports for audit review or conducts audit review of such reports and the identity of individuals or entities under audit.

(34) Underwriting and claims records of the Idaho petroleum clean water trust fund obtained pursuant to section 41-4905, 41-4909, 41-4911A, 41-4912, or 41-4912A, Idaho Code. Provided, however, that this subsection shall not prevent the Idaho petroleum clean water trust fund's submittal to the Idaho department of environmental quality or other regulatory agencies of information necessary to satisfy an insured's corrective action requirement under applicable federal or state standards in the event of a release into the environment from a petroleum storage tank; and provided further that nothing in this subsection shall prevent the Idaho petroleum clean water trust fund from providing auditing, reporting, or actuarial information as otherwise required of it pursuant to section 41-4919, 41-4925A, 41-4928, 41-4930, 41-4932, 41-4937, or 41-4938, Idaho Code.

74-108. Exemptions from disclosure — Archaeological, endangered species, libraries, licensing exams. The following records are exempt from disclosure:

(1) Records, maps or other records identifying the location of archaeological or geophysical sites or endangered species, if not already known to the general public.

(2) Archaeological and geologic records concerning exploratory drilling, logging, mining and other excavation, when such records are

required to be filed by statute for the time provided by statute.

(3) Documents and data related to oil and gas production submitted to the department of lands or the oil and gas conservation commission under the provisions of chapter 3, title 47, Idaho Code, provided that the records qualify for confidential status under section 47-327, Idaho Code, under the conditions and for the time provided by statute.

(4) The records of a library which, when examined alone, or when examined with other public records, would reveal the identity of the library patron checking out, requesting, or using an item from a library.

(5) The material of a library, museum or archive which has been contributed by a private person, to the extent of any limitation that is a condition of the contribution.

(6) Test questions, scoring keys, and other data used to administer a licensing examination, employment, academic or other examination or testing procedure before the examination is given if the examination is to be used again. Records establishing procedures for and instructing persons administering, grading or evaluating an examination or testing procedure are included in this exemption, to the extent that disclosure would create a risk that the result might be affected.

(7) Land management plans required for voluntary stewardship agreements entered into pursuant to law and written agreements relating to the conservation of all species of sage grouse entered into voluntarily by owners or occupiers of land with a soil conservation district.

74-109. Records exempt from disclosure — Draft legislation, research, personal communications, personally identifying information, work papers, and draft redistricting plans. The following records are exempt from disclosure:

(1) Records consisting of draft legislation and documents related to draft legislation, including requests for research or analysis submitted to the legislative services office by a member of the Idaho legislature and any documents related to such request.

(2) Records consisting of personal communication by a member of the Idaho legislature or between members of the Idaho legislature that does not relate to the conduct or administration of the public's business.

(3) Personally identifying information relating to a private citizen

contained in a writing to or from a member of the Idaho legislature. As used in this subsection, “private citizen” does not include a lobbyist registered with the office of the secretary of state, public official, or an individual who is communicating on behalf of an organization. As used in this subsection, “public official” has the same meaning as in section 74-101(12), Idaho Code, except that it does not include elected or appointed members of the Idaho legislature and legislative staff.

(4) Records consisting of or that are related to the work papers in the possession of the director of legislative performance evaluations prior to the release of the final performance evaluation.

(5) Records consisting of or that are related to the work papers in the possession of the division of legislative audits prior to release of the related final audit.

(6) Records consisting of draft congressional and legislative redistricting plans and documents specifically related to such draft redistricting plans or research requests submitted to the commission staff by a member of the commission for reapportionment for the purpose of placing such draft redistricting plan into form suitable for presentation to the full membership of the commission, unless the individual commission member having submitted or requested such plans or research agrees to waive the provisions of confidentiality provided by this subsection.

74-110. Exemption from disclosure — Records of court proceedings regarding judicial authorization of abortion procedures for minors. In accordance with section 18-609A, Idaho Code, the following records are exempt from public disclosure: all records contained in court files of judicial proceedings arising under section 18-609A, Idaho Code, are exempt from disclosure.

74-111. Exemption from disclosure — Records related to the uniform securities act. Except as otherwise determined by the director of the department of finance pursuant to section 30-14-607(c), Idaho Code, the following records are exempt from disclosure:

(1) A record obtained or created by the director of the department of finance or a representative of the director in connection with an audit or inspection under section 30-14-411(d), Idaho Code, or an investigation under section 30-14-602, Idaho Code;

(2) A part of a record filed in connection with a registration statement under section 30-14-301, Idaho Code, and sections 30-14-303

through 30-14-305, Idaho Code, or a record under section 30-14-411(d), Idaho Code, that contains trade secrets or confidential information if the person filing the registration statement or report has asserted a claim of confidentiality or privilege that is authorized by law;

(3) A record that is not required to be provided to the director of the department of finance or filed under chapter 14, title 30, Idaho Code, and is provided to the director only on the condition that the record will not be subject to public examination or disclosure;

(4) A nonpublic record received from a person specified in section 30-14-608(a), Idaho Code; and

(5) Any social security number, residential address unless used as a business address, and residential telephone number unless used as a business telephone number, contained in a record that is filed pursuant to chapter 14, title 30, Idaho Code.

74-112. Exempt and nonexempt public records to be separated. If any public record contains material which is not exempt from disclosure as well as material which is exempt from disclosure, the public agency or independent public body corporate and politic shall, upon receipt of a request for disclosure, separate the exempt and nonexempt material and make the nonexempt material available for examination, provided that a denial of a request to copy nonexempt material in a public record shall not be based upon the fact that such nonexempt material is contained in the same public record as the exempt material.

74-113. Access to records about a person by a person.

(1) A person may inspect and copy the records of a public agency or independent public body corporate and politic pertaining to that person, even if the record is otherwise exempt from public disclosure.

(2) A person may request in writing an amendment of any record pertaining to that person. Within ten (10) days of the receipt of the request, the public agency or independent public body corporate and politic shall either:

(a) Make any correction of any portion of the record which the person establishes is not accurate, relevant, or complete; or

(b) Inform the person in writing of the refusal to amend in accordance with the request and the reasons for the refusal, and indicate clearly the person's right to appeal the refusal and the

time period for doing so. The procedures for appealing a refusal to amend shall be the same as those set forth in sections 74-115 and 74-116, Idaho Code, and the court may award reasonable costs and attorney's fees to the prevailing party or parties, if it finds that the request for amendment or refusal to amend was frivolously pursued.

(3) The right to inspect and amend records pertaining to oneself does not include the right to review:

(a) Otherwise exempt investigatory records of a public agency or independent public body corporate and politic if the investigation is ongoing;

(b) Information that is compiled in reasonable anticipation of a civil action or proceeding which is not otherwise discoverable;

(c) The information relates to adoption records;

(d) Information which is otherwise exempt from disclosure by statute or court rule;

(e) Records of a prisoner maintained by the state or local agency having custody of the prisoner or formerly having custody of the prisoner or by the commission of pardons and parole.

74-114. Access to air quality, water quality and hazardous waste records – Protection of trade secrets.

(1) To the extent required by the federal clean air act, the federal clean water act and the resource conservation and recovery act for state primacy over any delegated or authorized programs, even if the record is otherwise exempt from disclosure under this chapter, any person may inspect and copy:

(a) Air pollution emission data;

(b) The content of any title V operating permit;

(c) The name and address of any Idaho pollutant discharge elimination system (IPDES) applicant or permittee;

(d) The content of any IPDES permit;

(e) IPDES permit applications, and information required to be submitted by IPDES application forms, whether the information is submitted on the application forms themselves or in attachments used to supply information required by the application forms;

(f) Effluent data or a standard or limitation, as defined in 40 CFR 2.302;

(g) The name and address of any applicant or permittee for a hazardous waste treatment, storage, or disposal facility permit pursuant to chapter 44, title 39, Idaho Code; and

(h) Any other record required to be provided to or obtained by the department of environmental quality pursuant to the federal clean air act, the federal clean water act and the resource conservation and recovery act, and the implementing state statutes, federal regulations and state rules, unless the record is a trade secret.

(2) For purposes of this section, a record, or a portion of the record, is a “trade secret” if the information contained in the record is a trade secret within the meaning of the Idaho trade secrets act, sections 48-801, et seq., Idaho Code, including commercial or financial information which, if disclosed, could cause substantial competitive harm to the person from whom the record was obtained.

(3) Any record, or portion of a record, provided to or obtained by the department of environmental quality and identified by the person providing the record as a trade secret shall not be disclosed to the public and shall be kept confidential according to the procedures established in this section.

(4) Nothing in this section shall be construed as limiting the disclosure of a trade secret by the department of environmental quality:

(a) To any officer, employee, or authorized representative of the state or the United States, under a continuing claim of confidentiality, as necessary to carry out the provisions of state or federal law, or when relevant to any proceeding thereunder;

(b) As determined necessary by the director of the department of environmental quality (under a continuing confidentiality claim) to protect the public health and safety from imminent and substantial endangerment;

(c) As required by state or federal law, including section 74-115(3), Idaho Code, under a continuing claim of confidentiality and subsection (1) of this section; or

(d) With the consent of the person from whom the record is obtained.

(5) It shall be the responsibility of any person providing a record to the department of environmental quality to give notice of the existence of a trade secret on each page or other portion of information at the time of submittal, and such person shall have the burden of demonstrating that the information is a trade secret.

(6) Notwithstanding the time frames set forth in section 74-103(1), Idaho Code, when a request is made to the department of environmental quality pursuant to the provisions of this chapter for the disclosure of information for which a trade secret claim has been made, and the information has not been demonstrated to be a trade secret to the satisfaction of the director of the department of environmental quality, within three (3) working days of receipt of the request for the disclosure of the information, the department of environmental quality shall provide a written request for substantiation to the person making the confidentiality claim. A response shall be submitted to the department of environmental quality by the person claiming the trade secret protection within ten (10) working days after receipt of the request for substantiation, or the information subject to the claim shall be disclosed without further notice. Upon receipt of a timely response to the request for substantiation, the director of the department of environmental quality shall determine whether the information is a trade secret subject to protection.

(a) If it is determined that the information, or any portion of the information, is a trade secret, within three (3) working days after receipt of the response, the director of the department of environmental quality shall notify the person requesting the information that the request is denied pursuant to subsections (3) and (4) of section 74-103, Idaho Code.

(b) If it is determined that the information, or any portion of the information, is not a trade secret and is, therefore, subject to disclosure, within three (3) working days after receipt of the response, the director of the department of environmental quality shall inform the person making the confidentiality claim of the determination. The decision shall be a final agency action directly appealable, de novo, to the district court of the county

where the records or some part thereof are located. An appeal contesting the decision of the director of the department of environmental quality to release information claimed to be a trade secret shall be filed within ten (10) working days from the date of receipt of the written notice of decision. The information claimed to be a trade secret shall not be disclosed until the period for appeal has expired with no appeal being taken, or a court order has been issued finding that the information is not a trade secret and all appeals of that order have been exhausted.

(7) In any appeal taken pursuant to this section, the court may award reasonable costs and attorney's fees to the prevailing party if it finds the claim of confidentiality or the decision of the director of the department of environmental quality to provide records was frivolously pursued.

(8) The department of environmental quality shall adopt rules which include:

(a) Appropriate measures to safeguard and protect against improper disclosure of trade secrets, including procedures to train all employees on the proper handling of trade secrets; and

(b) Any other provisions necessary to carry out this section.

(9) As it relates to the department of environmental quality, or to agents, contractors, or other representatives of the department, the immunity created in section 74-118, Idaho Code, shall apply only when disclosure of a trade secret is made consistent with this section.

74-115. Proceedings to enforce right to examine or to receive a copy of records — Retention of disputed records.

(1) The sole remedy for a person aggrieved by the denial of a request for disclosure is to institute proceedings in the district court of the county where the records or some part thereof are located, to compel the public agency or independent public body corporate and politic to make the information available for public inspection in accordance with the provisions of this chapter. The petition contesting the public agency's or independent public body corporate and politic's decision shall be filed within one hundred eighty (180) calendar days from the date of mailing of the notice of denial or partial denial by the public agency or independent public body corporate and politic. In cases in which the records requested are claimed as exempt pursuant to section 74-107(1) or

(24), Idaho Code, the petitioner shall be required to name as a party and serve the person or entity that filed or provided such documents to the agency, and such person or entity shall have standing to oppose the request for disclosure and to support the decision of the agency to deny the request. The time for responsive pleadings and for hearings in such proceedings shall be set by the court at the earliest possible time, or in no event beyond twenty-eight (28) calendar days from the date of filing.

(2) The public agency or independent public body corporate and politic shall keep all documents or records in question until the end of the appeal period, until a decision has been rendered on the petition, or as otherwise statutorily provided, whichever is longer.

(3) Nothing contained in this chapter shall limit the availability of documents and records for discovery in the normal course of judicial or administrative adjudicatory proceedings, subject to the law and rules of evidence and of discovery governing such proceedings. Additionally, in any criminal appeal or post-conviction civil action, this chapter shall not make available the contents of prosecution case files where such material has previously been provided to the defendant nor shall this chapter be available to supplement, augment, substitute or supplant discovery procedures in any other federal, civil or administrative proceeding.

74-116. Order of the court – Court costs and attorney fees.

(1) Whenever it appears that certain public records are being improperly withheld from a member of the public, the court shall order the public official charged with withholding the records to disclose the public record or show cause why he should not do so. The court shall decide the case after examining the pleadings filed by the parties and such oral arguments and additional evidence as the court may allow. The court may examine the record in camera in its discretion.

(2) If the court finds that the public official's decision to refuse disclosure is not justified, it shall order the public official to make the requested disclosure. If the court determines that the public official was justified in refusing to make the requested record available, he shall return the item to the public official without disclosing its content and shall enter an order supporting the decision refusing disclosure. In any such action, the court shall award reasonable costs and attorney fees to the prevailing party or parties, if it finds that the request or refusal to provide records was frivolously pursued.

74-117. Additional penalty. If the court finds that a public official has deliberately and in bad faith improperly refused a legitimate request for

inspection or copying, a civil penalty shall be assessed against the public official in an amount not to exceed one thousand dollars (\$1,000), which shall be paid into the general account.

74-118. Immunity. No public agency or independent public body corporate and politic, public official, or custodian shall be liable, nor shall a cause of action exist, for any loss or damage based upon the release of a public record governed by the provisions of this chapter if the public agency or independent public body corporate and politic, public official or custodian acted in good faith in attempting to comply with the provisions of this chapter.

74-119. Agency guidelines. By January 1, 2019, every state agency or independent public body corporate and politic shall adopt guidelines that identify the general subject matter of all public records kept or maintained by the state agency or independent public body corporate and politic, the custodian or custodians, and the physical location of such documents. Public agencies shall designate at least one (1) person as custodian to receive public records requests and shall provide an alternate custodian or alternate custodians for contingencies.

74-120. Prohibition on distribution or sale of mailing or telephone number lists – Penalty.

(1) Except as provided in subsections (2), (3), (4), (5), (6), (7), (8) and (9) of this section, in order to protect the privacy of those who deal with public agencies or an independent public body corporate and politic:

(a) No agency or independent public body corporate and politic may distribute or sell for use as a mailing list or a telephone number list any list of persons without first securing the permission of those on the list; and

(b) No list of persons prepared by the agency or independent public body corporate and politic may be used as a mailing list or a telephone number list except by the agency or independent public body corporate and politic or another agency without first securing the permission of those on the list.

(2) Except as may be otherwise provided in this chapter, this section does not prevent an individual from compiling a mailing list or a telephone number list by examination or copying of public records, original documents or applications which are otherwise open to public inspection.

(3) The provisions of this section do not apply to the lists of registered electors compiled pursuant to title 34, Idaho Code, or to lists of the names of employees governed by chapter 53, title 67, Idaho Code.

(4) The provisions of this section shall not apply to agencies which issue occupational or professional licenses.

(5) This section does not apply to the right of access either by Idaho law enforcement agencies or, by purchase or otherwise, of public records dealing with motor vehicle registration.

(6) This section does not apply to a corporate information list developed by the office of the secretary of state containing the name, address, registered agent, officers and directors of corporations authorized to do business in this state or to a business information list developed by the department of commerce containing the name, address, telephone number or other relevant information of Idaho businesses or individuals requesting information regarding the state of Idaho or to business lists developed by the department of agriculture, division of marketing and development, used to promote food and agricultural products produced in Idaho.

(7) This section does not apply to lists to be used for ordinary utility purposes which are requested by a person who supplies utility services in this state. Ordinary utility purposes, as used in this chapter only, do not include marketing or marketing research.

(8) This section does not apply to lists to be used to give notice required by any statute, ordinance, rule, law or by any governing agency.

(9) This section does not apply to student directory information provided by colleges, universities, secondary schools and school districts to military recruiters for military recruiting purposes pursuant to the requirements of federal laws.

(10) Nothing in this section shall prohibit the release of information to the state controller as the state social security administrator as provided in section 59-1101A, Idaho Code.

(11) If a court finds that a person or public official has deliberately and in bad faith violated the provisions of subsection (1)(a) or (1)(b) of this section, the person or public official shall be liable for a civil penalty assessed by the court in an amount not in excess of one thousand dollars (\$1,000) which shall be paid into the general account.

74-121. Replevin – public records – improper or unlawful transfer or removal.

(1) Public records of the state and/or territory of Idaho are the property of the citizens of the state in perpetuity and they may not be improperly or unlawfully transferred or removed from their proper custodian. For purposes of this section, the terms “public record” and “record,” or plurals thereof, shall have the same meaning as “public record” as provided in section 74-101, Idaho Code.

(2) For the purpose of this section, where public records of a county, local district, or independent public body corporate and politic thereof are involved, all references to the state archivist also refer to any responsible public official or records custodian and all references to the attorney general also refer to county prosecutors.

(3) Whenever the state archivist or their designee has reasonable grounds to believe that records belonging to the state, county, local district, or independent public body corporate and politic thereof, are in the possession of a person or entity not authorized by law to possess those records, and such possession was acquired on or after July 1, 2011, he or she may issue a written notice demanding that person or entity to do either of the following within ten (10) calendar days of receiving the notice:

(a) Return the records to the office of origin or the Idaho state archives; or

(b) Respond in writing and declare why the records do not belong to the state or a local agency.

(4) The notice and demand shall identify the records claimed to belong to the state or local agency with reasonable specificity, and shall specify that the state archivist may undertake legal action to recover the records if the person or entity fails to respond in writing within the required time or does not adequately demonstrate that the records do not belong to the state or a local agency.

(5) If a person or entity that receives a written notice and demand from the state archivist pursuant to this chapter fails to deliver the described records, fails to respond to the notice and demand within the required time, or does not adequately demonstrate that the records do not belong to the state or a local agency, the state archivist may ask the attorney general to petition a court of competent jurisdiction for an order requiring the return of the records.

(6) The court may issue any order necessary to protect the records from destruction, alteration, transfer, conveyance or alienation by the person or entity in possession of the records, and may order that the records be surrendered into the custody of the state archivist pending the court's decision on the petition.

(7) After a hearing, and upon a finding that the specified records are in the possession of a person or entity not authorized by law to possess the records, the court shall order the records to be delivered to the state archivist or other official designated by the court.

(8) If the attorney general recovers a record under this section, the court may award attorney's fees and court costs.

(9) Notwithstanding any other provision of this section, any public record that is in the custody of an organization or institution shall not be subject to the provisions of this section provided:

(a) That professional standards recognized by the society of American archivists for the management and preservation of historical records are maintained; and

(b) Such records are accessible to the public in a manner consistent with this chapter.

(10) When a record is returned pursuant to subsection (3)(a) of this section, upon the request of the person, organization or institution that returned the record, the record custodian that receives the record shall issue to that person, organization or institution a copy or digital image of the record which shall be certified as a true copy of the record that was returned to the state or local agency, and dated on the same day the record was returned.

74-122. Confidentiality language required in this chapter. On and after January 1, 2016, any statute which is added to the Idaho Code and provides for the confidentiality or closure of any public record or class of public records shall be placed in this chapter. Any statute which is added to the Idaho Code on and after January 1, 2016, and which provides for confidentiality or closure of a public record or class of public records and is located at a place other than this chapter shall be null, void and of no force and effect regarding the confidentiality or closure of the public record and such public record shall be open and available to the public for inspection as provided in this chapter.

74-123. Idaho Code is property of the state of Idaho.

(1) The Idaho Code is the property of the state of Idaho, and the state of Idaho and the taxpayers shall be deemed to have a copyright on the Idaho Code. If a person reproduces or distributes the Idaho Code for the purpose of direct or indirect commercial advantage, the person shall owe to the Idaho code commission, as the agent of the state of Idaho, a royalty fee in addition to the fee charged for copying the Idaho Code. Any person who reproduces or distributes the Idaho Code in violation of the provisions of this section, shall be deemed to be an infringer of the state of Idaho's copyright. The Idaho code commission, through the office of the attorney general, is entitled to institute an action for any infringement of that particular right committed while the Idaho code commission or its designated agent has custody of the Idaho Code.

(2) A court having jurisdiction of a civil action arising under this section may grant such relief as it deems appropriate. At any time while an action under this section is pending, the court may order the impounding, on such terms as it deems reasonable, of all copies claimed to have been made or used in violation of the Idaho code commission's copyright pursuant to this section.

(3) An infringer of the state of Idaho's copyright pursuant to this section is liable for any profits the infringer has incurred by obtaining the Idaho Code for commercial purposes or is liable for statutory damages as provided in subsection (4) of this section.

(4) The Idaho code commission, as agent of the copyright owner, may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages for all infringements involved in the action, with respect to the Idaho Code for which any one (1) infringer is liable individually, or for which any two (2) or more infringers are liable jointly and severally, in a sum of not less than two hundred fifty dollars (\$250) or more than ten thousand dollars (\$10,000), as the court considers just.

(5) In any civil action under this section, the court may allow the recovery of full costs by or against any party and may also award reasonable attorney's fees to the prevailing party as part of the costs.

(6) The Idaho code commission is hereby authorized to license and charge fees for the use of the Idaho Code. The Idaho code commission may grant a license for the use of the Idaho Code to a public agency in the state and waive all or a portion of the fees. All fees

recovered by the Idaho code commission shall be deposited in the general account.

74-124. Exemptions from disclosure – Confidentiality.

(1) Notwithstanding any statute or rule of court to the contrary, nothing in this chapter nor chapter 10, title 59, Idaho Code, shall be construed to require disclosure of investigatory records compiled for law enforcement purposes by a law enforcement agency, but such exemption from disclosure applies only to the extent that the production of such records would:

- (a) Interfere with enforcement proceedings;
- (b) Deprive a person of a right to a fair trial or an impartial adjudication;
- (c) Constitute an unwarranted invasion of personal privacy;
- (d) Disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement agency in the course of a criminal investigation, confidential information furnished only by the confidential source;
- (e) Disclose investigative techniques and procedures;
- (f) Endanger the life or physical safety of law enforcement personnel; or
- (g) Disclose the identity of a reporting party maintained by any law enforcement entity or the department of health and welfare relating to the investigation of child abuse, neglect or abandonment unless the reporting party consents in writing to the disclosure or the disclosure of the reporting party's identity is required in any administrative or judicial proceeding.

(2) Notwithstanding subsection (1) of this section, any person involved in a motor vehicle collision which is investigated by a law enforcement agency, that person's authorized legal representative and the insurer shall have a right to a complete, unaltered copy of the impact report, or its successors, and the final report prepared by the agency.

(3) An inactive investigatory record shall be disclosed unless the disclosure would violate the provisions of subsection (1)(a) through (g)

of this section. Investigatory record as used herein means information with respect to an identifiable person or group of persons compiled by a law enforcement agency in the course of conducting an investigation of a specific act or omission and shall not include the following information:

- (a) The time, date, location, and nature and description of a reported crime, accident or incident;
- (b) The name, sex, age, and address of a person arrested, except as otherwise provided by law;
- (c) The time, date, and location of the incident and of the arrest;
- (d) The crime charged;
- (e) Documents given or required by law to be given to the person arrested;
- (f) Informations and indictments except as otherwise provided by law; and
- (g) Criminal history reports.

As used herein, the term “law enforcement agency” means the office of the attorney general, the office of the state controller, the Idaho state police, the office of any prosecuting attorney, sheriff or municipal police department.

