

STATE BOARD OF LAND COMMISSIONERS

March 19, 2024
Information Agenda

Subject

Endowment Land Alternative Energy Leasing Policy

Background

As part of ongoing efforts to fulfill its fiduciary responsibilities to endowment beneficiaries, the State Board of Land Commissioners (Land Board) tasked the Idaho Department of Lands (Department) to regularly review and recommend necessary policies and procedures for leasing activities on endowment lands. The Department recognized the need for a policy governing alternative energy leasing practices. The implementation of such a policy will improve efficiencies, allow for growth of the alternative energy leasing portfolio, and offer increased security to the endowments.

Discussion

Over the past two months, the Department has led a thorough collaboration with the Office of Energy Resources, and Land Board staff, with meaningful contributions from the Offices of the Governor and Attorney General, to review the Department's alternative energy leasing process and develop a policy for alternative energy leasing activities on endowment lands. The alternative energy leasing policy identifies the permitted types of alternative energy leases, criteria for seeking Land Board approval of alternative energy lease opportunities, how the Department will proceed with lease opportunities through the traditional leasing process or a Request for Proposal (RFP) process, and stipulates specific lease provisions that must be present in alternative energy leases to maximize revenue and protect the endowments.

The Department's goal is to provide a streamlined, uniform way to perform alternative energy leasing transactions while abiding by all relevant codes and statutes. This will allow the Department to explore opportunities to increase revenue generating activity on endowment lands. The alternative energy leasing policy and related procedures will provide direction and consistency for alternative energy leasing, ensure the endowments and endowment lands are protected for the life of the lease, and work with existing leasing programs to explore further ways to meet the fiduciary mission of endowment lands.

Attachments

1. Alternative Energy Leasing Policy DRAFT



Alternative Energy Leasing Policy

Purpose

This policy establishes requirements for alternative energy leasing on endowment lands and delegates certain related decision-making authority to the Director of the Idaho Department of Lands.

Agency Contact

Bureau Chief - Real Estate Services

Policy

I. Allowed Types of Alternative Energy Leases

The Department shall evaluate alternative energy lease applications, initiate the Request for Proposal (RFP) process, and create and maintain leasing processes for activities consistent with existing alternative energy leases. These include leases for alternative energy projects of ten (10) megawatts or more, or for power generation for the purpose of sale, involving wind turbines, solar power generation, geothermal power generation (direct use, electrical generation, and associated by-products), battery storage, transmission lines, and other related infrastructure.

II. Land Board Approval of Commercial Lease or RFP Proposals

The Department shall seek Land Board approval for any alternative energy project that meets any of the following criteria:

- A. The proposed alternative energy lease exceeds 20 years.
- B. The proposed energy lease is known to have or is likely to generate public interest, may have resource or political complexity, is related to a larger project involving federal lands, or has other relevant concerns as determined by the Director.

Prior to advertising an RFP, Land Board Staff will be notified of the Department's plans, and the opportunity to voice concerns will be provided during a Staff Briefing. Formal approval will be sought from the Land Board to move forward with lease negotiations for projects initiated either through an RFP or traditional lease process.

III. RFP Versus Traditional Lease Application Process

- A. The Department will have discretion as to which lease opportunities are best suited for RFP versus the traditional lease advertisement process. In making that decision, the Department will consider various factors, including, but not limited to, prevailing market conditions, recent expressions of interest in leasing opportunities, ongoing development activities in the vicinity, strategic objectives outlined by the Land Board or Department leadership, the project's public perception, managerial complexities, and whether the concerned lands are in transition.

- B. An RFP is more likely to be used in situations where potential developments are primarily or solely on endowment land; have multiple outside interested users/lessees; have a strong interest in a long-term lease (more than 20 years); and, the potential for multiple energy uses.
- C. A traditional lease process is more likely to be employed in situations involving small additions of endowment land to existing energy leases/projects and characteristics of the property that result in a high degree of certainty that there will not be competition for competing uses (such as properties with poor access, properties located in areas with limiting geographic features, limiting environmental or zoning factors, etc.).
- D. In situations where an RFP is not indicated and the traditional lease process is employed, the initial terms of the lease, including rent, will be communicated to applicants during the advertisement period. At the end of the advertisement period, if there is only one applicant, the terms of the lease will be updated and offered to that applicant. If the lease has more than one applicant during the advertisement period, the lease will be offered at a live auction among the applicants. The bidding during the live auction will determine a one-time premium bid for the right to execute the lease; the terms of the lease will be updated based on the successful bidder, and the lease will be offered to that party.
- E. The Department may identify a parcel to nominate as a candidate for an energy lease through the RFP process. The highest and best energy use will be determined by analyzing the responses to the RFP and the financial offering from the proponents. At the end of the RFP period, a lease will be negotiated by the Department, with the assistance of the Office of the Attorney General (OAG), and with input from the selected proponent of the RFP. Once lease terms have been reviewed by the OAG and approved by the Department, the resulting lease and land will be publicly advertised as available for lease. If there is only one applicant, then the applicant will be offered the lease. If there are two or more applicants, then a live auction will be held among the applicants.
- F. All leases will be reviewed by the Office of Attorney General prior to being executed by the Land Board.

IV. Alternative Energy Lease Provisions

The following protections should be present in all alternative energy leases to ensure protection of endowment trust lands.

