

STATE BOARD OF LAND COMMISSIONERS

May 21, 2024
Regular Agenda

Subject

Endowment Land Energy Leasing Policy

Question Presented

Shall the Land Board approve the 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. Recently, there has been a substantial increase in interest in potential energy projects on private or federal lands adjacent to endowment lands. In some cases, the planned developments would greatly benefit through the expansion of activity to endowment land. Due to this increased interest, and the potential for substantially increased leasing revenue, the Department recognized the need for a policy governing energy leasing practices. The implementation of such a policy will provide clarity for project proponents, improve efficiencies, protect endowment lands, and allow for the growth of the energy leasing portfolio by participating in these projects proposed by the private sector.

Discussion

Over the past several months, the Department has led a thorough collaboration to review its leasing process and develop a policy for energy leasing activities on endowment lands. This was accomplished through meetings with the Office of Energy and Mineral Resources, researching and discussing the energy leasing policies and activities of several adjacent states, and incorporating significant amounts of language provided by the Office of Attorney General identifying the necessary parameters that must be met when evaluating these projects. The energy leasing policy identifies the permitted types of energy leases, criteria that must be met before seeking Land Board approval of energy leasing opportunities, the use of the traditional leasing process or a Request for Proposal (RFP) process, and stipulates specific lease provisions that must be present in energy leases to maximize revenue and protect the endowments. It is important to note that this policy does not supersede any authority the Land Board has to approve or deny any lease at its discretion.

The goal is to provide a streamlined, uniform way to perform 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 energy leasing policy and related procedures will provide direction and consistency for 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.

Recommendation

Approve the Energy Leasing Policy.

Board Action

Attachments

1. Energy Leasing Policy



Energy Leasing Policy

Purpose

This policy establishes requirements for energy leasing on endowment lands and delegates certain related decision-making authority to the Director of the Idaho Department of Lands.¹

Agency Contact

Bureau Chief - Real Estate Services

Policy

I. Allowed Types of Energy Leases

This policy applies to leases of state endowment land for an electric energy production facility (Facility) with a gross rated capacity of at least 10 MW. The Department shall evaluate energy lease applications, initiate the Request for Proposal (RFP) process, and create and maintain leasing processes for activities consistent with existing energy leases.

II. Land Board Approval of Commercial Lease or RFP Proposals

Any proposed Facility lease exceeding twenty (20) years shall require approval of the Land Board prior to advertising a lease initiated through either the RFP process or the traditional lease process.

III. RFP Versus Traditional Lease Application Process

- A. The Department has discretion to determine whether a particular parcel or lease opportunity is best suited for the Request for Proposal (RFP) process versus the traditional lease advertisement process. The Department should pursue an RFP when, after considering factors, including, but not limited to, the income generating potential of the parcel, prevailing market conditions applicable to the parcel, recent expressions of interest in leasing opportunities, ongoing development activities in the vicinity, strategic objectives outlined by the Land Board or Department leadership, managerial complexities, and whether the concerned lands are in transition, it determines there exists a competitive interest in the lease opportunity.
- B. An RFP should be used in situations where a proposed Facility would be primarily or solely located on endowment land; the subject land has multiple interested lessees; potential lessees have a strong interest in a long-term lease (more than 20 years); and there is potential for multiple energy uses on the subject land.
- C. In situations where the RFP process is employed, a lease will be negotiated between the Department and the selected proponent of the RFP. Once lease terms have been agreed upon, and upon initial approval of the Land Board, the resulting lease and land will be publicly

¹ This policy does not apply to oil and gas leasing or to geothermal leasing, which are subject to IDAPA 20.03.15 and 20.03.16, respectively, and in the event of any conflict between this policy and any provision in those rules, those rules shall control.

advertised as available for lease. If there is only one applicant, then the applicant will be offered the lease. The lease will then be presented to the Land Board for consideration and potential approval. If there are two or more applicants, then a live auction will be held among the applicants and the live auction procedures of section E. shall be used.

- D. A traditional lease process should be employed in situations: (1) involving relatively small additions of endowment land to existing energy leases/projects or, (2) where endowment land would be added to energy projects comprising primarily federal land, and (3) where the characteristics of the endowment land indicate, with 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.).
- E. In situations where the traditional lease process is employed, following initial approval by the Land Board of the proposal, 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 executed by the applicant, the lease will be presented to the Land Board for consideration and potential approval. 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. If executed, the lease will be presented to the Land Board for consideration and potential approval.

IV. Energy Lease Provisions

The following list of items, which is not exhaustive, should be adequately addressed in all Facility leases to ensure protection of endowment trust lands:

- A. Adequate financial assurances in a form and amount sufficient to ensure compliance with all terms and conditions of the lease, as determined by the Department, are required. Acceptable forms include, without limitation, cash bonds, payment bonds, performance bonds, letters of credit or other security deemed acceptable to the Department (to assure compliance with all terms and conditions in each phase of the lease, including decommissioning, remediation, and restoration of the leased property. These financial assurances must be in place prior to and throughout each applicable 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. Additional financial assurances are required to cover risks not anticipated at the time of the original lease. Lessee shall indemnify lessor against 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 financial assurances to ensure lessor is protected against all such reasonably anticipated risks.
- B. Insurance shall be required to adequately cover full replacement costs of all infrastructure, improvements and fixtures allowed, constructed, 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. The lessor and its agents shall be additional insureds under all such policies. Insurance policy limits shall be reviewed at least every five (5) years by lessor and lessee and, if necessary to provide the coverage required of this section, modified accordingly. If modification of policy limits is not agreed upon, lessor retains the right to terminate the lease.

- C. Leases cannot be sublet or assigned without the prior written consent of lessor in its sole discretion and upon terms and conditions acceptable to lessor. Any approved sublease or assignment of the lease shall require proof, satisfactory to the Department in the Department's sole discretion, that the assignee 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. 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 sublessor to the sublessee for application of the payment of rent or otherwise.
- D. Leases shall adequately protect the lessor's interests in the lease and the subject parcel(s) from events of lessee's insolvency, bankruptcy, liquidation, receivership, lien foreclosure, etc.
- 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, and upon terms and conditions acceptable to the lessor. 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 default by the lessee, 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 purchase or assignee of the foreclosed interest must first be approved in writing by the 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. Leases shall permit the lessor to terminate the lease if the terms and conditions of any plan required by the lease, or any subsequent update of such plan, 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 shall be paid for by the lessee.
- H. Financial assurances for Decommissioning and Reclamation shall be based on the cost for completion of the Decommissioning and Reclamation Plan, as agreed by the parties or a mutually-agreed third party, determined at the execution of the lease, plus fifteen (15%) (including, but not limited to, costs to transport and deposit all materials to a recycling or disposal facility, net of salvage value) or as otherwise required by the Land Board. The financial assurances amount will be reevaluated and adjusted after the approval of the construction plan and the Decommissioning and Reclamation Plan, at regular intervals not exceeding 5 years, and or as otherwise deemed necessary or appropriate in the sole discretion of the lessor.

Revision History (Board Action)

DATE First approved iteration of this policy.