(4) Whenever it is made to appear by verified petition to the district court of the county where the records or some part thereof are situated that certain investigative records are being improperly withheld from a member of the public, the court shall order the officer or person charged with withholding the records to disclose the investigative record or show cause why he should not do so. The court shall decide the case after examining the record in camera, papers filed by the parties, and such oral argument and additional evidence as the court may allow.

If the court finds that the public official’s decision to refuse disclosure is not justified, he shall order the public official to make the record public. If the judge determines that the public official was justified in refusing to make the record public, he shall return the item to the public official without disclosing its content with an order supporting the decision refusing disclosure. Any person who fails to obey the order of the court shall be cited to show cause why he is not in contempt of court.

The court may, in its discretion, award costs and fees to the prevailing party.

74-125. Evidence from preliminary hearing – Admission – Requirements.

Prior to admitting into evidence recorded testimony from a preliminary hearing, the court must find that the testimony offered is:

1. Offered as evidence of a material fact and that the testimony is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and

2. That the witness is, after diligent and good faith attempts to locate, unavailable for the hearing; and

3. That at the preliminary hearing, the party against whom the admission of the testimony is sought had an adequate opportunity to prepare and cross-examine the proffered testimony.

74-126. Severability. The provisions of this act are hereby declared to be severable and if any provision of this act or the application of such provision to any person or circumstance is declared invalid for any reason, such declaration shall not affect the validity of remaining portions of this act.

**SUMMARY OF DECISIONS INTERPRETING THE IDAHO
PUBLIC RECORDS STATUTE**

IDAHO ATTORNEY GENERAL'S OFFICE

Reported Decisions

1. Adams County Abstract Co. v. Fisk, 117 Idaho 513, 788 P.2d 1336 (Ct. App. 1990) (title company did not have the right to make photocopies with its own private equipment in the courthouse).

2. Bolger v. Alan G. Lance, Idaho State Attorney General, 137 Idaho 792, 53 P.3d 1211 (2002). (Under the Public Records Law, the office of the Attorney General is considered a law enforcement agency. An individual does not have the right to examine investigatory records about himself during an ongoing investigation.)

3. Cowles Publishing Co. v. Kootenai County Board of Commissioners, 144 Idaho 259, 159 P.3d 896 (2007) (e-mail correspondence, even though of a personal nature, may constitute a public record if it relates to the conduct or administration of public business and provides an explanation for a public official's actions, provided that the document is owned, used, or retained by a public agency).

4. Dalton v. Idaho Dairy Products Comm'n, 107 Idaho 6, 684 P.2d 983 (1994) (list of names of state farmers was a public record subject to disclosure).

5. Federated Publications, Inc. v. Boise City, 128 Idaho 459, 915 P.2d 21 (1996) (under Idaho Code § 9-340(3)(a) [now Idaho Code § 9-340C(1)], the names and resumes of applicants for appointment to a vacancy in city council, and an internal review of a police shooting incident, may be subject to disclosure).

6. Fox v. Estep, 118 Idaho 454, 797 P.2d 854 (1990) (county clerk's "raw notes" of meeting of county commissioners could be public records within the scope of the law).

7. Henry v. Taylor, 152 Idaho 155 (2012) (records regarding prosecuting attorney's private bank account were public records).

8. Hymas v. Meridian Police Dept., 156 Idaho 739, 330 P.3d 1097 (2014) (on going nature of investigation into decedent's death was not a

sufficient basis for police department to categorically deny petitioners' public records request in its entirety).

9. Wade v. Taylor, 156 Idaho 91, 320 P.3d 1250 (2014) (district court lacked statutory authority to limit disclosure of public records to petitioner and his attorney).

10. Ward v. Portneuf Medical Center, Inc., 150 Idaho 501 (2011) (Agency's sale of its medical center to a private entity did not alter status of agency's public records that were subject to disclosure under Public Records Act at time of petitioner's request).

Unreported Decisions

(On File with the Office of Attorney General)

1. APG Media of the Rockies, LLC, dba The Post Register v. Ronald Nate, Case No. CV-2016-435 (7th Dist.-Tingey 2017) (whether a recording of a conversation between legislators should be disclosed as a public record).

2. Benson v. Industrial Comm'n, Case No. 94600 (4th Dist.-Carey 1993) (workers compensation files were medical records exempt under Idaho Code § 9-340(26)); Benson v. Industrial Comm'n, Case No. 94600 (4th Dist.-Carey 1992) (statistical compilations are public records and may be subject to disclosure even though they may be used to blacklist prospective employees).

3. Bingham v. Blackfoot School District #55, Case No. CV-2012-0002123 (7th Dist.-Nye 2012) (whether a school district separation contract is a personnel record exempt from disclosure).

4. Boise State University v. Smith, Case No. 97785 (4th Dist. 1995) (sweeping public records request, subsequently made more specific by the requester, but still "extremely broad," must nonetheless be filled under the public records statute).

5. CNN v. Blaine County, Case No. CV-2014-437 (5th Dist.-Elgee 2014) (whether an agency in charge of a record has the discretion to determine whether disclosure of a particular reported "crime, accident or incident" may be prohibited because disclosure would constitute an "unwarranted invasion of privacy.")

6. Doe v. Garcia, Case No. 95805 (4th Dist.-McKee 1993) (court grants motion to quash subpoena for taking deposition duces tecum, and “does not wish to encourage the practice of using the Prosecutor’s files as a source of preparation for civil lawsuits”).

7. Eugene Television, Inc. v. Montgomery, Case No. 90556 (4th Dist.-Schwartzman 1988) (under Idaho Code § 9-335(1)(e), tape recordings made by police dispatch center were exempt from public records disclosure because disclosure would divulge police investigative techniques used during bank robberies).

8. Federated Publications, Inc. v. Carvino, Case No. 96459 (4th Dist.-Carey 1994) (where state had decided not to prosecute, police reports were subject to disclosure except identifying information relating to witnesses was exempt under Idaho Code § 9-335(1)(c) and all references to mental commitment of the potential defendant were exempt under Idaho Code § 66-348) (internal report of investigation of police shooting exempt as personnel records under Idaho Code § 9-340(3) [now Idaho Code § 9-340C]).

9. Federated Publications, Inc. v. City of Meridian, Case No. 06708 (4th Dist.-McKee 1998) (documents submitted in connection with applications for employment, including application forms or resumes for the position of director of parks and recreation, are exempt under Idaho Code § 9-340(3)(a)[1997] because director does not serve a fixed term, is not elected, is not required to take an oath of office, has no responsibility or authority to set policy and is, therefore, an “employee” as opposed to a “public official”).

10. Federated Publications, Inc. v. Schroeder, Case No. 98036 (4th Dist.-Carey 1994) (assessor’s list subject to disclosure so long as requester complied with Idaho Code § 9-348(1); assessor was required to provide public records only in a reasonable format, not necessarily in the particular format requested).

11. Hampel v. The City of Boise, Case No. 08148 (4th Dist.-Neville 2011) (examining the law enforcement exemption to the Public Records Act).

12. Howe v. City of Boise, Case No. 98224 (4th Dist.-Carey 1995) (city could designate county as its public records custodian under Idaho Code § 9-338(9)) (county could ask the identity of the person making the request) (under Idaho Code § 9-335, county properly deleted identifying information from accident reports disclosed, except for certain names,

sex, ages, and addresses of persons who were arrested, which should have been disclosed).

13. Idaho Press Club, Inc. v. Ada County, Case No. CV 01-19-16277 (4th Dist.-Bail) (A public record can only be withheld if there is a clear and statutorily-grounded justification.)

14. In re: Petition of Elaine Maybury, Case No. 95412 (4th Dist.-Newhouse 1992) (initial police report was exempt under Idaho Code § 9-335(2)(a), but affidavits received by police after initial investigation were subject to disclosure).

15. Lepin v. Hall, Case No. 92780 (4th Dist.-Schwartzman 1990) (requested criminal file exempt under Idaho Code § 9-335(1)(c) because public disclosure would not shed “light on a governmental agency’s performance of its statutory obligations,” and would constitute an unwarranted invasion of personal privacy).

Attorney General’s Office Analyses

1. Attorney General Opinion No. 95-06, October 26, 1995 (under Idaho Code § 9-343(3) an exemption from disclosure under public records law does not limit the requirement to comply with a subpoena issued in an administrative adjudicatory proceeding and compelling the production of public records).

2. Attorney General’s Legal Guideline, March 7, 1996 (draft minutes and tape recordings of the meetings of state regulatory boards are “public records” under public records statute, whether or not the board has approved or reviewed the records).

3. Attorney General’s Legal Guideline, October 5, 1995 (membership list of Idaho Historical Society was public record but excluded from disclosure in this case under Idaho Code § 9-348).

4. Attorney General’s Legal Guideline, August 9, 1995 (draft administrative rules in the possession of administrative rules coordinator are “public records” under public records statute and, under Idaho Code § 9-338(8), access to the record may not be restricted by charging a fee beyond the copying cost).

5. Attorney General’s Legal Guideline, January 25, 1993 (city may not pass ordinance to allow it to charge a fee in excess of actual cost of reproducing requested public records despite the “otherwise provided by law” language of Idaho Code § 9-338(8)).

Memorandum

To: Idaho Water Resource Board

From: Brian Patton

Date: May 12, 2021

Re: Bear River Planning Model Presentation



Hydrology staff will present the Bear River Planning Model. They may provide materials at the meeting.

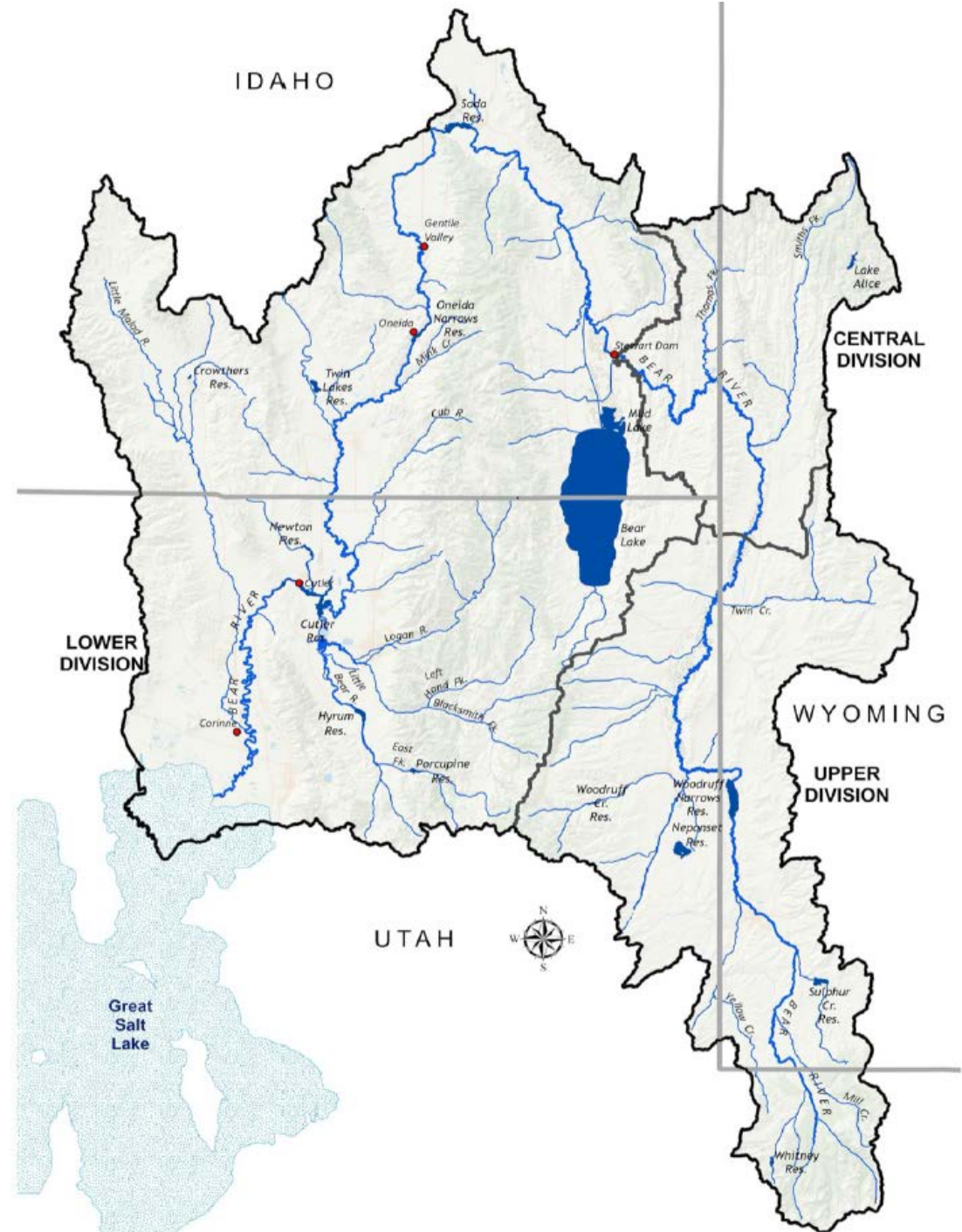
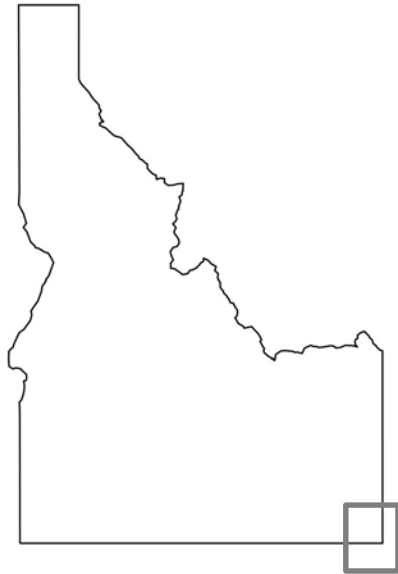


3 State + PacifiCorp Bear Lake Project

Presenters: David Hoekema & Matt Anders

Date: May 20, 2021

Bear River Basin



Bear River Flood Control Operations



- PacifiCorp operates Bear Lake.
- Flooding occurs in the Gentile Valley when flows in the river are above 1,500 cfs.
- Near the end of the irrigation season (August - October)
 - If Bear Lake is >5918 ft., PacifiCorp begins flood control operations to get the lake down to 5918 ft. by January 1.
- January 1, February 1, & March 1
 - PacifiCorp adjusts flood control operations based on NRCS runoff forecast.

PacifiCorp Proposal in 2017

Increase maximum flow at Gentile Valley from 1,500 to 2,600 cfs by purchasing or obtaining easements on 900 acres of land in the floodplain.

- Increase Storage in Bear Lake
 - Increasing the maximum flows at Gentile Valley allows PacifiCorp to delay flood control operations until later in the year when runoff forecasts are more accurate.
 - PacifiCorp would sell new storage to existing water users.
- Establish a Spinning Reserve at Soda Springs Power Plant
 - Spinning Reserve = PacifiCorp would be paid to have power turbines running and ready, but not sending power to the grid. If there is a disruption in power supply on the power grid, PacifiCorp would start generating power within minutes.

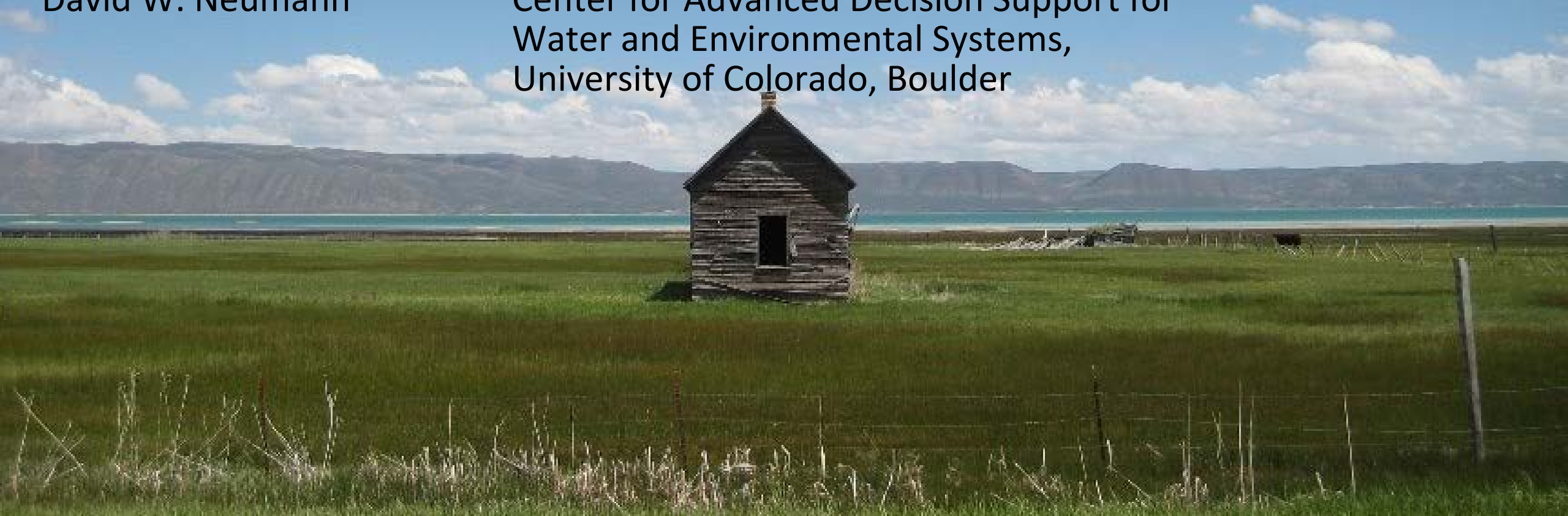
Water Right Applications

- Idaho & Utah filed water right applications in Idaho and Utah on 3/23/2018 for 400,000 AF of storage in Bear Lake.
 - “To store and appropriate water that would otherwise be released from or routed past Bear Lake for flood control purposes.”
- Water right applications have not been processed or advertised.
 - Applications on hold while Idaho, Utah, and PacifiCorp meet to discuss how to proceed. The group developed a cooperative model to define the amount of additional storage in Bear Lake.

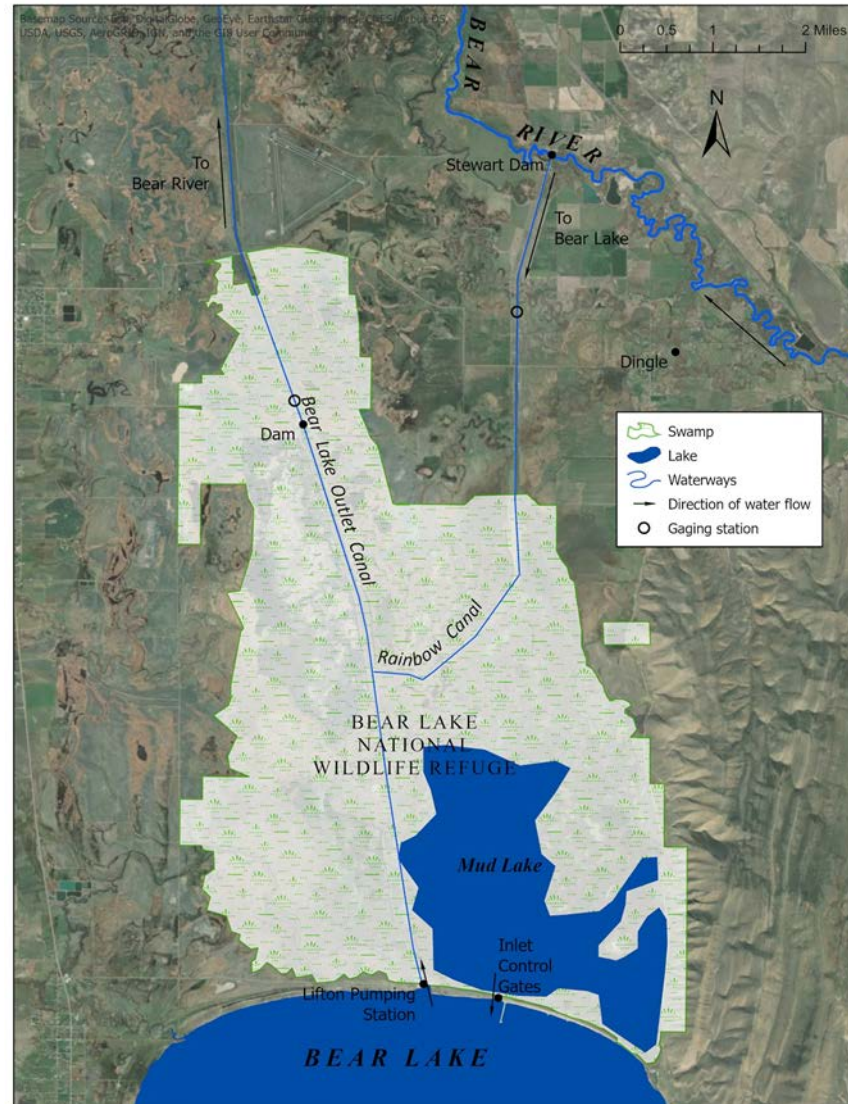
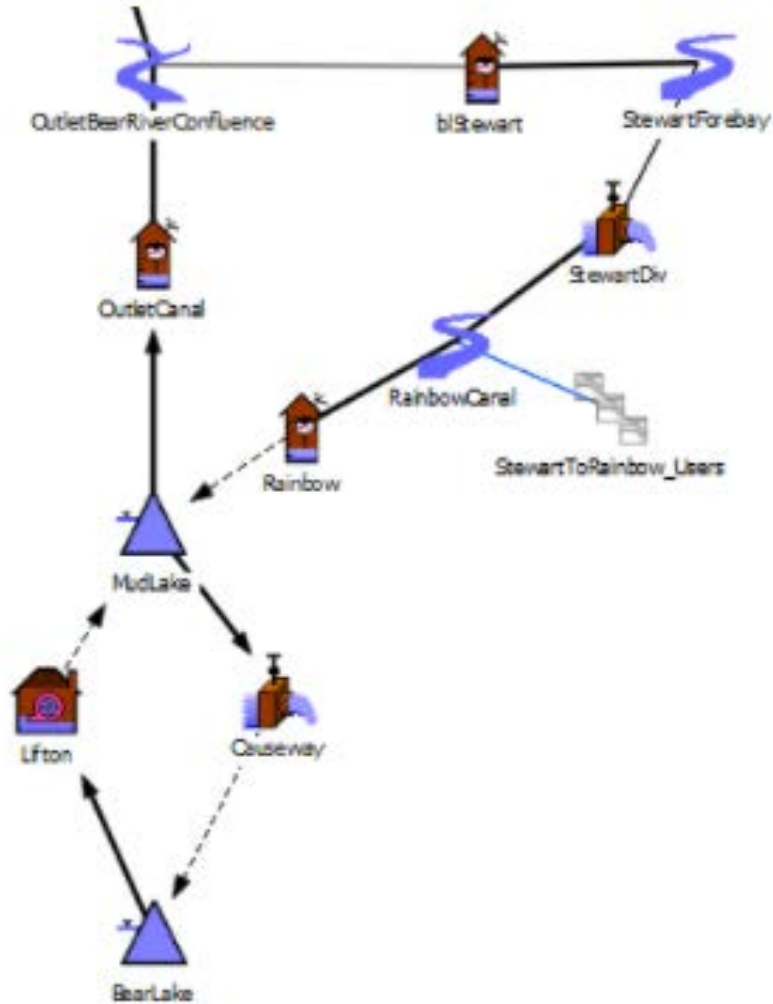
Bear Lake Storage Analysis

Jake M. Serago P.E.
Connely K. Baldwin
David J. Hoekema
Ethan T. Geisler
Carlyle Burton
David W. Neumann