- A. Adequate bonding, in the form of cash bonds, payment bonds, performance bonds, letters of credit or other security deemed acceptable to the Land Board (to cover all costs of performance of all required obligations in each phase of the lease, including costs of decommissioning, remediation and restoration of the leased property in the event of default for all permitted or required activities during each phase of the lease as determined by the Land Board), will be in place prior to and throughout each phase of the lease through the life of the lease. In addition to specific lease phase bonds, a bond shall be in place sufficient to cover two years' rent extending through complete reclamation upon termination should operations cease for any reason, including through the complete reclamation of the leased property in accordance with the terms of the lease. Regardless of bonding, lessee shall indemnify lessor against any and all costs actually incurred in the event of default or disaster, and it is the intent of the Land Board that such potential liability be the subject of adequate bonding to ensure lessor is protected against any and all such reasonably anticipated risks.

- B. Insurance shall be required to adequately cover full replacement costs of all infrastructure, improvements and fixtures allowed, constructed and/or placed on the leased premises during each phase of the lease and sufficient to cover all hazards and risks, including, but not limited to, damage, injury or death to persons, damage to real and personal property, improvements and fixtures; environmental hazards, pollution, and pollution impairment; risks and damage resulting from fire; earthquake; flooding; automobile; workers compensation; etc. All insurance shall provide policy limits on a per incident basis and that all defense costs shall be and remain outside of policy limits. Insurance limits may be modified throughout the term of the lease at lessor's sole discretion.
- C. Leases shall restrict subleasing and assignment upon the prior written consent of lessor, and shall be void unless specifically agreed to in writing by lessor in lessor's sole discretion. Any approved sublease or assignment of the lease shall require proof, satisfactory to the Department in the Department's sole discretion, that the assignee and/or sublessee has experience with projects of like size and kind, expertise, and financial resources to perform all terms and conditions of the lease. No assignment or sublease shall extend beyond the term of the lease that is the subject of the assignment or sublease and shall terminate upon the termination of the lease for any reason. Any approved sublease or assignment shall not relieve the original lessee or assignee of its obligations under the lease unless specifically released from such liability by lessor, which release may be granted in lessor's sole discretion. In the event of a sublease, there shall not be any prepayment of rent beyond the current rent period. In no event shall lessor be liable for any obligations of the sublessor to the sublessee for application of the payment of rent or otherwise.
- D. Alternative energy leases shall provide strong provisions to prohibit and, to the extent possible, to protect lessor against the risk of, bankruptcy, assignment for the benefit creditors, appointment of receiver, deed in lieu of foreclosure and other foreseeable risks that may be identified by the Department.
- E. Mortgages and security interests may be permitted upon the prior written consent of lessor, provided lessee is not then in default of any term or condition of the lease. Any mortgage or security interest created without lessor's prior written consent shall be void. All rights of a lender or mortgagee shall be subordinate to lessor's interest in the lease and in the real property the subject of the lease, and any such mortgage or security interest shall secure only lessee's leasehold interest and improvements owned by lessee. No mortgage or security interest shall extend beyond the term of the lease. Upon termination of the lease for any reason, all mortgages and security interests shall also automatically terminate. In the event of a default by the lessee (whether a monetary default or otherwise), the holder of a mortgage or security interest or mortgagee, may cure such default within the time period allowed for lessee to cure, or within thirty (30) days after lessee's cure period ends; and, if the holder of the mortgage or security interest or mortgagee cures the default within such period, then the lease shall not be terminated for any such default. If the holder of a mortgage, security interest or mortgagee successfully forecloses against the lessee for default under the mortgage or security interest while the lease remains in effect, and the holder of the mortgage or security interest or mortgagee sells or otherwise transfers or assigns the foreclosed interest to a successor, lessor's prior written approval of such successor must be obtained before the transfer or assignment is

effective. Prior to assuming the rights of a successor lessee under the lease, the proposed purchaser or assignee of the foreclosed interest must first be approved in writing by lessor, which approval shall be in the sole discretion of lessor and subject to the same qualifications and requirements as a valid assignee subject to lessor's approval.

- F. Alternative energy leases shall provide that the termination of the lease by the Department may occur if the terms and conditions of the Decommissioning and Reclamation Plan, or any subsequent update of such plan required pursuant to the terms of the lease, cannot be agreed upon.
- G. A third-party expert, selected by the Department, will review and offer recommendations regarding the adequacy, feasibility, projected cost, and implementation of the Decommissioning and Reclamation Plan and any updates thereto during the term of the lease. The costs of the third-party evaluation will be paid for by the lessee.
- H. Security provisions related to Decommissioning and Reclamation must contain language that allow for bonding and security requirements in amounts of at least 150% of the estimated costs of full decommissioning and reclamation (including, but not limited to, costs to transport and deposit of all materials to an active recycling or disposal facility) or as otherwise required by the Land Board, to be reevaluated and adjusted as necessary at regular intervals not exceeding 5 years, or as otherwise deemed necessary or appropriate in the sole discretion of the Department. Bond amounts will be subject to an annual CPI escalator to account for cost increases between review periods. The Land Board shall retain the right to adjust the bonding amounts for the Decommissioning and Reclamation phase at the time of notification of the initiation of each phase and such bonding may be adjusted during the term of any phase of the lease at regular intervals not exceeding 10 years, or as otherwise deemed necessary or appropriate in the sole discretion of the Board.

Revision History (Board Action)

DATE First approved iteration of this policy.