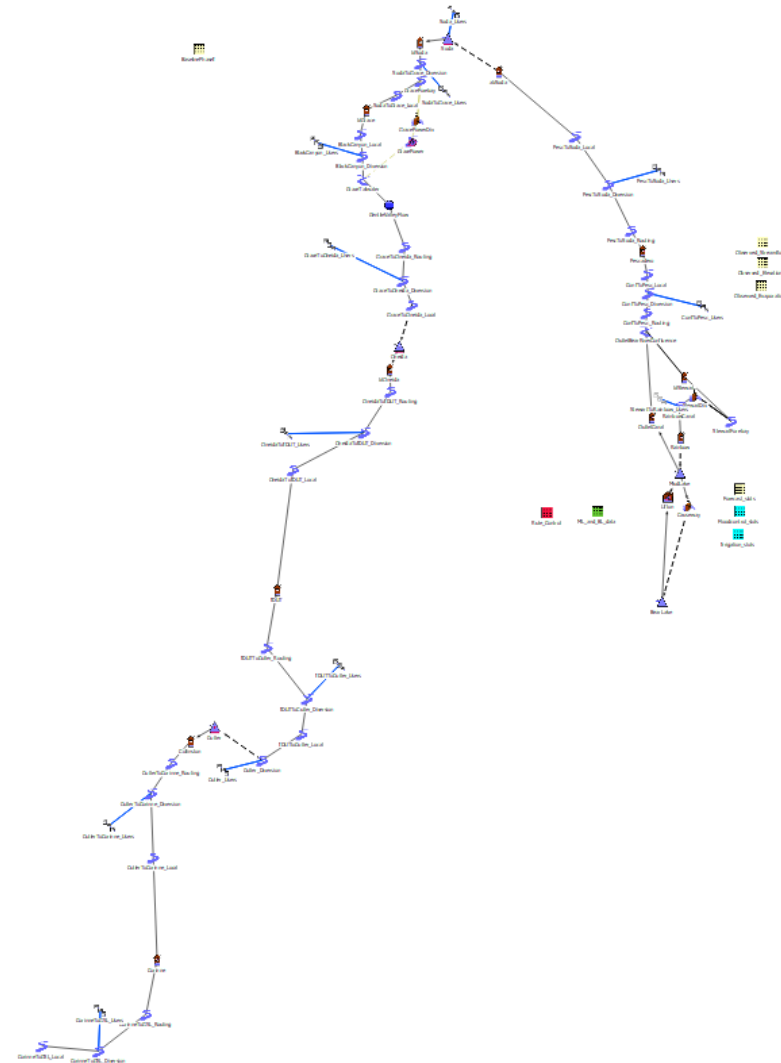
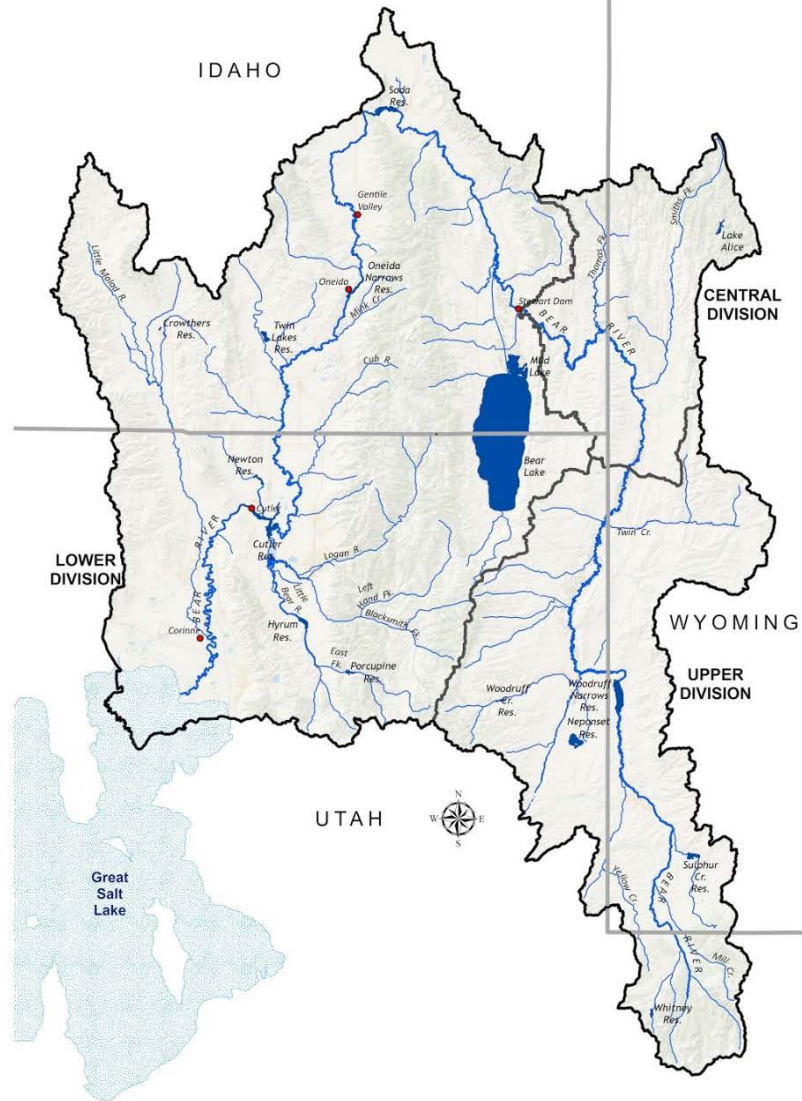
Utah Division of Water Resources
PacifiCorp
Idaho Department of Water Resources
Idaho Department of Water Resources
Utah Division of Water Resources
Center for Advanced Decision Support for
Water and Environmental Systems,
University of Colorado, Boulder



Planning Model Components (Bear Lake)



Model Developed for Lower Division



Data Sources

- Time Period (WY 1980 to 2018)
- Rules control operations of the Bear Lake / Mud Lake Complex
- Data Sources
 - Rainbow Inflow
 - Hydrologic Inflow to Bear Lake
 - Reach Gains (based on historic streamflow, reservoir content, and irrigation use)
 - Historic Irrigation Use

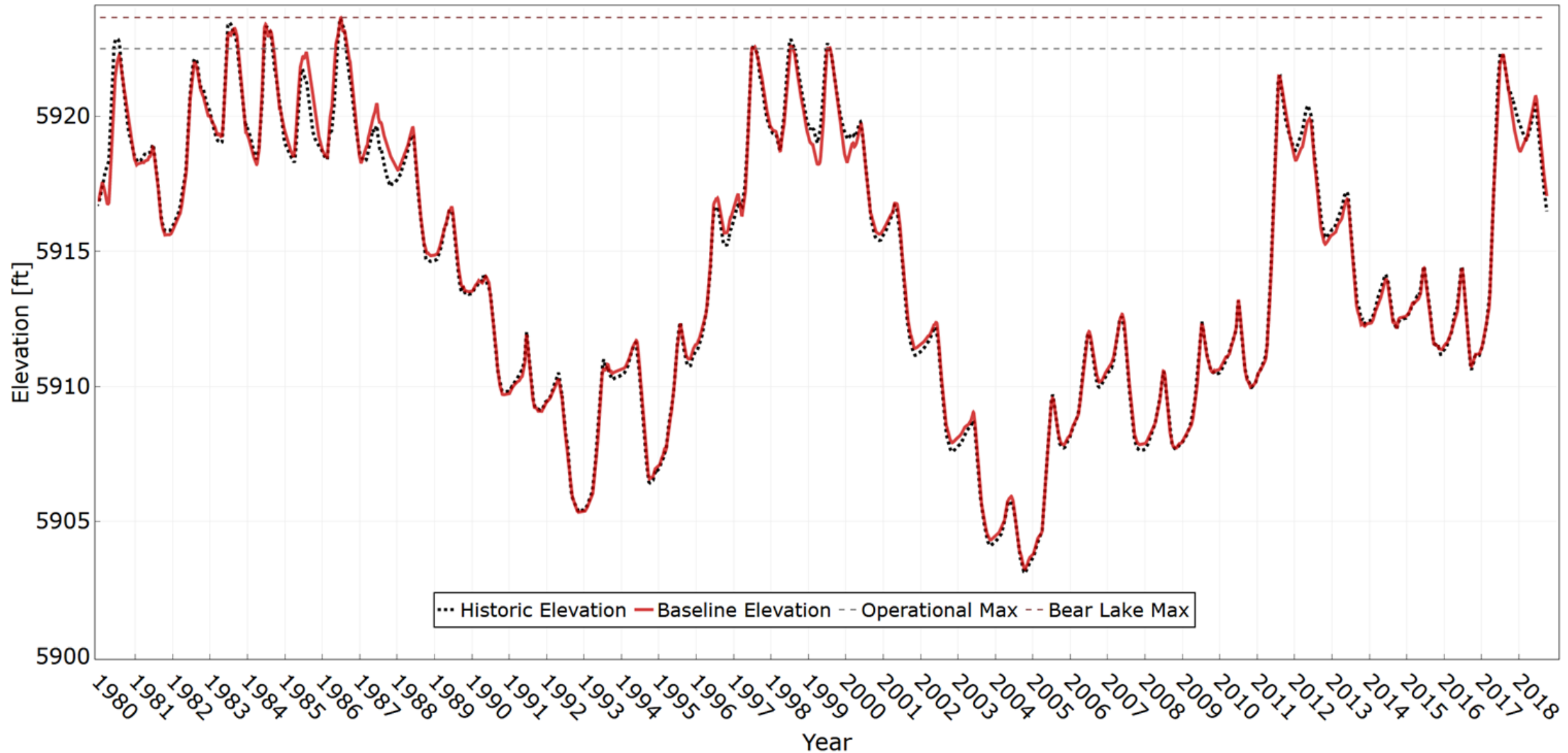


Baseline Scenario

- GVtmf (Gentile Valley target maximum flow)
Maximum Flow Target Gentile Valley: 1500 cfs
- PTE (PacifiCorp Target Elevation)
Default PTE: 5918 feet (August to December)
Range PTE: 5916 to 5920 feet (January to March)

Fill Target: 5922.5 feet
OHWM: 5923.65 feet

Model Calibration: Bear Lake

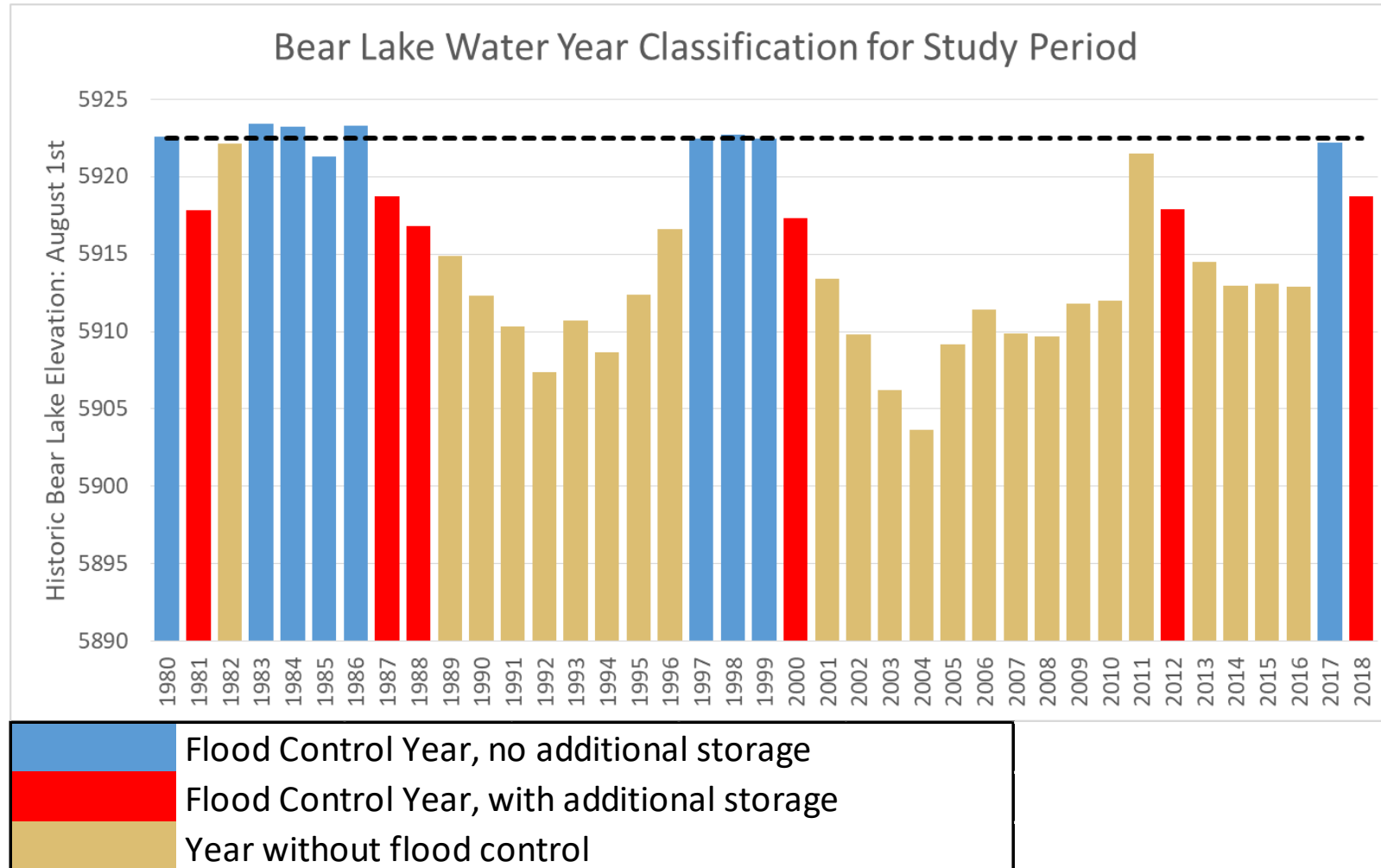


Study Questions in Phase 1

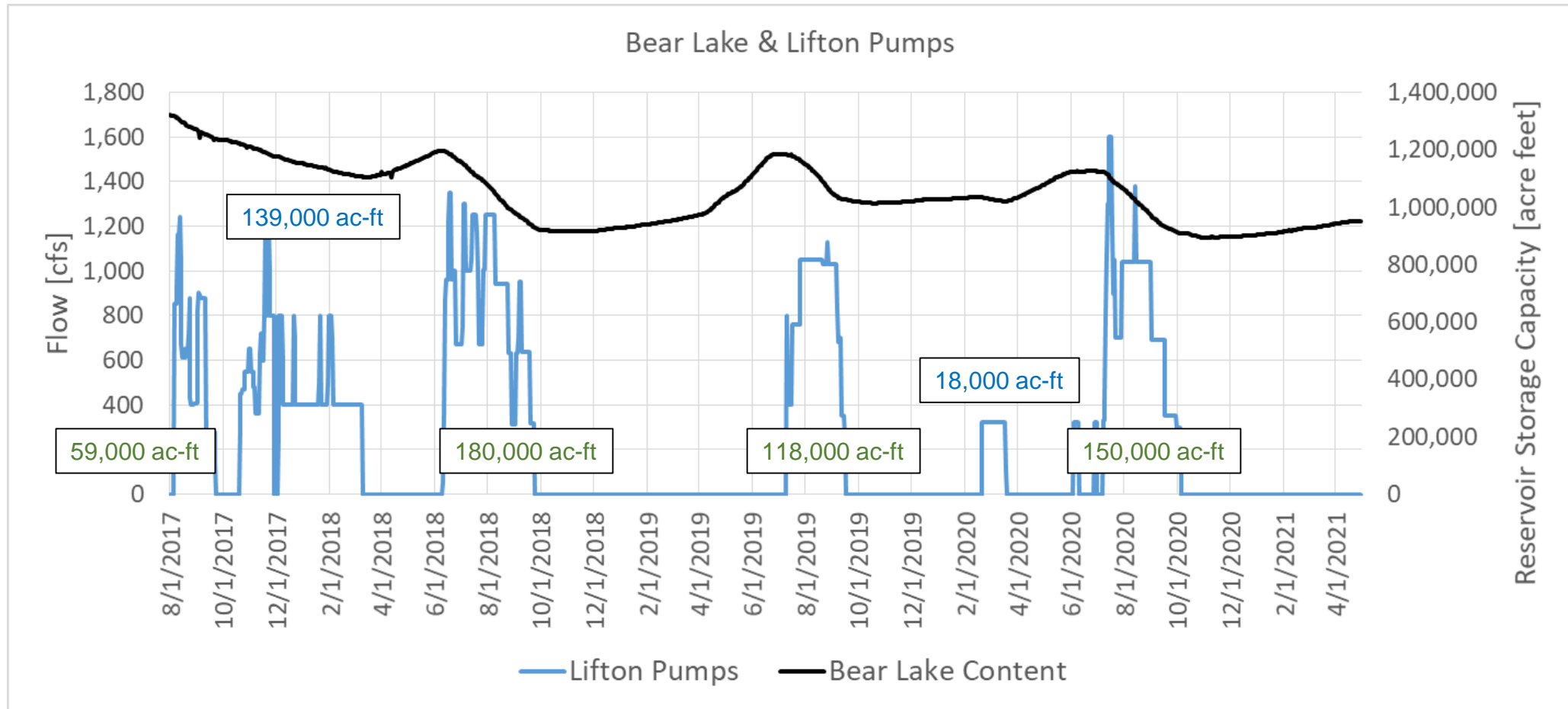
- How often could Bear Lake have stored additional water?
- What volume of additional storage could have been achieved?
- How would flow through Gentile Valley be impacted?
- How would interactions between the Bear River and Bear Lake change?
- How would the 5911.0 elevation be impacted?
- How would additional storage in Bear Lake impact Great Salt Lake?

Question: When is Additional Storage Available?

Answer: When entering into a drought cycle.



Recent Reservoir Operations



Scenarios Analyzed

Scenario Indices					
PTEra (feet)	Scenario Default PTE	GVtmf (cfs)			
		1,500	2,000	2,600	3,000
+3.5	5,921.5	37	38	39	40
+3.0	5,921.0	33	34	35	36
+2.5	5,920.5	29	30	31	32
+2.0	5,920.0	25	26	27	28
+1.5	5,919.5	21	22	23	24
+1.0	5,919.0	17	18	19	20
+0.5	5,918.5	13	14	15	16
0.0	5,918.0	9*	10	11	12
-0.5	5,917.5	5	6	7	8
-1.0	5,917.0	1	2	3	4

Scenarios	9	22	31	35	36	
Default PTE	5918.0	5919.5	5920.5	5921.0	5921.0	[ft]
Max PTE	5920.0	5921.5	5922.5	5923.0	5923.0	[ft]
Min PTE	5916.0	5917.5	5918.5	5919.0	5919.0	[ft]
Target Fill	5922.5	5922.5	5922.5	5923.0	5923.0	[ft]
GVtmf	1500	2000	2600	2600	3000	[cfs]
OHWL	5923.65 ft					



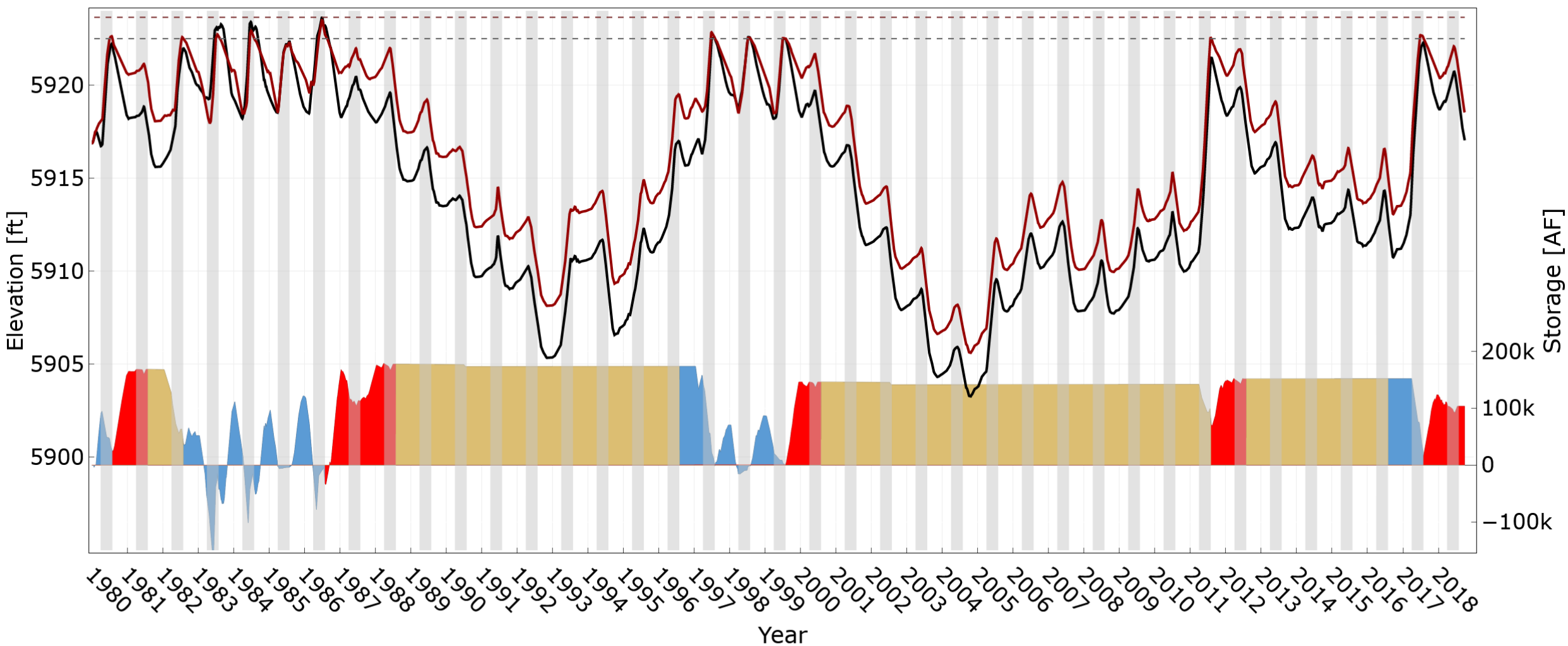
Simulation Methods

No policy for additional storage use defined at this time

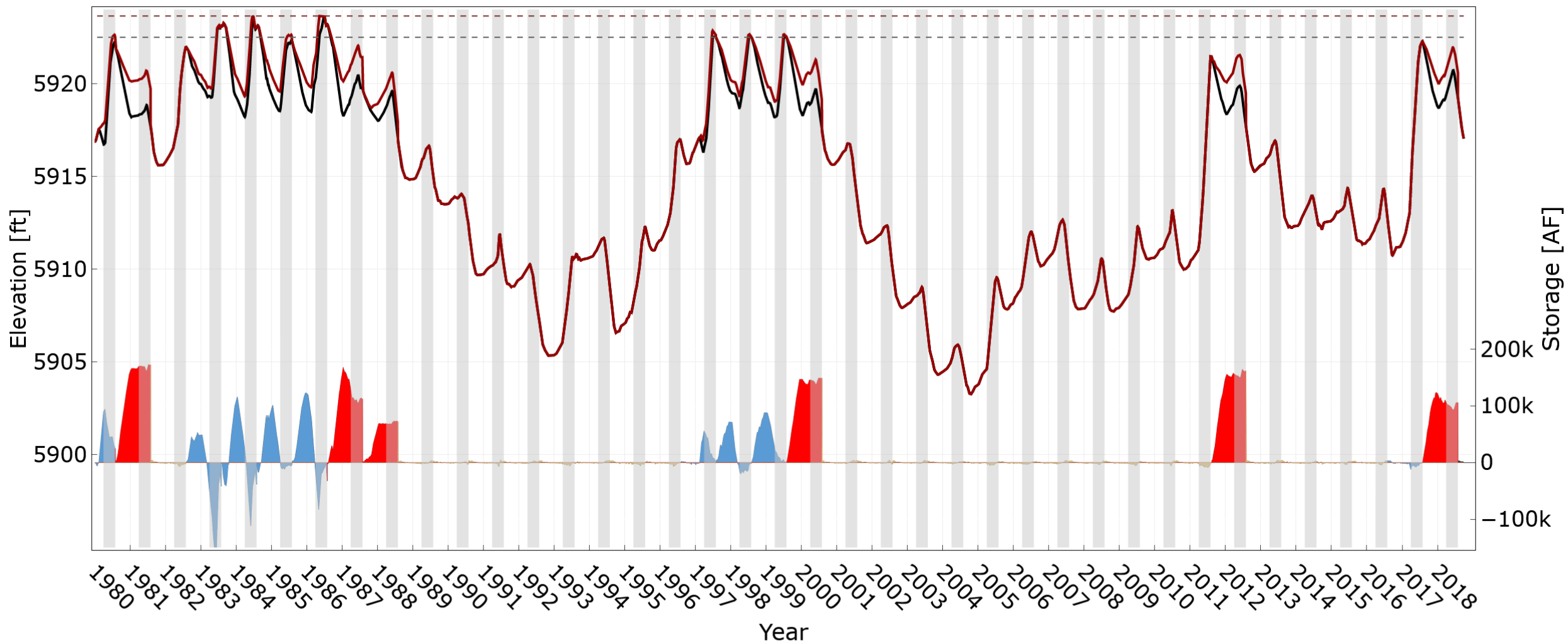
Continuous Simulation--the additional storage is carried over from year to year

Yearly Simulation--the reservoir is reset to the Baseline each August (removes additional storage from the reservoir)

Continuous Simulation



Yearly Simulation



Question: How Much Additional Storage?

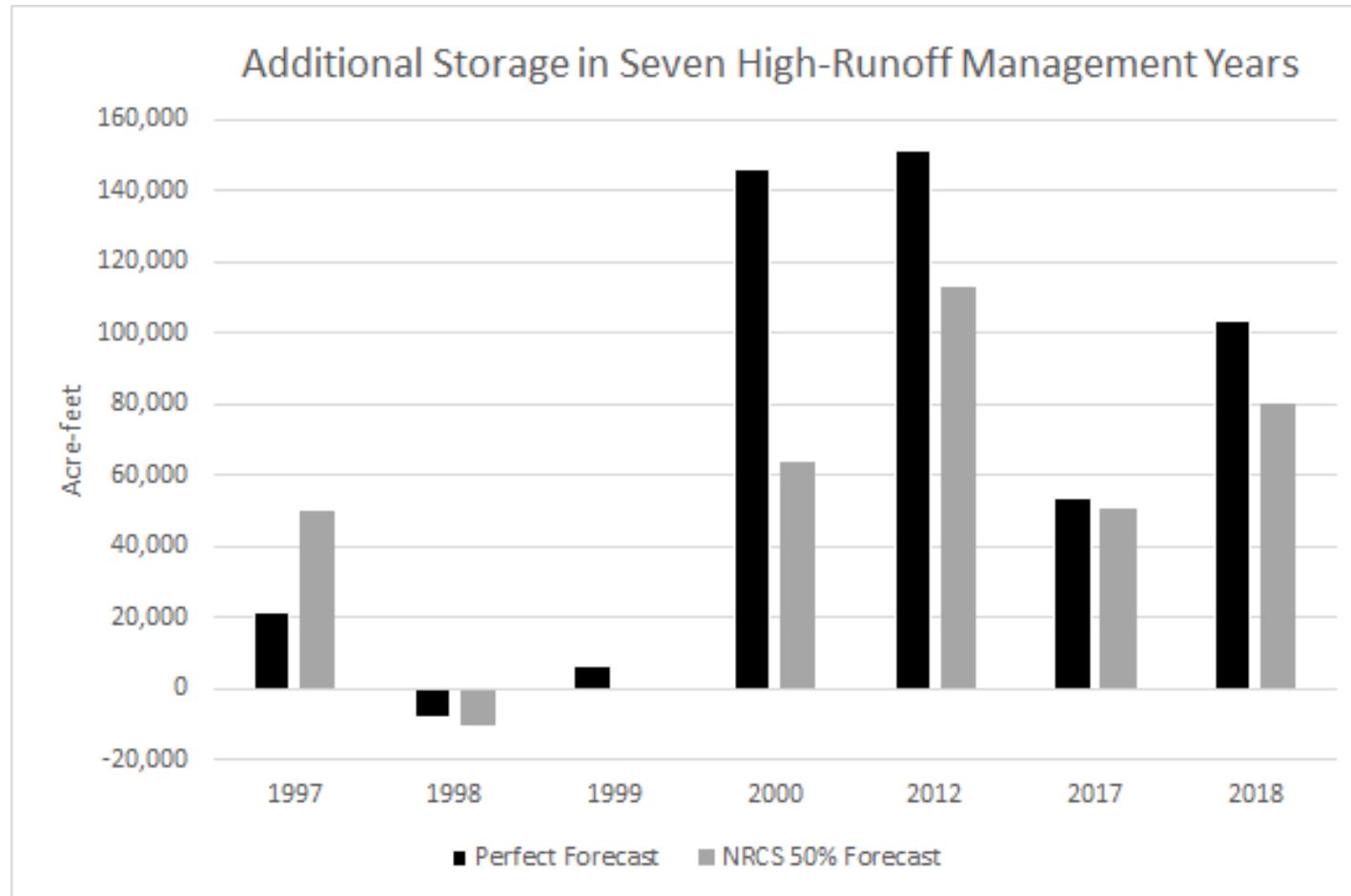
Answer: In carryover years 58,000 ac-ft per 1-foot increase in PTE.

Bear Lake - Average additional volume on August 1st for carry-over years (TAF)					
PTEra (ft.)	Scenario Default	GVtmf			
		1500	2000	2600	3000
3.5	5921.5	197	197	197	197
3.0	5921.0	168	168	168	168
2.5	5920.5	138	138	138	138
2.0	5920.0	111	111	111	111
1.5	5919.5	84	84	84	84
1.0	5919.0	57	57	57	57
0.5	5918.5	31	28	28	28
0.0	5918.0	0	-7	-7	-7
-0.5	5917.5	-25	-39	-40	-40
-1.0	5917.0	-46	-71	-72	-72

TAF (thousand acre-feet)



Question: Perfect vs. Imperfect/Actual Forecasts



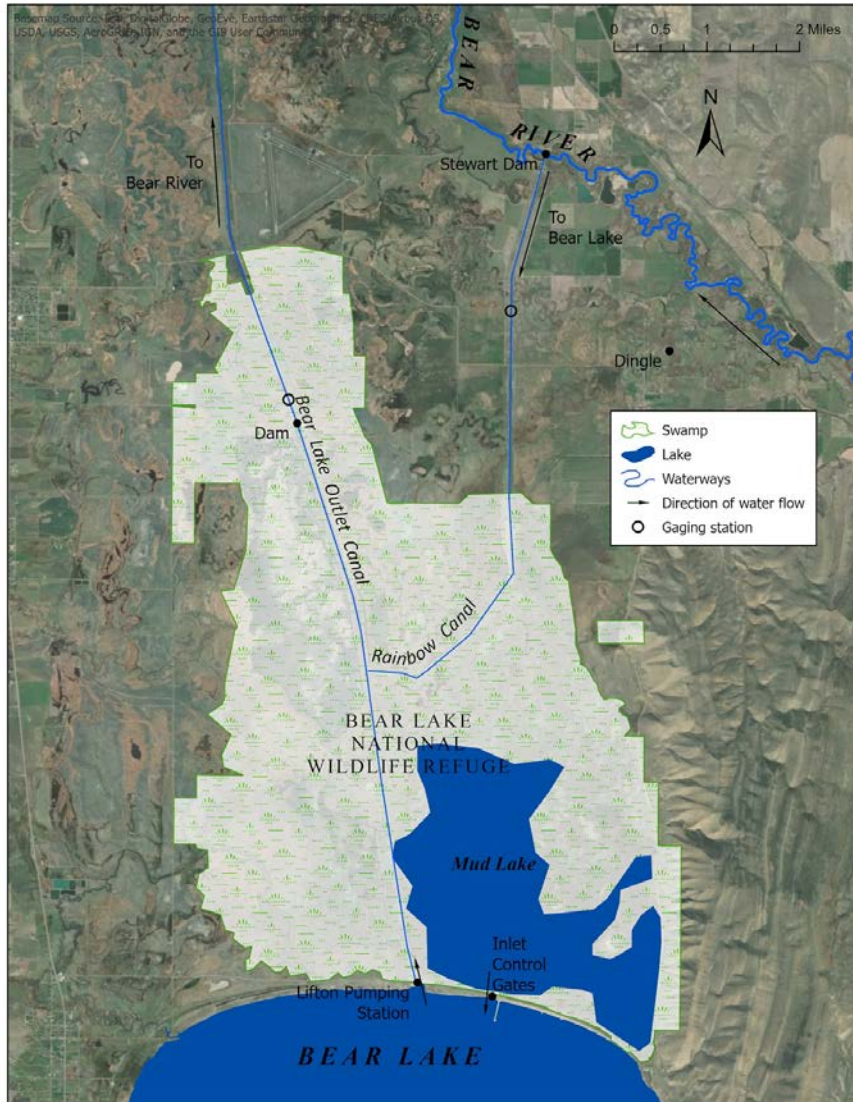
Question: What is the impact on Gentile Valley?

Answer: Have to pass more flow through the valley.

Gentile Valley									
PTEra (feet)	Scenario Default PTE	Number of years with winter (Jan-Mar) peak flow above baseline peak and well above target threshold.				Number of years with spring (Apr-Jul) peak flow above baseline peak and well above target threshold.			
		GVtmf				GVtmf			
		1,500	2,000	2,600	3,000	1,500	2,000	2,600	3,000
3.5	5,921.5	4	1	0	0	6	4	4	3
3.0	5,921.0	3	1	0	0	4	3	1	0
2.5	5,920.5	3	1	0	0	4	2	0	0
2.0	5,920.0	0	0	0	0	5	2	0	0
1.5	5,919.5	0	0	0	0	5	0	0	0
1.0	5,919.0	0	0	0	0	5	0	0	0
0.5	5,918.5	0	0	0	0	4	0	0	0
0.0	5,918.0	0	0	0	0	0	0	0	0
-0.5	5,917.5	0	0	0	0	0	0	0	0
-1.0	5,917.0	0	0	0	0	0	0	0	0

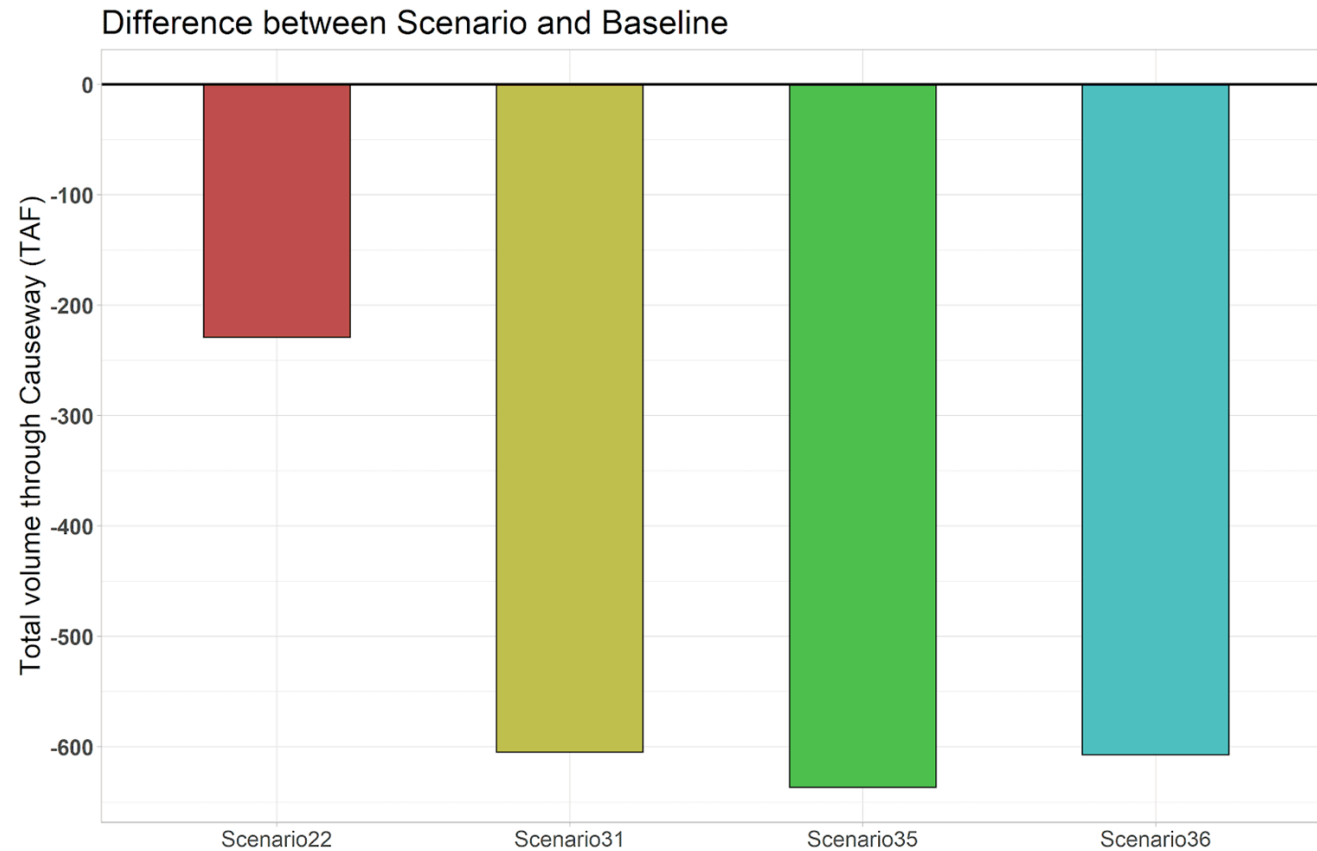


Question: What is the impact on Bear Lake inflows?



Question: What is the impact on Bear Lake inflows?

Answer: Less inflow from the Mud Lake to Bear Lake (higher lake).



Question: How is the 5911.0 elevation impacted?

Answer: Bear Lake would stay above 5911.0' for longer periods.

Bear Lake - Additional years above 5,911 feet from baseline (equivalent elevation).					
PTEra (feet)	Scenario Default PTE	GVtmf (cfs)			
		1,500	2,000	2,600	3,000
3.5	5,921.5	8.6	8.6	8.6	8.6
3.0	5,921.0	7.4	7.2	7.2	7.2
2.5	5,920.5	5.9	5.8	5.8	5.8
2.0	5,920.0	5.0	4.9	4.9	4.9
1.5	5,919.5	4.3	4.1	4.1	4.1
1.0	5,919.0	3.6	3.1	3.0	3.0
0.5	5,918.5	2.0	1.6	1.4	1.4
0.0	5,918.0	0.0	-0.5	-0.6	-0.6
-0.5	5,917.5	-1.1	-2.4	-2.4	-2.4
-1.0	5,917.0	-2.5	-4.0	-4.0	-4.0



Question: How would Great Salt Lake be impacted

Answer: The cumulative loss to GSL over 39 years less than:

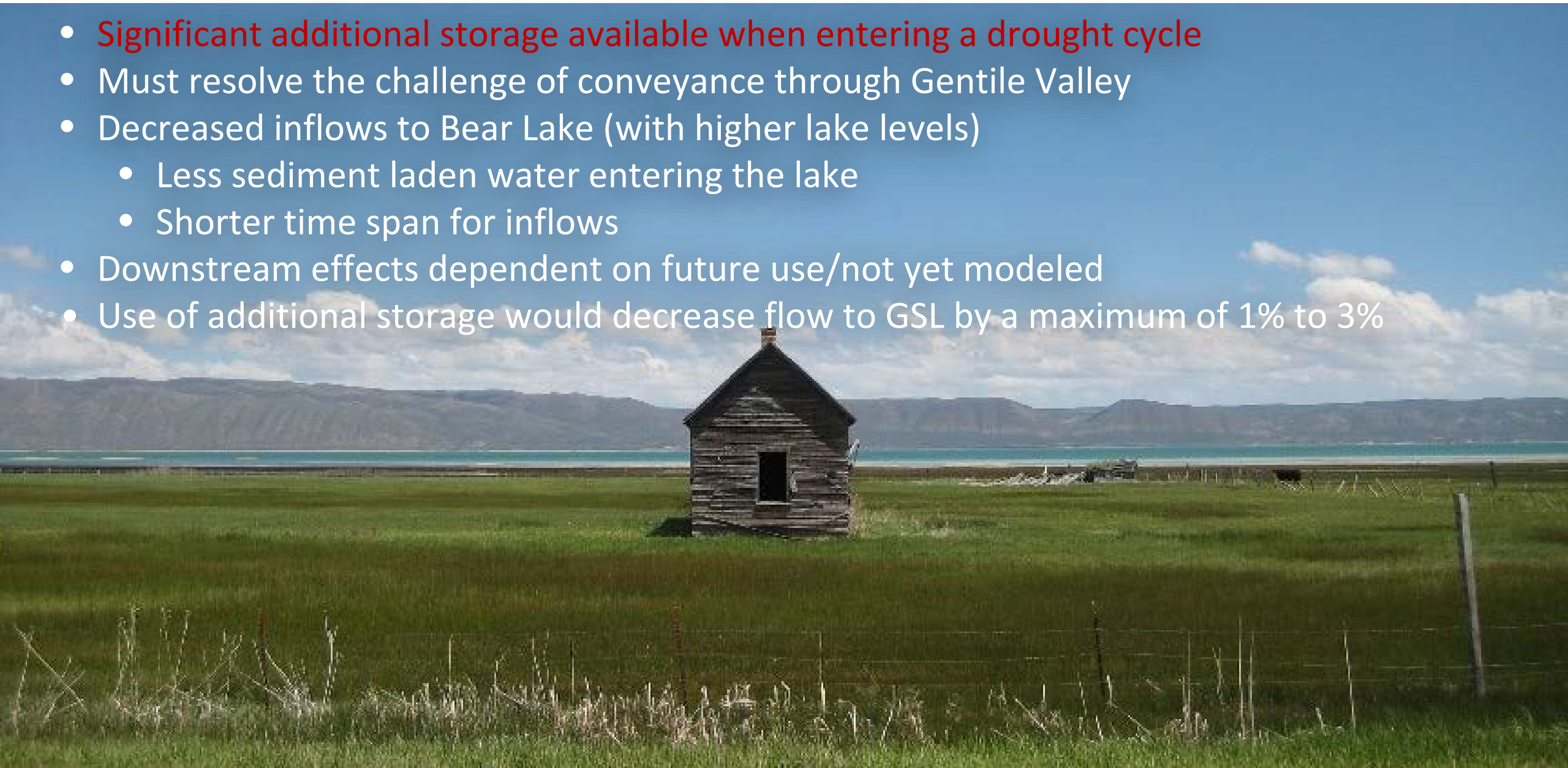
Change in total flow to GSL (TAF)					
PTEra (ft.)	Scenario Default	GVtmf			
		1500	2000	2600	3000
3.5	5921.5	-1711	-1684	-1683	-1682
3.0	5921.0	-1256	-1221	-1196	-1192
2.5	5920.5	-816	-739	-683	-674
2.0	5920.0	-687	-631	-576	-558
1.5	5919.5	-518	-458	-380	-362
1.0	5919.0	-338	-219	-145	-126
0.5	5918.5	-178	12	110	123
0.0	5918.0	0	278	375	384
-0.5	5917.5	132	500	571	575
-1.0	5917.0	249	695	758	761



Yearly Simulation method assumes complete consumptive use
of all additional storage water.
Which is not going to happen.

Summary of Results

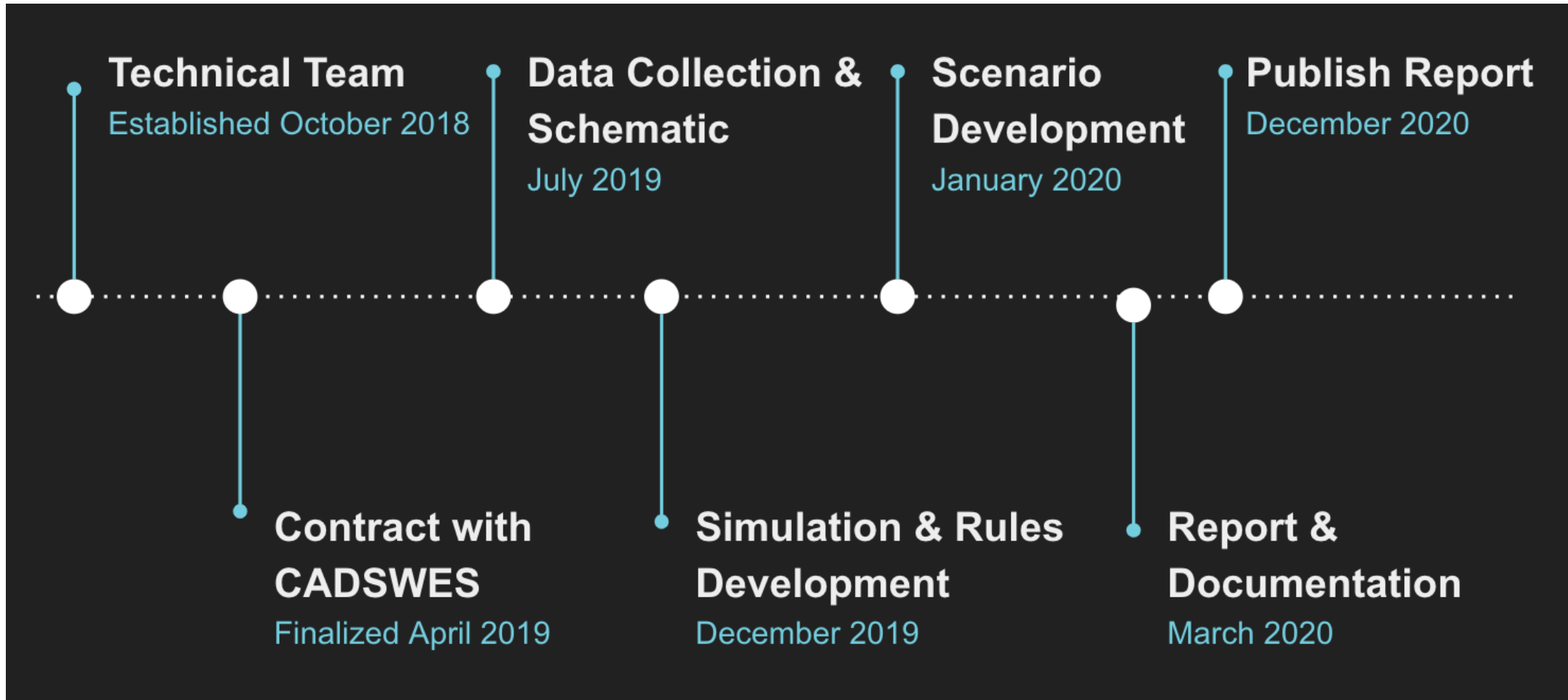
- Significant additional storage available when entering a drought cycle
- Must resolve the challenge of conveyance through Gentile Valley
- Decreased inflows to Bear Lake (with higher lake levels)
 - Less sediment laden water entering the lake
 - Shorter time span for inflows
- Downstream effects dependent on future use/not yet modeled
- Use of additional storage would decrease flow to GSL by a maximum of 1% to 3%



Questions ?

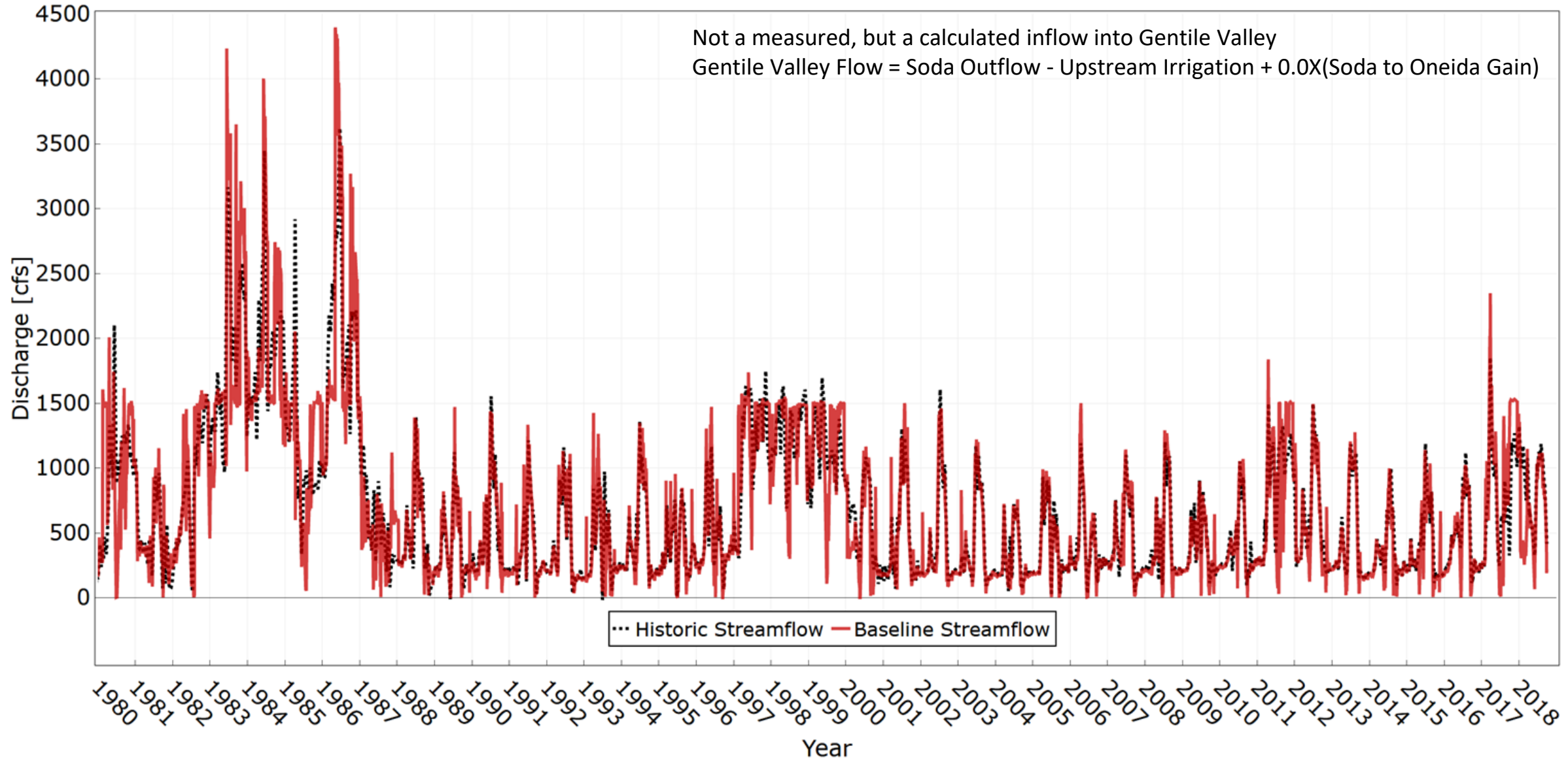


Timeline (Phase 1)



Model Calibration: Gentile Valley

Gentile Valley Streamflow



Memorandum



To: Idaho Water Resource Board
From: Kala Golden
Date: May 7, 2021
Re: Collaborative Cloud Seeding Program

REQUESTED ACTION: None

Cloud Seeding Analysis

A presentation of the analysis and initial findings was given at the November 2020 Board meeting. Staff also described several limitations identified during the initial phase of the analysis and provided recommendations for refining the results with a proposed second phase. Staff have worked with the National Center for Atmospheric Research (NCAR) and technical staff from Idaho Power Company (IPC) to develop a methodology, identify analytical tools and data, and the corresponding tasks necessary to refine the analysis. Two separate modeling tools were identified as necessary to implement these tasks, each requiring a certain level of calibration and set up to reflect localized characteristics of each region where cloud seeding activities occur.

The Board, at its January meeting, approved funding in the amount of \$500,000 for a second phase of the analysis to cover work to be done by NCAR. This work includes model calibration for each of the regions where cloud seeding occurs, as well as the development of hydrologic data for the assessment of cloud seeding impacts.

Work outlined under the second phase of the analysis is underway. The IWRB will be updated on the status of the analysis at its upcoming May meeting.



Cloud Seeding Benefits Update

Noah Stewart-Maddox, IDWR

Cloud Seeding Analysis



Cloud seeding has been shown to increase snowpack throughout Idaho



This increased snowpack results in increased runoff



Who is benefiting from this increased runoff?

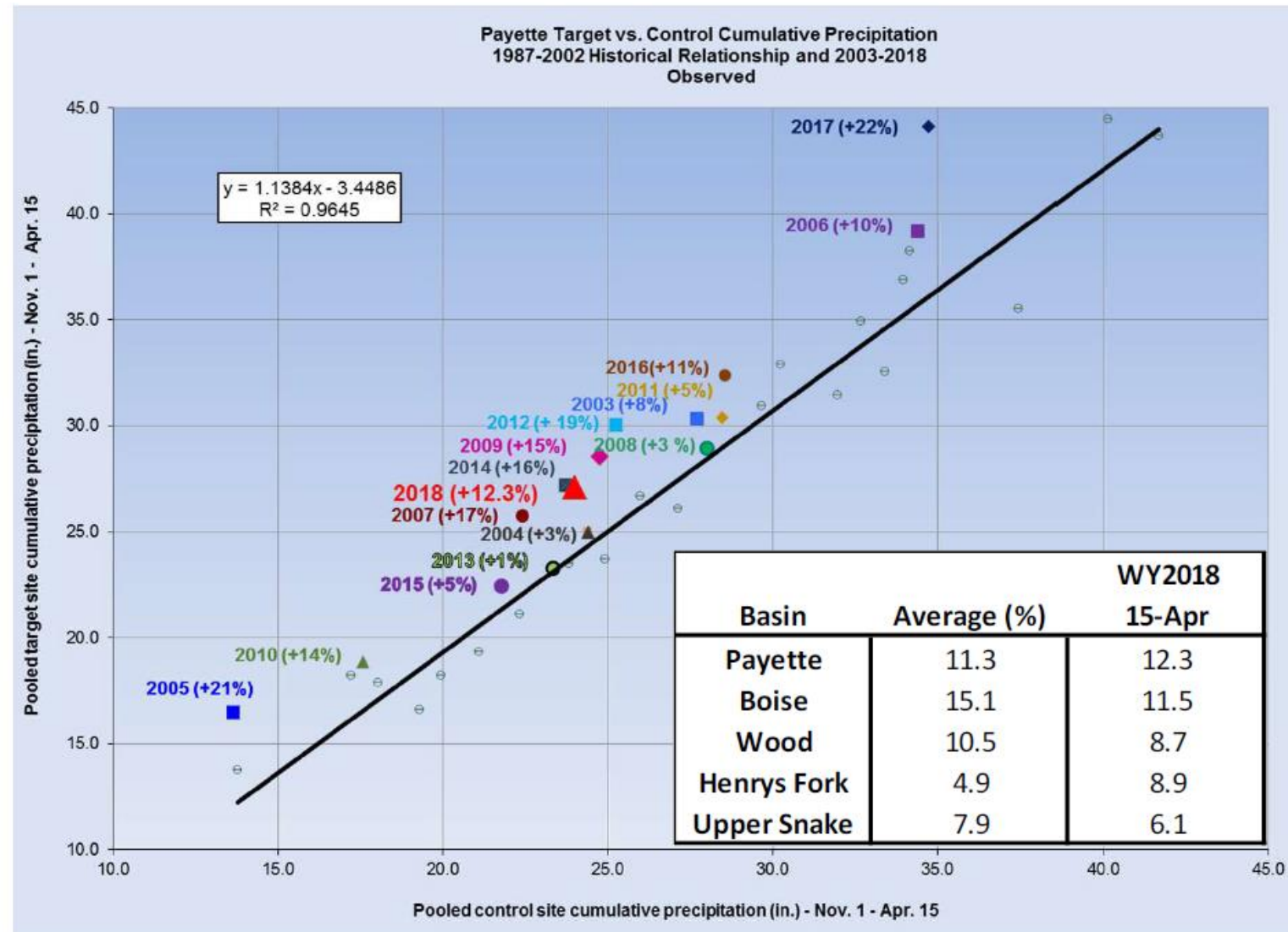
Work Done to Date

- Phase I Analysis
 - Started in 2019
 - Collaboration between IDWR, BSU, and IPC
 - Analysis designed to be broad overview
 - Broke benefit into large categories: In-Basin Use, Hydropower, Spill Out of State, Recharge, Reservoir Capture
 - Finished in Fall 2020
 - Results presented to Board, Legislators, and Stakeholders
- Phase II Analysis
 - Started in Spring 2021
 - Expected to be completed by 2023

Phase I Analysis Summary

IPC Regression
Snowpack
Cloud Seeding
Increase

IPC “Regression Method” is used to estimate snowpack increase due to Cloud Seeding.

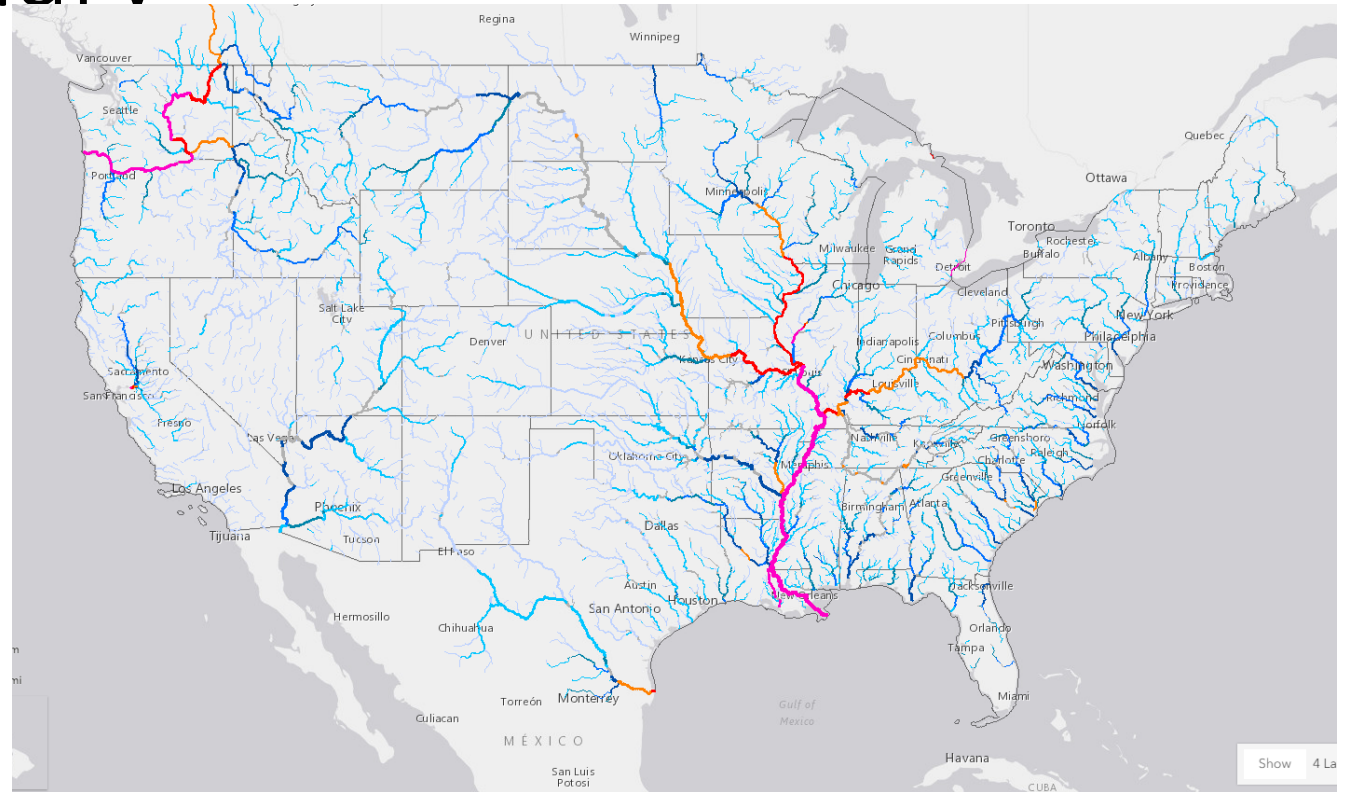


Phase I Analysis Summary

IPC Regression
Snowpack
Cloud Seeding
Increase

Modeled
Runoff
Increase

Uses Weather Research and Forecasting Model
Hydrological modeling system (WRF-Hydro)
developed for entire United States



Cloud
Seeding
Model Run

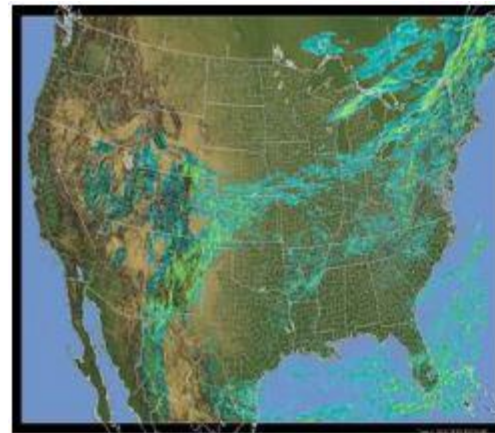
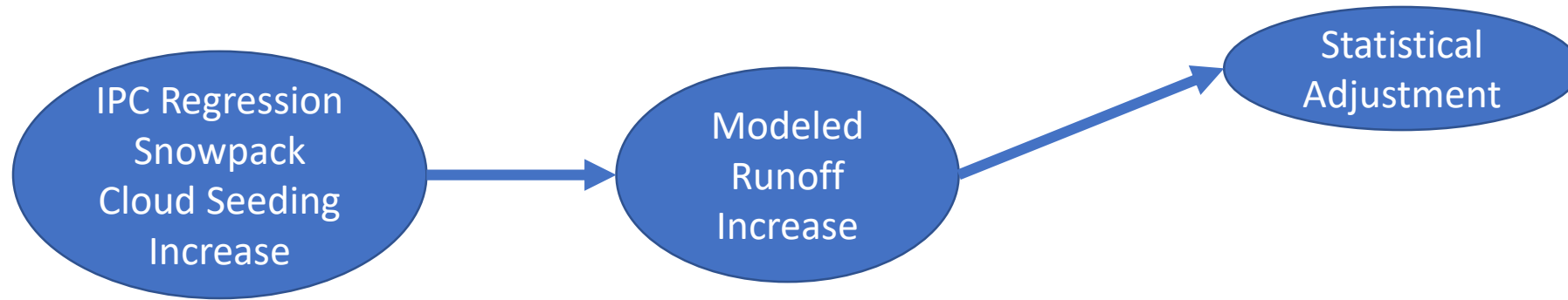


Non-Cloud
Seeding
Model Run

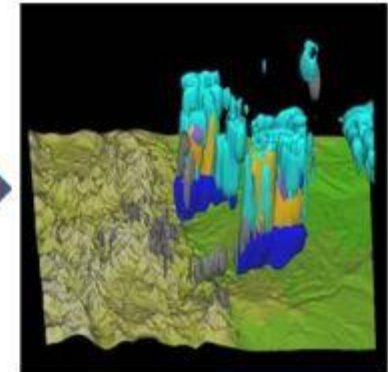


Added Water
Due to Cloud
Seeding

Phase I Analysis Summary

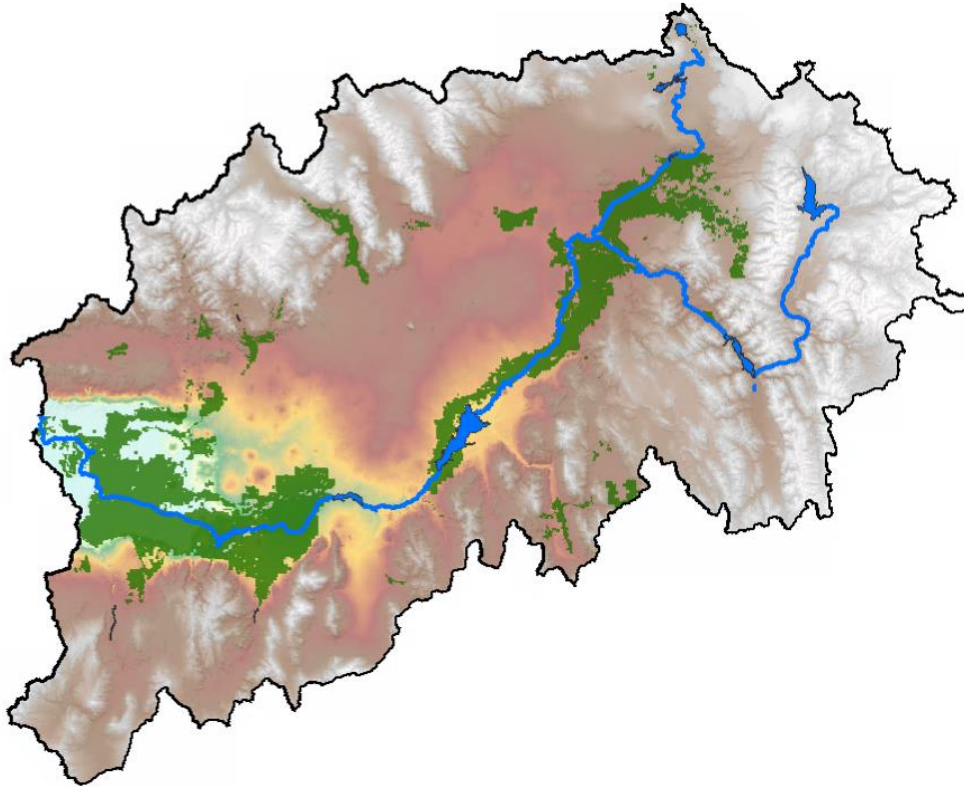
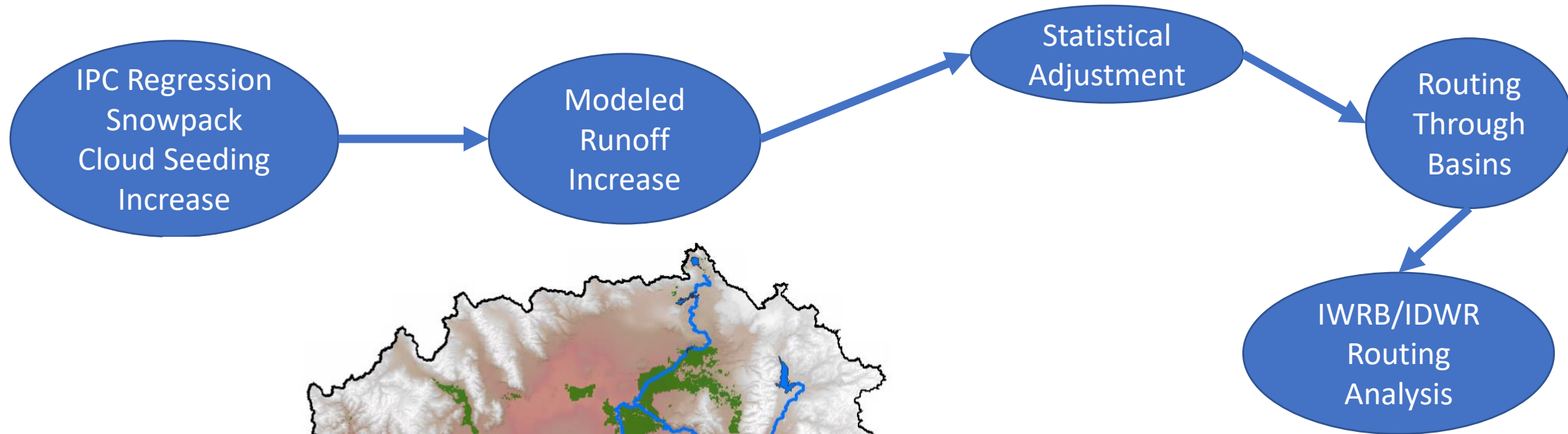


1-10's km



100's m - 1's km

Phase I Analysis Summary

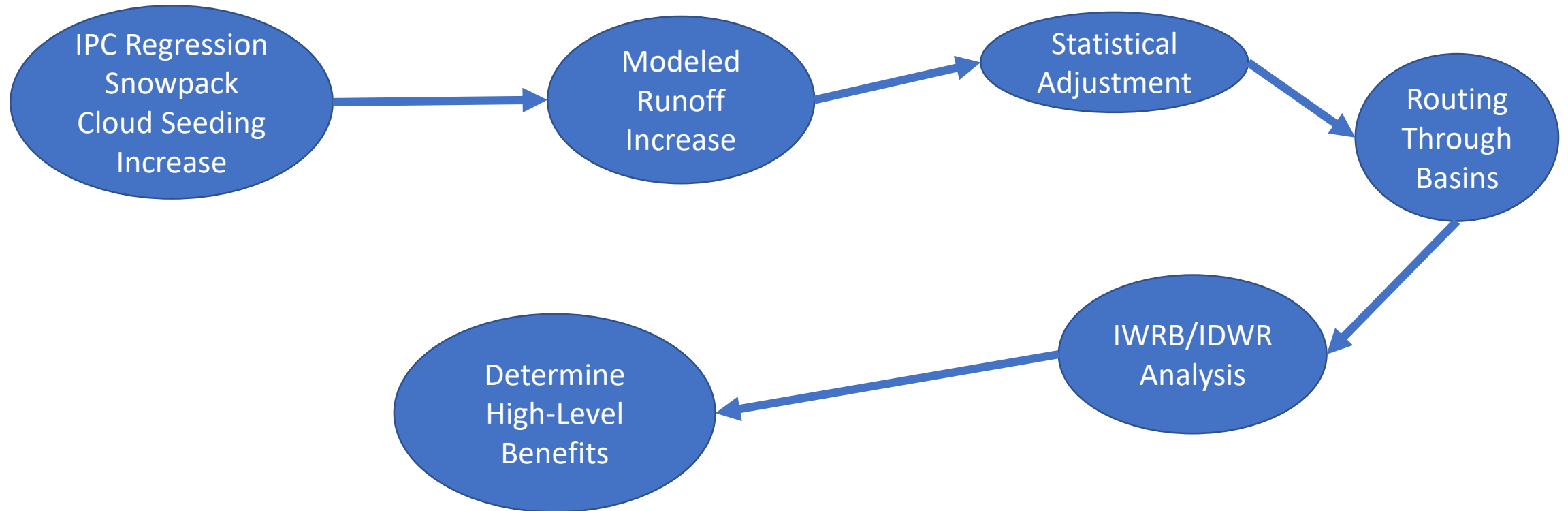


Considerations in Routing Analysis

- Reservoir Operations
- Diversion Demands
- Carryover Allocation
- IWRB Recharge Allocations
- Hydropower Generation on Snake River

Phase I Analysis Summary

- Phase I completed
 - A high-level analysis
- Results were presented to IWRB, legislators, and stakeholders
- A more detailed analysis was deemed necessary



Phase I High-Level Analysis Summary

	In-Basin Use	Hydropower	Spill Out of State	IWRB Recharge	Captured by Reservoirs
Snake	32%	13%	33%	12%	10%
Boise	17%	45%	30%	-	7%
Wood	29%	20%	28%	1%	22%

Phase I High-Level Analysis Takeaways:

- 1/3 of benefit goes to spills out of state
- Reservoir capture ranges between 10-20%
- Recharge benefit dependent on an existing operations recharge program (only currently significant on Snake River)
- Cloud seeding has a significant impact on in-basin use and hydropower production

Limitations of Phase I analysis

Cloud Seeding Inputs

- First order approximations were required in basins where issues were encountered in the modeling
- A statistical correction was used to adjust modeled results in other basins
- Short time period (1995-2007)

Routing Analysis

- No explicit reservoir modeling
- Diversion demand was considered constant, regardless of climate
- Reach and spring gains due to recharge and increased diversions were not modeled

What Will Phase II Offer?

Cloud Seeding Inputs

- All Basins will be fully modeled including Payette River
- Increased confidence in results
- Twenty-year time period

Routing Analysis

- Reservoir operations will be explicitly modeled
- Diversion demand will change with varying water supply
- Changes in reach and spring gains due to increased diversions and recharge will be modeled
- Everything will be modeled together allowing us to determine system-wide effects

Recent Updates



RiverWare Model obtained from USBR and refinements have begun



Board has allocated funds for more detailed cloud seeding modeling from National Center for Atmospheric Research (NCAR)

Refine Cloud Seeding inputs

- Intensive effort being undertaken by NCAR
- Sets up for future detailed analysis

RiverWare

- USBR has laid out a large portion of the groundwork
- Adding functionality is required for Cloud Seeding analysis

Phase Two Analysis

NCAR Cloud Seeding Analysis

- Calibrate models for Snake, Boise, Wood, and Payette
- Run over 20-year period
- Will produce robust results that can take multiple factors into consideration

RiverWare Capabilities



RiverWare is a surface water
planning model software



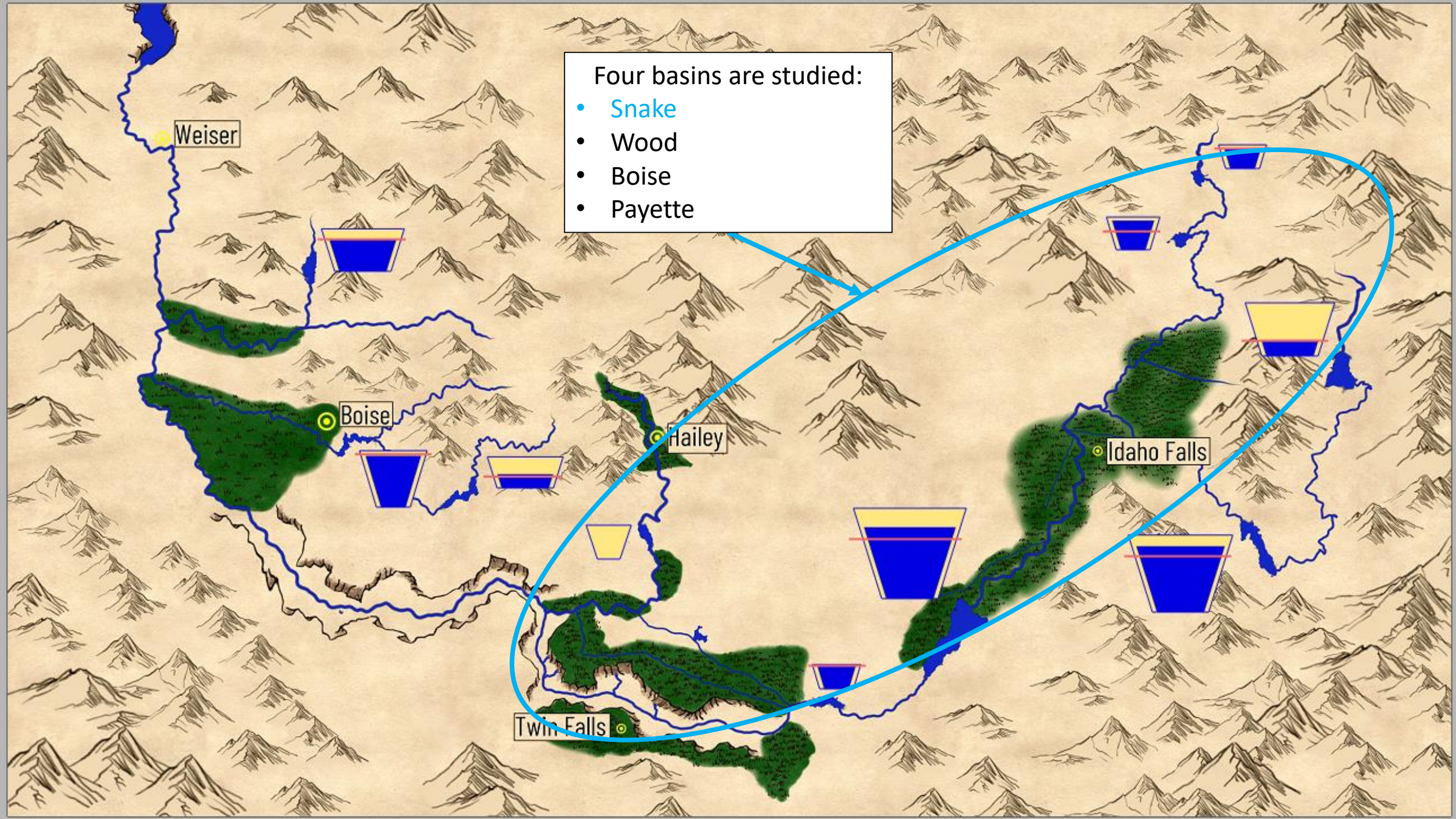
Some features
which can be
modeled are as
follows:

Reservoir control
Irrigation diversions
Hydropower production
Groundwater returns



Can be used for
other applications:

Milner Bypass
Long-term Planning
Operational changes



- Four basins are studied:
- Snake
 - Wood
 - Boise
 - Payette

Weiser

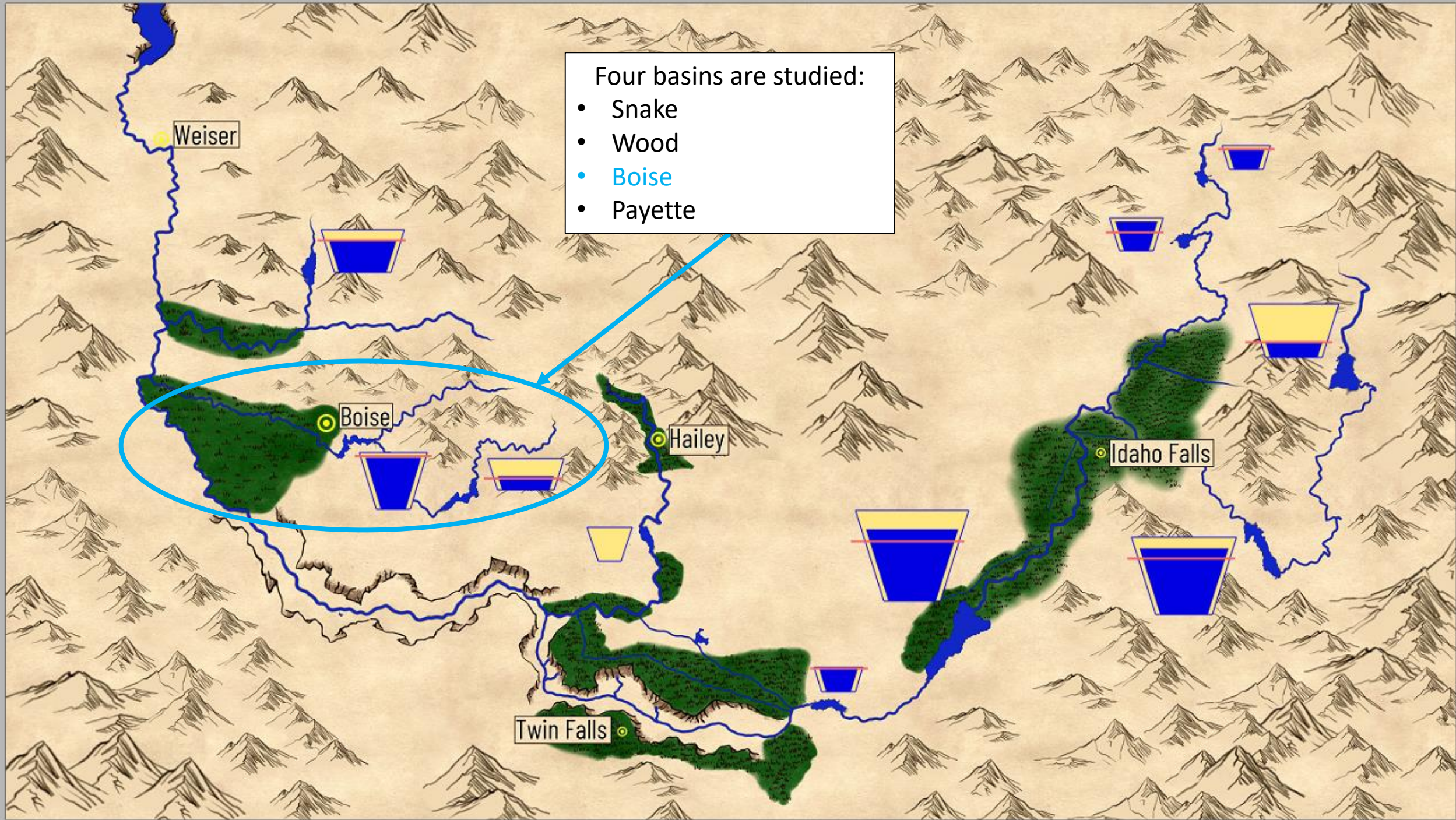
Boise

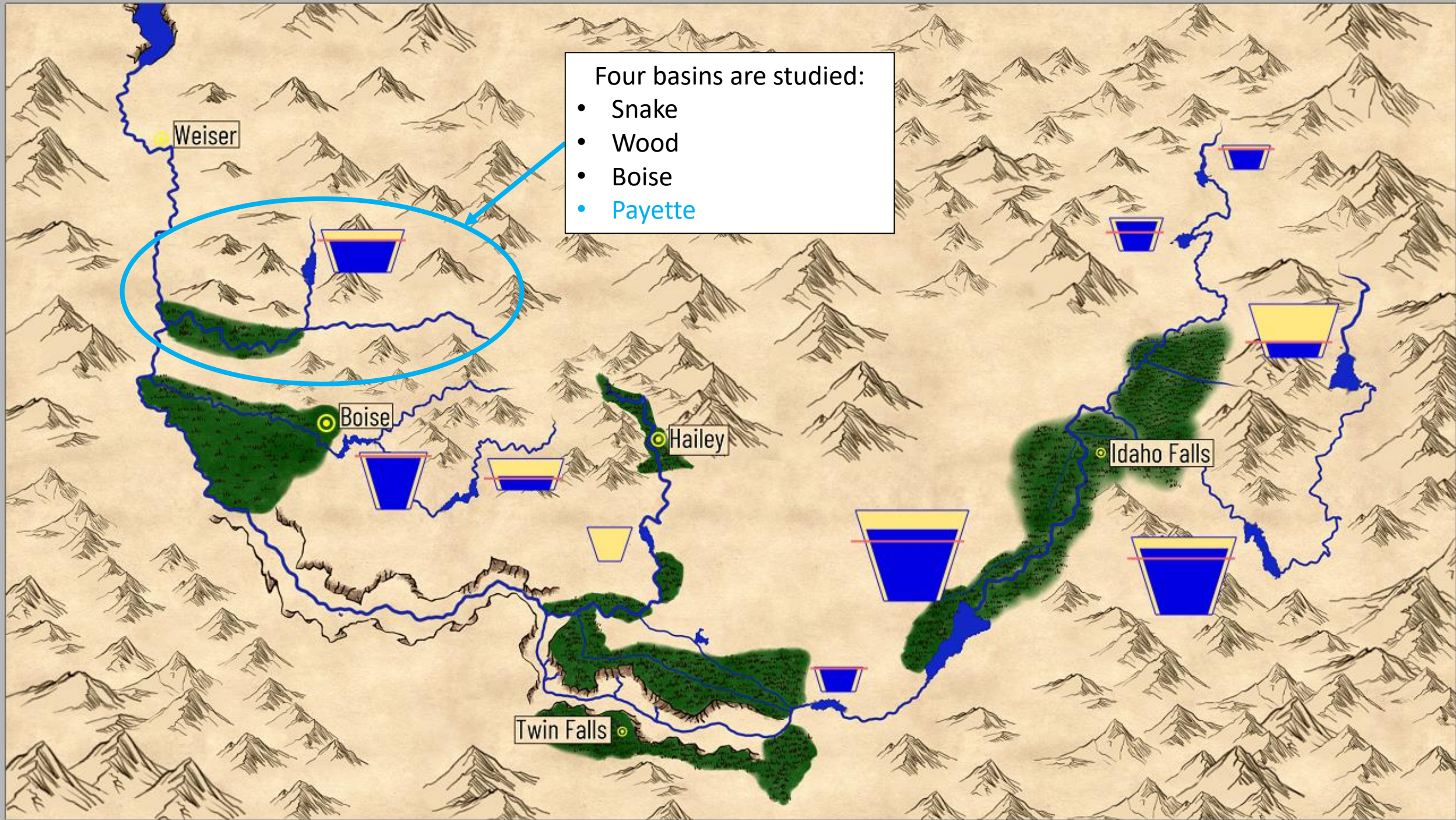
Hailey

Idaho Falls

Twin Falls







Cloud Seeding Modeling Considerations:

- Changes in Reservoir Operations
- Increases in Irrigation Diversions
- Increases in Managed Recharge
- Increases in Hydropower Production
- Changes in reach gains due to managed recharge/increased irrigation

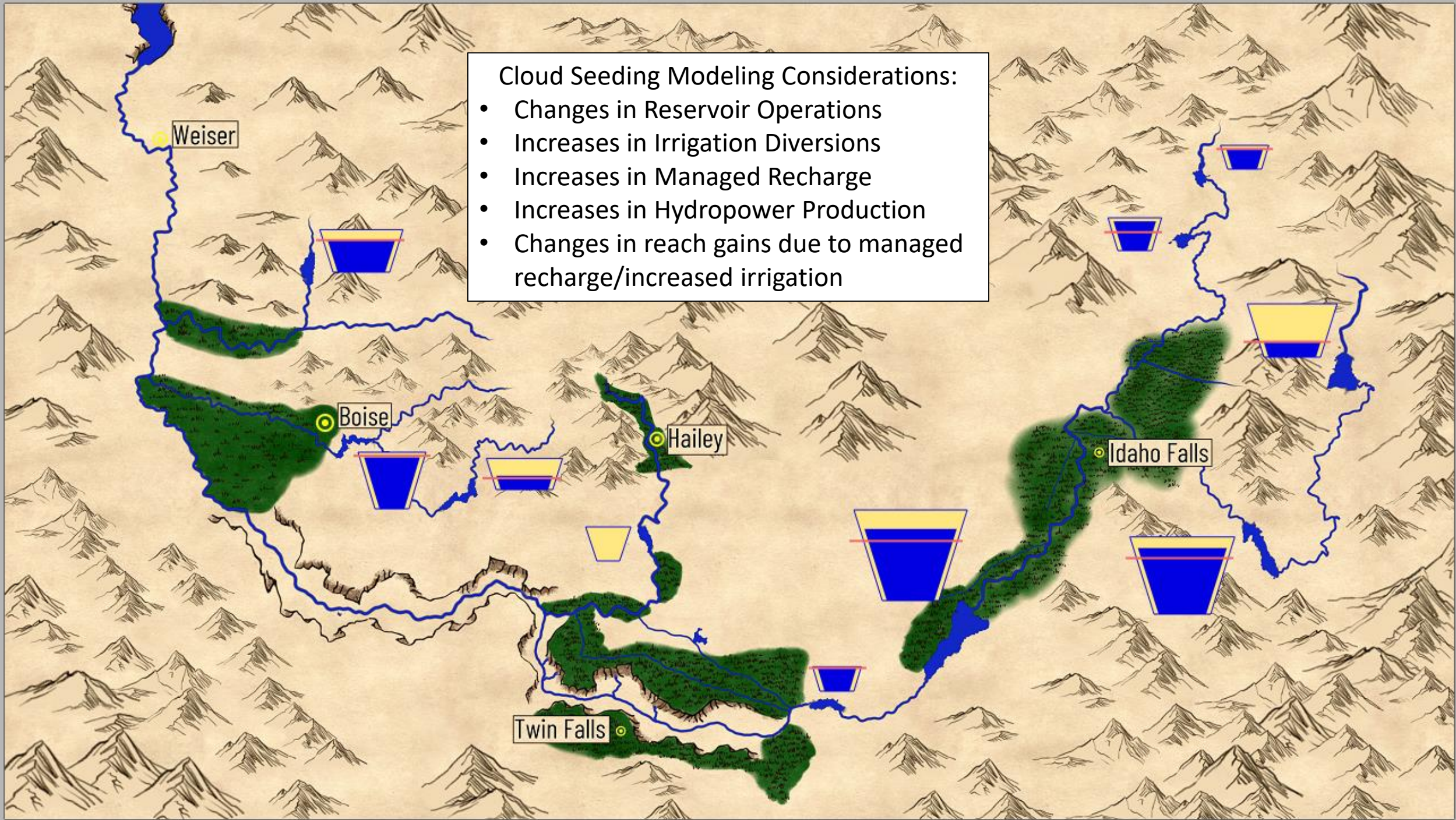
Weiser

Boise

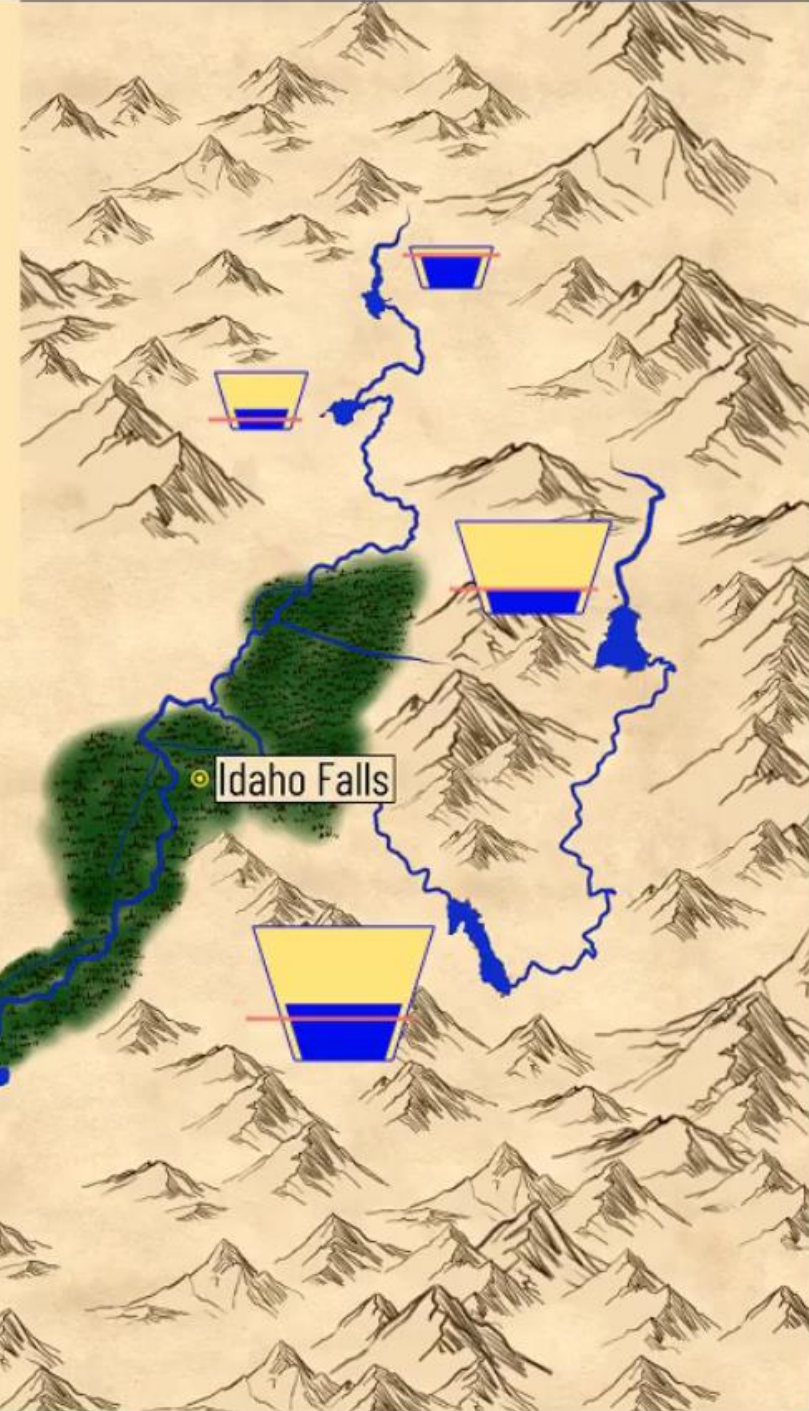
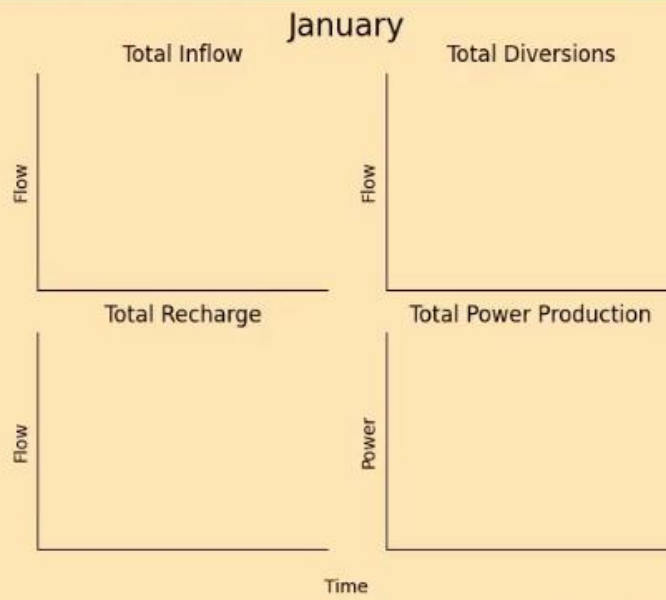
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Idaho Falls

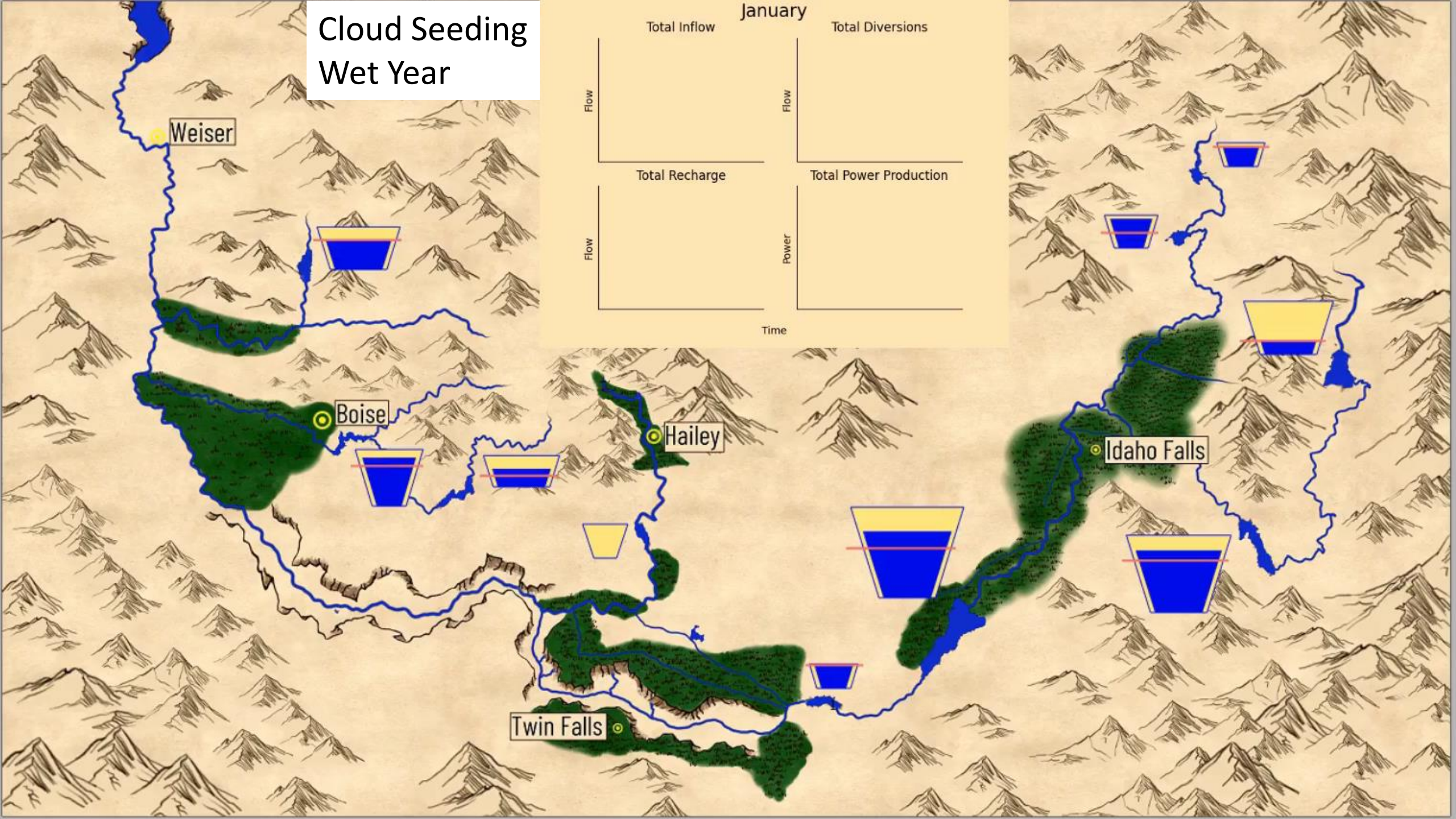
Twin Falls



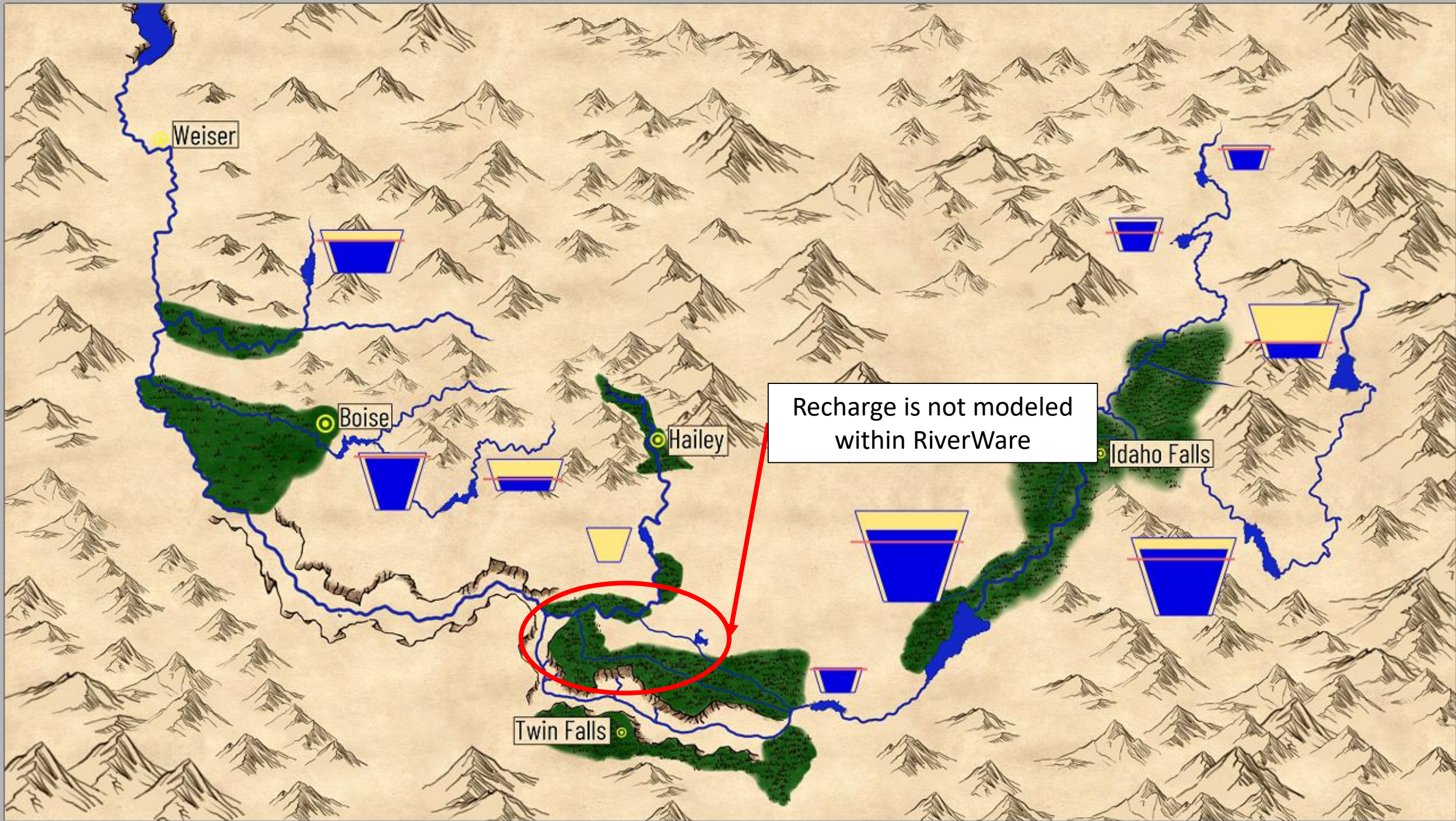
Cloud Seeding Dry Year



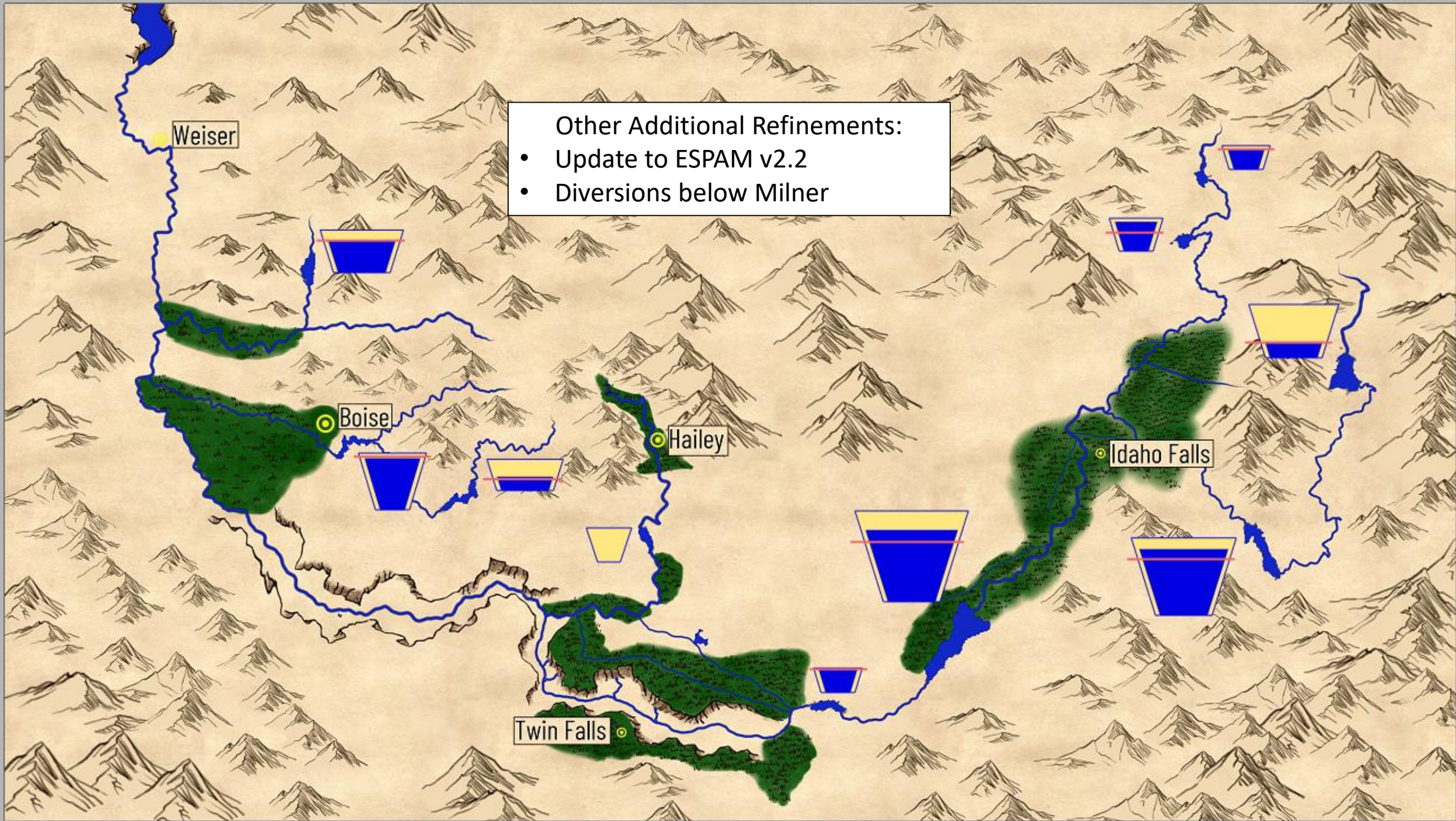
Cloud Seeding Wet Year



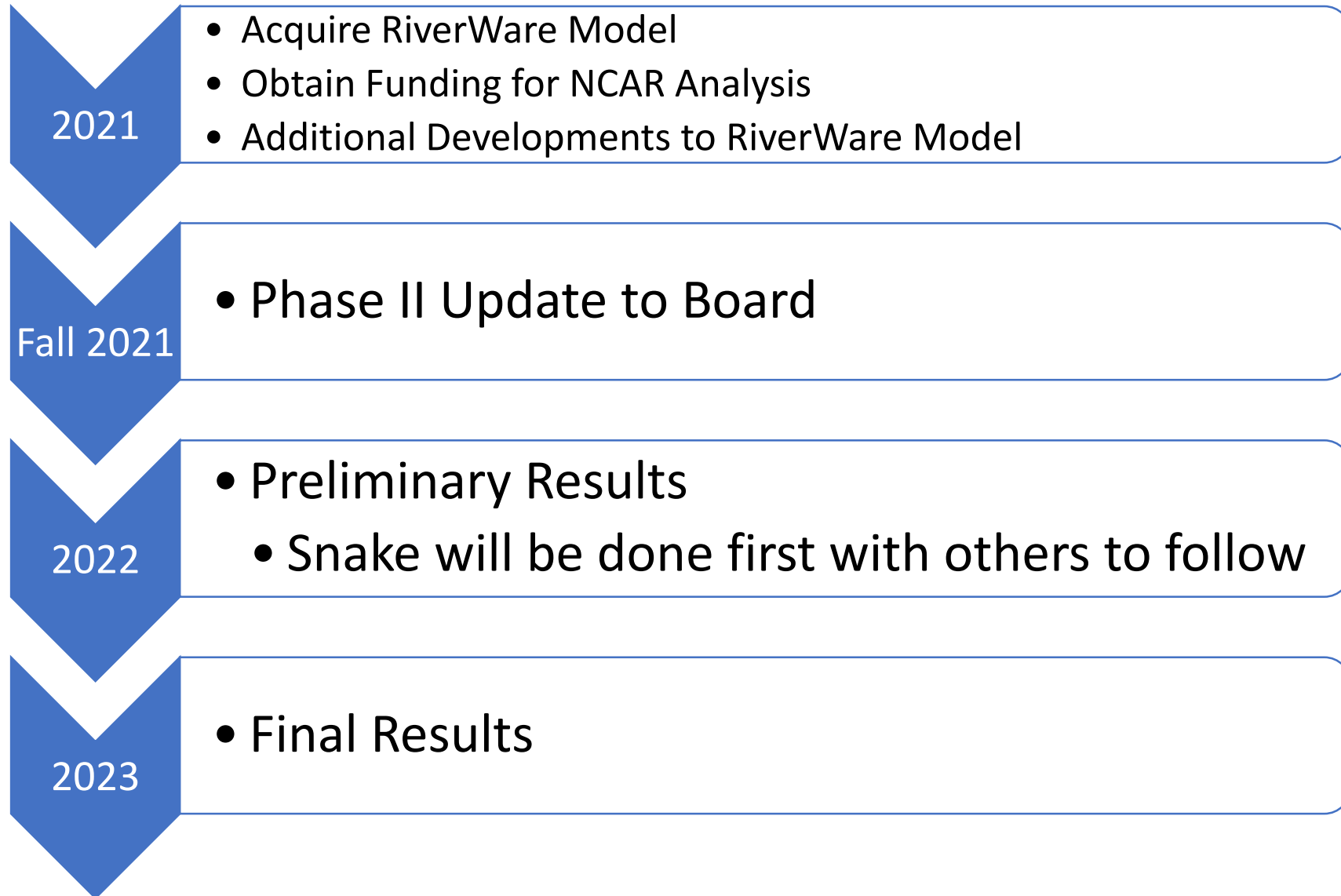








Phase II Timeline

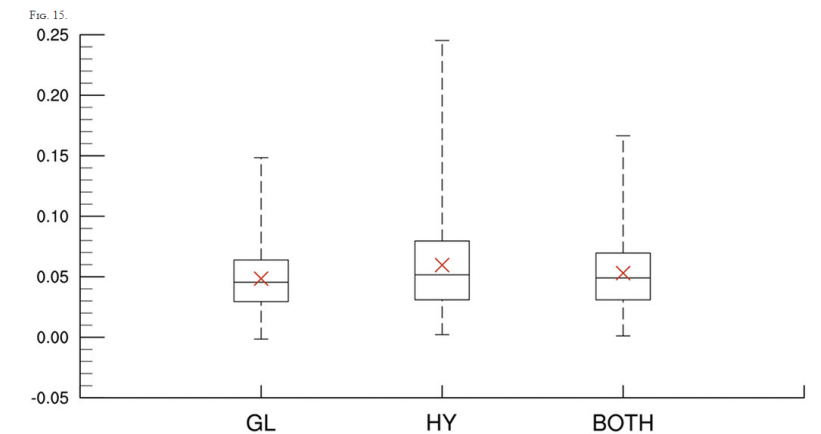
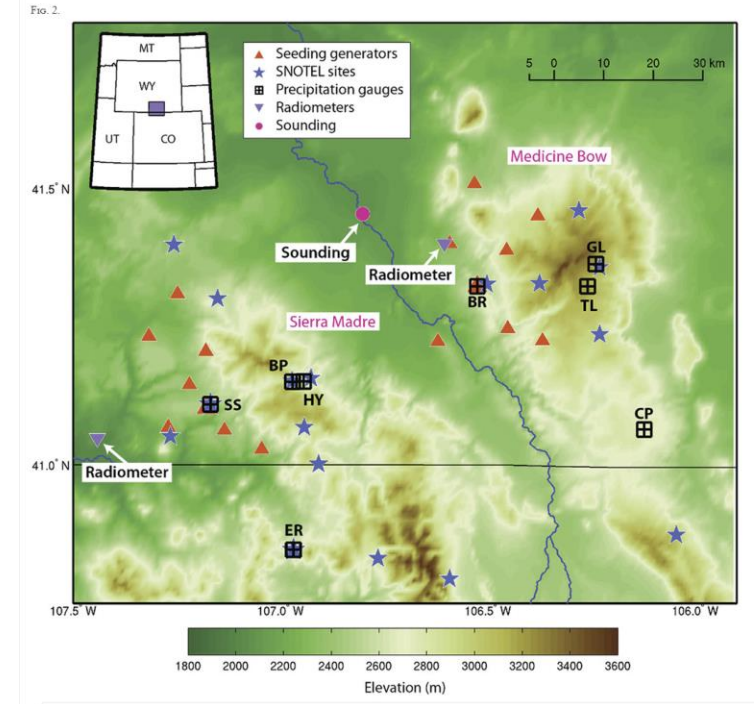


Past Phase II

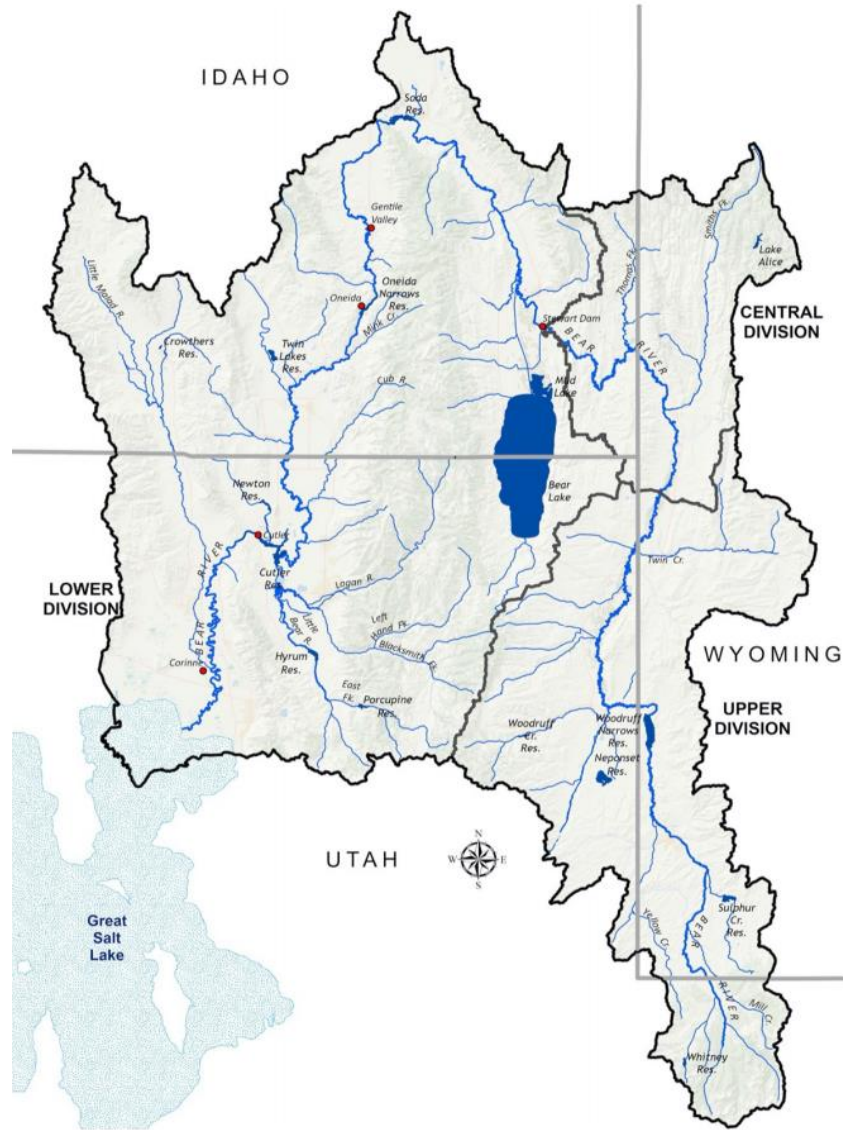
- House Bill 266 -“The legislature recommends that the water resource board complete an assessment of basins and work with affected stakeholders to implement the cloud seeding program in basins that would benefit from the program.”
- This methodology can be replicated across Idaho
- Primary requirements for each basin
 - Cloud seeding study
 - Physical hydrologic model of the basin

Cloud Seeding

- Initial discussions with NCAR
- Look at the potential for Cloud Seeding
- Similar studies have been performed in Wyoming



River Basin Modeling



- Models have already been constructed on some basins
- For other basins, additional work would be required
- This work would serve other benefits beyond cloud seeding
 - Can be used for a multitude of planning projects



Next Steps

- Currently we are developing the RiverWare model
 - Will be providing updates on model development this fall
 - Preliminary results will be available in 2022
 - Full results by 2023
- This planning model can be used for other applications on the Snake River and other basins
- This work can be extended to basins across Idaho

Memorandum

To: Idaho Water Resource Board
From: Amy Cassel
Date: May 10, 2021
Re: Water Transaction Program – USFS water rights permanent rental



REQUIRED ACTION: Consideration of the attached funding resolution to authorize the payment of the one-time rental fee for the USFS water rights permanent rental

Background:

The Upper Salmon River is utilized by Chinook salmon and steelhead, both listed as threatened under the Endangered Species Act (ESA). Sockeye salmon utilize the Salmon River for migration to Redfish Lake Creek and are listed as endangered under ESA. Additionally, Chinook salmon and steelhead utilize Alturas Lake Creek and Valley Creek, two tributaries to the Salmon River, for spawning, rearing, and migration.

The 2004 Snake River Water Rights Agreement (Nez Perce Agreement) established 27 minimum stream flow water rights in the Upper Salmon Basin, and includes the minimum stream flows on Alturas Lake Creek, Valley Creek, and the Salmon River. The Nez Perce Agreement committed the state of Idaho to provide incentives for improving fish habitat, and the IWRB has the authority to meet those minimum stream flows through water right rentals or acquisitions under state law.

The United States Forest Service (USFS) currently holds water supply bank lease contracts for 19 separate water rights in Basin 71 (Sawtooth Valley). The combined lease total for these water rights is 123.9 cfs and 2,490 acres. The 5-year lease term ends December 31, 2021. These rights are sourced by the Upper Salmon River, Alturas Lake Creek, Valley Creek, and several Salmon River tributaries.

IWRB staff approached the USFS about the possibility of a permanent rental of these water rights to be delivered to meet the IWRB's minimum stream flow water rights: 72-16668 on the Salmon River, 71-10890 on Alturas Lake Creek, and 71-10886 on Valley Creek. There would be no change of ownership on the water rights. The USFS would continue to own the water rights and the IWRB would rent them indefinitely to meet the aforementioned minimum stream flows. There would be no payment for this rental to the USFS. The permanent rental of these water rights is in the public interest, and is consistent with the State Water Plan and the intent of the Nez Perce Agreement.

Meeting Minimum Stream Flows:

Salmon River: There is currently only one active stream gage on the Salmon River located near MSF 72-16668. It is operated by USGS and is located approximately 25 miles upstream from the quantification point for MSF 72-16668. The period of record for this gage is 1921 – 2019, with a data gap from 1992 – 1999 (reason unknown). The USGS operates two additional gages upstream of the MSF, one on Thompson Creek and one on Squaw Creek (tributary to the Salmon River).

The water supply bank will use all available gage data to determine if the MSF 72-16668 is being met. Upon a brief analysis of the monthly mean flow recorded at these three gage locations between 1980 and 2019, the

minimum stream flow from May 1 through September 30 is not always met during the irrigation season, and the contribution of the USFS water rights would augment the flows necessary to meet the MSF.

Alturas Lake Creek: A continuous flow stream gage was operated on Alturas Lake Creek from 2006 to 2015. During this period of record, the minimum stream flow on Alturas Lake Creek was not met most of the days from mid-July through September.

Valley Creek: The USGS operates a stream gage on Valley Creek, and monthly mean discharges between 1911 and 2020 indicate that MSF 71-10886 is typically met. However, there are low flow years where the minimum stream flow is not met during the irrigation season. Those low flow years would benefit from the administration and delivery of the rented USFS water rights.

Thus, when reviewing the existing stream flow data, both current and historic, the rental of the USFS water rights to meet minimum stream flows on Alturas Lake Creek, Valley Creek, and the Salmon River could contribute additional flows and enhance the IWRB's ability to meet its minimum stream flows in the Upper Salmon River basin.

In the near term, IWRB staff determined that completing the permanent rental agreement was an important first step to protecting the USFS water rights in stream. The USFS water rights are leased into the water supply bank, but they are not rented and could, in theory, be rented out by other parties for irrigation purposes. A permanent rental for delivery to the IWRB's minimum stream flows would protect the water rights instream in perpetuity, and contribute to the IWRB's minimum stream flows and aid the recovery of ESA-list fish species.

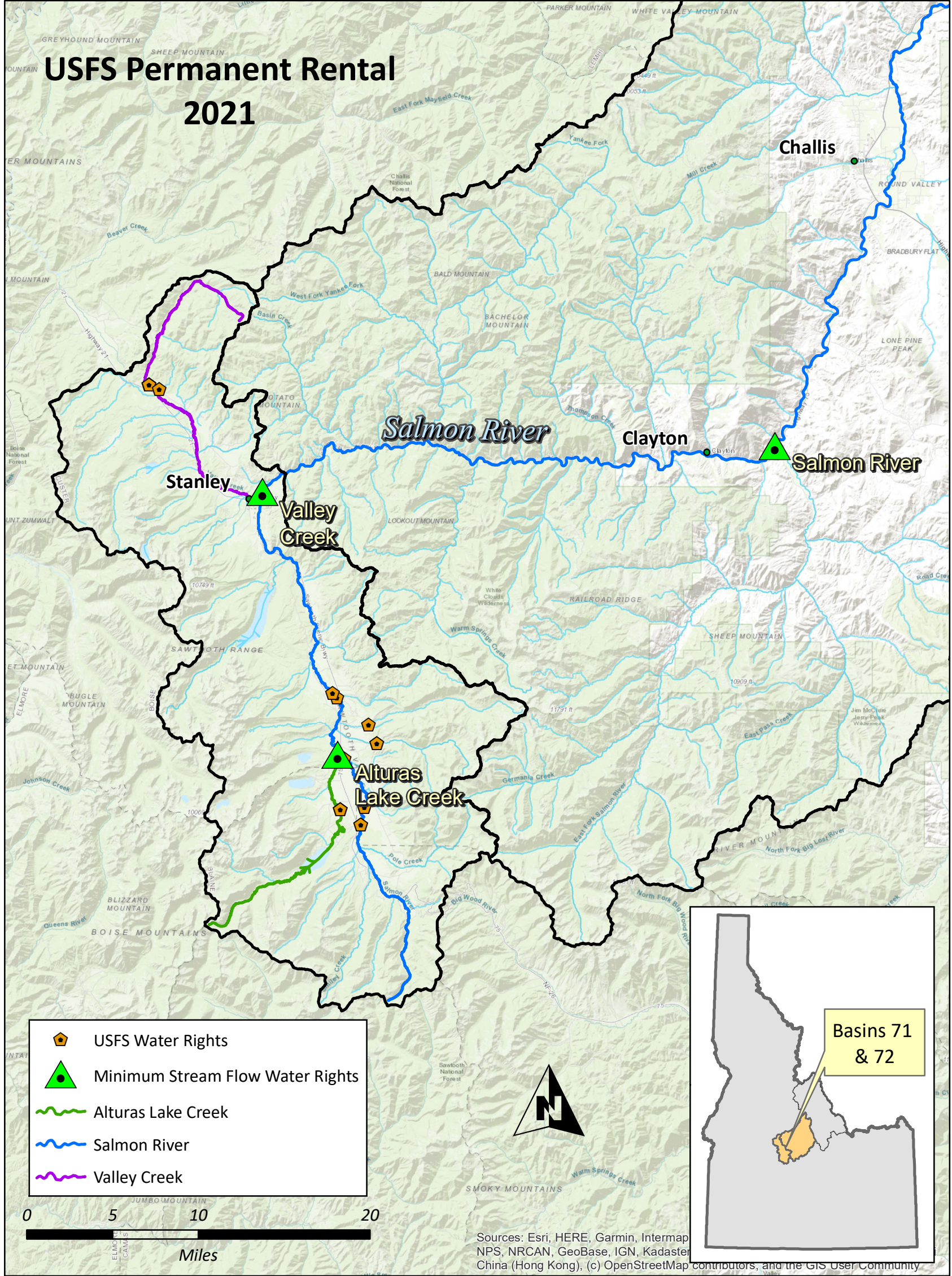
IWRB staff will conduct more analysis on the administration and delivery of the water rights. This is an effort that will require more stream flow data and additional fixed gaging stations, and it will take at least several irrigation seasons to gather this data. It will also require a detailed analysis of the USFS water rights and their priority dates relative to other active water rights in the basin. Once that analysis is complete, IWRB staff can determine the resources needed to assist with administration of the water instream (watermaster time and fixed stream gage costs). This information and identified costs will be used in a proposal to the Columbia River Basin Water Transactions Program to compensate the water district for administering the rented water to meet the minimum stream flows.

The one-time permanent rental fee, to be paid to the water supply bank, is \$14,941.20. Funds are available in the IWRB's Revolving Development Account, and staff is requesting that IWRB consider the authorization of those funds to cover the one-time rental fee and permanently secure the leased USFS water rights in stream.

Attachments:

1. Map of Upper Salmon Minimum Stream Flow water rights
2. Draft Resolution

USFS Permanent Rental 2021



Sources: Esri, HERE, Garmin, Intermap, NPS, NRCAN, GeoBase, IGN, Kadaster, China (Hong Kong), (c) OpenStreetMap contributors, and the GIS User Community

BEFORE THE IDAHO WATER RESOURCE BOARD

IN THE MATTER OF THE PERMANENT RENTAL OF
SAWTOOTH VALLEY WATER RIGHTS

RESOLUTION TO MAKE A FUNDING
COMMITMENT

1 WHEREAS, Chinook and Sockeye salmon, steelhead, and bull trout habitat in the Upper Salmon
2 River basin is limited by low flow conditions and high water temperatures; and
3

4 WHEREAS, it is in the interest of the State of Idaho to augment stream flows and provide habitat
5 in the Upper Salmon River Basin to encourage recovery of ESA-listed Chinook and Sockeye salmon,
6 steelhead, and bull trout fish; and
7

8 WHEREAS, the 2004 Snake River Water Rights ("Nez Perce") Agreement commits the state to
9 providing incentives for improving fish habitat which includes improving or protecting flow conditions to
10 augment stream flows; and
11

12 WHEREAS, Alturas Lake Creek, Valley Creek, and the Upper Salmon River have been identified as
13 high priority streams for flow restoration efforts, to provide high quality habitat for anadromous Chinook
14 and Sockeye salmon, steelhead and resident bull trout; and
15

16 WHEREAS, as provided for in the Nez Perce Agreement, the Idaho Water Resource Board (Board)
17 established minimum streamflow Water Rights 71-10890 on Alturas Lake Creek, 71-10886 on Valley
18 Creek, and 72-16668 on the Salmon River to be met through water right rentals or acquisitions under state
19 law; and
20

21 WHEREAS, the United States Forest Service (USFS) owns Water Right Nos. 71-41, 71-42B, 71-43B,
22 71-49B, 71-50, 71-59, 71-61, 71-64B, 71-66, 71-68, 71-2004D, 71-2053A, 71-7002, 71-10277, 71-10278,
23 71-10728, 71-10766, 71-10772 and 71-10871 (Water Rights) on Alturas Lake Creek, Valley Creek, the
24 Salmon River, and several Salmon River tributaries, and has leased the referenced rights into the Idaho
25 Water Supply Bank; and
26

27 WHEREAS, the Board, pursuant to Section 42-1734, Idaho Code, has the authority to acquire,
28 purchase, lease, or exchange land, rights, water rights, easements, franchises, and other property deemed
29 necessary or proper for the construction, operation, and maintenance of water projects; and
30

31 WHEREAS, the USFS desires to protect the Water Rights in stream and offers them to the Board
32 for rental and permanent delivery to Board minimum stream flow Water Right Nos. 71-10890, 71-10886,
33 and 72-16668; and
34

35 WHEREAS, the permanent rental of the Water Rights is in the public interest, and is consistent
36 with the State Water Plan and intent of the Nez Perce Agreement; and
37

38 WHEREAS, the total rate of the flow from the Water Rights is 124 cfs, resulting in a one-time rental
39 fee of \$14,941.20 to be paid to the Idaho Water Supply Bank; and
40

41 WHEREAS, funds are available in the Board's Revolving Development Account to cover the cost of
42 the one-time rental fee; and
43

44 NOW THEREFORE BE IT RESOLVED that the Board authorizes expenditure of a one-time rental fee
45 in the amount of fourteen thousand, nine hundred forty-one dollars and twenty cents (\$14,941.20) to the
46 Idaho Water Supply Bank from the Board's Revolving Development Account.
47
48

DATED this 21st day of May 2021.

Jeff Raybould, Chairman
Idaho Water Resource Board

ATTEST _____
Jo Ann Cole-Hansen, Secretary

MEMO



To: Idaho Water Resource Board

From: Kala Golden

Date: May 7, 2021

Subject: Point Springs Grazing Association – New Water Supply Project Loan Application

Action Item: \$20,000 loan

1.0 INTRODUCTION

Point Springs Grazing Association (Association) is requesting a new loan in the amount of \$20,000 from the Idaho Water Resource Board (Board) to construct a new well and pump system for purposes of supplying stock water on grazing lands (Project).

2.0 BACKGROUND

Based out of Cassia County, the Association is formed by a group of 6 ranchers that pasture cattle in Meadow Creek Canyon, approximately 36 miles southeast of Declo, ID. The association holds a 2,379 Animal Unit Month (AUM) grazing allotment, which allows it to graze cattle on 13,000 acres of BLM land during the summer months. The Association rotates cattle between the Cold Springs and Meadow Creek areas of their allotment. Stock water in the Meadow Creek area is sourced from a ground water well that supplies approximately 6 miles of pipeline, servicing 11 watering stations. Water in the Cold Springs area is currently supplied by the spring, however in recent years the spring has increasingly lost supply and is no longer a sustainable source. The Association will need to drill a new ground water well in the Cold Springs area to ensure a long term water supply.

3.0 PRIOR LOANS

The current Project will be the third the Association has funded through a Board loan. In 2000, the Board approved a loan to the Association in the amount of \$12,000 at 5.5% interest and a 10-year term. Funds from this initial loan were used to deepen an existing well in the Meadow Creek area of the Association's allotment. In 2012, the Board approved a second loan to the Association in the amount of \$48,276.62, also with a 5.5% interest rate and 10 year term; funds for which were used to replace the 6 miles of pipeline that supplies watering stations throughout the allotment. The initial loan was repaid timely and in full; the second loan has been paid timely and holds a remaining balance of \$17,335.53, with 3 annual payments remaining. The Association would like to roll this remaining balance into a new loan to drill a new well.

4.0 PROPOSED WELL PROJECT

The Project includes the drilling of a new stock water well, and installation of a pump system in the Cold Springs area of the Association's grazing allotment.

5.0 BENEFITS

The new ground water well will provide a reliable, long-term water supply in the Cold Springs area of this grazing allotment. Sufficient water supply in both areas will allow the Association to continue rotation of its cattle, and limit pressure to one area due to extended periods of grazing.

6.0 FINANCIAL ANALYSIS

Currently, each rancher in the Association is assessed \$1.35 per Animal Unit Month (AUM) for their grazing allotments, and an additional 18% fee is charged by the Association to cover operations and maintenance associated with the watering facilities. Each rancher is then charged annually for the existing loan payment based on the percentage of their share of the Association's total AUMs. The Association intends to continue billing its members annually for the new loan payment based on each member's share of the Association's total AUMs.

The Association is requesting a new loan of \$37,335.53 at 3.5% interest for a 10-year term. This includes \$20,000 for the cost of a new well and pump system, and the remainder of the existing loan in the amount of \$17,335.53. The following analysis reflects the Board's current interest rate of 3.5%. Given the reduced interest rate and loan total amount, the new loan payment and member assessment will be lower than under the current loan.

Payment Analysis

Term (Years)	Existing Annual Payment- Revolving Account Loan	New Annual Payment- Revolving Account Loan	Current Assessment Cost/AUM/Year	New Assessment Cost/AUM/Year
10	\$6,297.53	\$4,497.03	\$5.20	\$4.16

6.0 WATER RIGHTS

There are no existing water rights for the Association's facilities. The Association is responsible for constructing, operating, and maintaining the works it needs to support grazing, however, the BLM maintains ownership of all improvements constructed on these grazing allotments, including developed water rights. Pursuant to Idaho Code §42-111, use of water for "domestic purposes", including livestock, does not require a water right if the total use does not exceed 13,000 gallons of water per day.

7.0 SECURITY

Currently, the IWRB holds an Assignment of Interests agreement set forth under the Association's existing loan, which includes the existing well facilities in the Meadow Creek area, and all grazing leases issued to the Association or its members by the United States Department of Interior.

8.0 CONCLUSION AND RECOMMENDATION

This loan will be used to drill a new stock water well and install an accompanying pump system. Staff recommends approval of the loan request by the Association, for the total amount of \$37,335.53.

BEFORE THE IDAHO WATER RESOURCE BOARD

IN THE MATTER OF POINT SPRINGS GRAZING
ASSOCIATION FUNDING REQUEST

RESOLUTION TO AUTHORIZE FUNDING FOR
NEW WELL

1 WHEREAS, Point Springs Grazing Association (Association) submitted a loan application to the
2 Idaho Water Resource Board (IWRB) in the amount of \$20,000.00 for the drilling of a new ground water
3 well (Project); and
4

5 WHEREAS, the Association holds a grazing allotment on 13,000 acres of land owned by the
6 Bureau of Land Management (BLM); and
7

8 WHEREAS, the Association rotates cattle between two areas of the allotment known as the Cold
9 Springs area and the Meadow Creek area, to allow for periods of rest; and
10

11 WHEREAS, water in the Meadow Creek area is provided by an existing ground water well and 6
12 miles of pipeline supplying several watering stations; and
13

14 WHEREAS, water in the Cold Springs area is currently supplied by a spring which is no longer
15 able to provide a sustainable supply. The Association will need to drill a new ground water well in this
16 area to supply water and allow for continued rotation of its livestock; and
17

18 WHEREAS, the total estimated cost for the Project is \$20,000; and
19

20 WHEREAS, the Association currently holds a loan with the IWRB, with a remaining balance of
21 \$17, 335.53. The Association is requesting to roll the balance from its existing loan, into a new loan that
22 includes funding for the proposed well project in the Cold Springs area; and
23

24 WHEREAS, the Association is requesting a new loan of \$37,335.53; and
25

26 WHEREAS, the Association is a qualified applicant and the proposed Project qualifies for a loan
27 from the IWRB'S Revolving Development Account; and
28

29 WHEREAS, the proposed Project is in the public interest and is in compliance with the State
30 Water Plan; and
31

32 NOW THEREFORE BE IT RESOLVED that the IWRB approves a loan not to exceed \$20,000 from
33 the Revolving Development Account at 3.5% interest with a 10-year repayment term and provides
34 authority to the Chairman of the Idaho Water Resource Board, or his designee, to enter into contracts
35 with the Association on behalf of the IWRB.
36

37 NOW THEREFORE BE IT FURTHER RESOLVED that this resolution and the approval of the loan are
38 subject to the following conditions:
39

- 40 1) The Association shall comply with all applicable rules and regulations that apply to the
41 proposed Project.
42 2) The Association will provide acceptable security for the loan including, but not limited to, all
43 existing assets held as collateral under the Associations current loan agreement with the
44 IWRB.
45

DATED this 21th day of May, 2021.

JEFF RAYBOULD, Chairman
Idaho Water Resource Board

ATTEST _____
JO ANN COLE-HANSEN, Secretary



IDAHO WATER RESOURCE BOARD

322 East Front Street, Statehouse Mail

Boise, Idaho 83720

Tel: (208) 287-4800

FAX: (208) 287-6700



APPLICATION FOR FINANCIAL ASSISTANCE FOR NON-POTABLE WATER SYSTEM CONSTRUCTION PROJECT

Answer the following questions and provide the requested material as directed. All pertinent information provided. Additional information may be requested by the Idaho Water Resource Board (IWRB) depending on the scope of the project and amount of funding requested. For larger funding amounts an L.I.D. may be required.

Incomplete documents will be returned and no further action taken will be taken by IWRB staff. All paperwork must be in twenty eight (28) working days prior to the next bi-monthly Board meeting.

Board meeting agendas can be found at: <http://www.idwr.idaho.gov/waterboard/>

I. Prepare and attach a "Loan Application Document".

The Loan Application Document requirements are outlined in the Water Project Loan Program Guidelines. The guidelines can be found at:

<http://www.idwr.idaho.gov/waterboard/Financial%20program/financial.htm>.

You can also obtain a copy by contacting IWRB staff.

II. General Information:

A. Type of organization: (Check box)

- ☐ Irrigation District
- ☐ Canal/Irrigation Company
- ☐ Lateral Association
- ☐ Flood Control District
- ☐ Homeowners Association

- ☐ Water User's Association
- ☐ Municipality
- ☐ Reservoir Company
- ☒ Other

Explain: BLM / Stock Well

Point Springs Grazing Association
Organization name

Lee Matthews / Member Secretary
Name and title of Contact Person

631 S. 2327 E.

PO Box/Street Address

(208) 312-3349

Contact telephone number

Declo, ID 83323

City, County, State, Zip Code

shanna.matthews4@gmail.com
e-mail address

Project location legal description

T13S R28E Sec 23 N1/2 SW 1/4 SW 1/4

B. Is your organization registered with the Idaho Secretary of State's office? Yes ☐ No ☒

IWRB Non-drinking loan form 2/08

C. Purpose of this loan application.

- ☒ New Project
☐ Rehabilitation or replacement of existing facility
☐ DEQ requirement
☐ Other: _____

D. Briefly describe the project:

Drilling a new well for Stock cows

III. WATER SYSTEM:

A. Source of water:

- ☐ Stream ☒ Groundwater
☐ Reservoir ☐ Other

B. Water Right Numbers:

Water Right	Stage	Priority Date	Source	Amount

Note: Stage refers to how the water right was issued. (License, Decree, or Permit)

C. If irrigation/lateral system:

Number of acres served: n/a
Number of shareholders served: _____
Water provided annually (acre-feet) _____

D. If flood control system, drainage system, groundwater recharge, or other type of system:

Number of acres within District or service area: n/a
Number of people within District or service area: _____

E. If an Association/Municipality the number of residences served by the system:

Number of residences served: n/a
Number of hookups possible: _____

IV. USER RATES:

A. How does your organization charge users rates?

- ☐ Per acre ☐ Per hook up
☐ Per share ☐ Tax assessment

Explain what a share is: _____

☒ Other, explain Rates are set on each member's AUMs allotted on BLM grazing ground.

B. Current rate? \$ _____ per _____
(Share, hook-up, month, year, etc.)

C. When was the last rate change? _____ (month/year)

D. Does your organization measure water use? Yes ☐ No ☒
If yes, explain how: _____

E. Does your organization have a regular assessment for a reserve fund? Yes ☐ No ☒
If yes, explain how it is assessed: _____

F. Does your organization have an assessment for some future special need? Yes ☐ No ☒
If yes, explain for what purpose and how it is assessed: _____

V. PROPOSED METHOD FOR REVENUE FOR REPAYMENT OF LOAN

How will you plan to assess for the annual loan payments?

Check revenue sources below:

- ☐ Tax Levies
☐ Capital Improvement Reserve Account or Sinking Fund
☐ User Fees and Tap/Hookup Fees
☒ Other (explain) assessed on AUMs per member

Will an increase in assessment be required? Yes ☒ No ☐

When will new assessments start and how long will they last?

When the new loan starts and will last until
its paid off

VI. SECUREMENT OF LOAN

List all land, buildings, waterworks, reserve funds, and equipment with estimated value that will be used as collateral for the loan:

Property	Estimated Value
<u>New well</u>	<u>\$ 17,000</u>
<u>New pump</u>	<u>\$ 3,000</u>

For property Securement, attach a legal description of the property being offered along with a map referencing the property.

VII. FINANCIAL INFORMATION:

A. Attach a copy of each of the last 3 year's financial statement. **(Copies must be attached)**

B. Reserve fund (current) _____

C. Cash on hand \$ 2000.-

D. Outstanding indebtedness:

To Whom	Annual Payment	Amt. Outstanding	Years Left
<u>none</u>			

E. What other sources of funding have been explored to fund the project? (example: NRCS, USDA Rural Development, Banks, Local Government, etc.)

Bureau of Land Management

VIII. ORGANIZATION APPROVAL:

Is a vote of the shareholders, members, etc. required for loan acquisition? Yes ☐ No ☒

If yes, a record of the vote must be attached.

Amount of funds requested: \$ 20,000.-

By signing this document you verify that all information provided is correct and the document is filled out to the best of your ability.

Authorized signature & date: 

Brief Explanation of the Project:

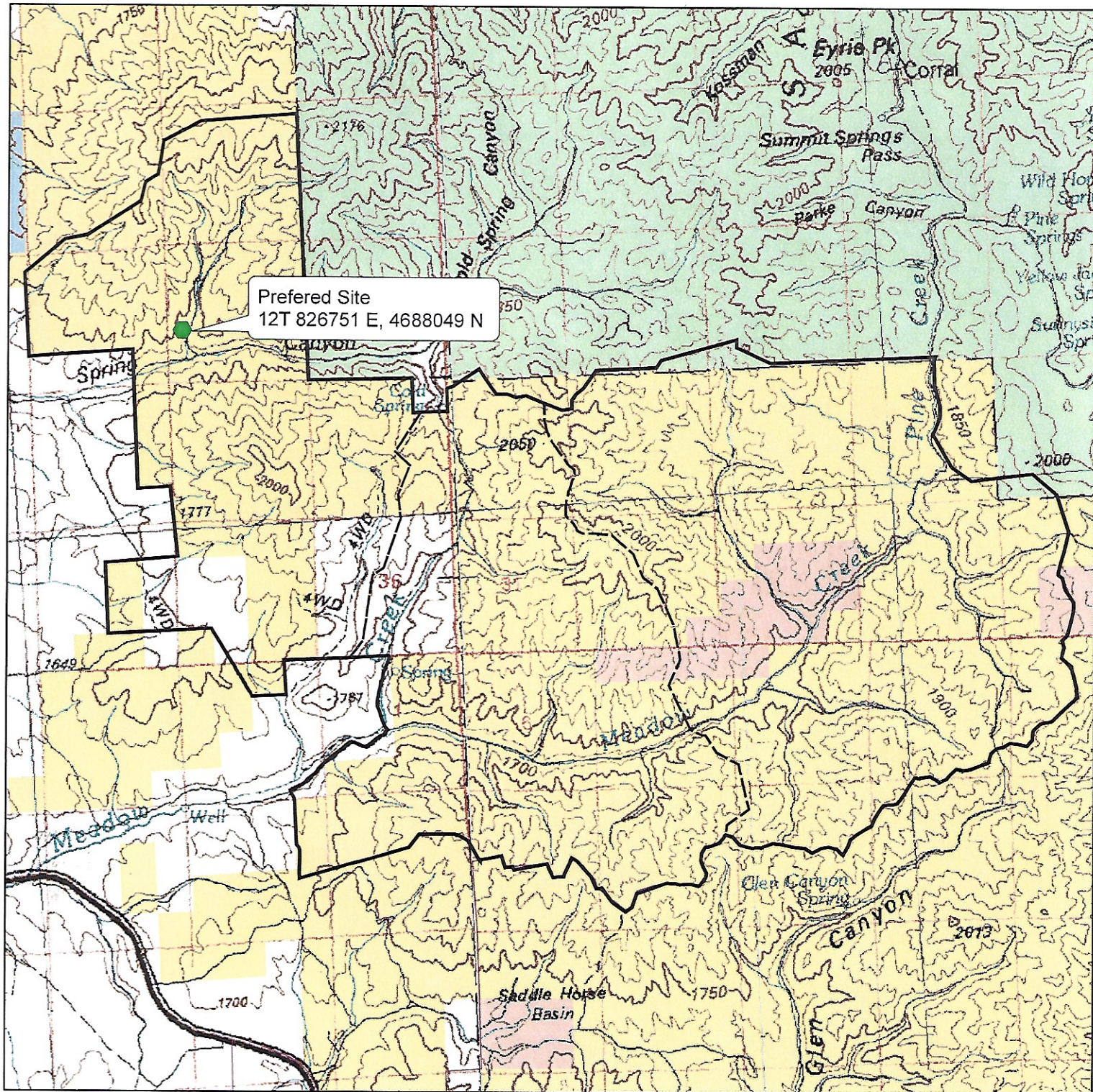
As an association, we run cattle on the BLM known as Cold Springs and Meadow Creek. Meadow Creek is on one side of the mountain and Cold Springs is on the other. Ten years ago, we drilled a new well and replaced the pipeline on the Meadow Creek side of the allotment. The new well and pipeline has worked very well and has been a big asset to the allotment. We rotate the cattle between Meadow Creek and Cold Spring to rest one pasture or the other. Over the last several years, the spring at Cold Springs started drying up. With no water on the Cold Springs side of the mountain, we haven't been able to use it as well as we should, adding extra pressure on the Meadow Creek side. The new well would open a lot more country up on the Cold Springs side of the mountain, helping the allotment out as a whole. There is already an existing pipeline that we could hook the new well into.

Each member of the association pays their share of the bills; they are billed out on percentage of each member's AUMs (Animal Unit a Month). This is the number of cattle each member runs on the allotment.

We, as an association, appreciate your time and consideration in this project.

Thank you,

Lee Matthews
Secretary
208-312-3349



Colds Springs Proposed Well Site Meadow Creek Allotment

Legend

- Well Site
- Bureau of Land Management
- Range Allotment
- Bankhead-Jones Land Use
- Pasture
- Forest Service
- County Boundary
- Private; other
- ID State Boundary
- State
- BLM Offices

0 0.5 1 2 Miles



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