



Endowment Land Exchange Policy

This agency guidance document was adopted by the State Board of Land Commissioners (Land Board) and helps us interpret existing state law.

Purpose

To provide Land Board guidance to Idaho Department of Lands (IDL) for the criteria and process for evaluating exchanges of endowment lands.

As the trustee for and acting in the best interest of endowment beneficiaries, the Land Board has the power and discretion to approve or reject any proposed land exchange. Given the broad discretion granted to the Land Board, this policy will assist applicants and IDL staff in evaluating the merits of a particular land exchange and establish the process for an exchange.

Scope

The criteria and text contained within this policy document are intended as guidance only. Legal requirements, which shape the Land Board's review of land exchanges, are found within the following constitutional and statutory provisions:

1. Idaho Constitution Article IX, §§ 7 and 8
2. Idaho Admission Bill §§ 5 - 12
3. Idaho Code §§ 47-701(3), 47-711, 58-104(8), 58-133, 58-138, 58-505

Agency Contact

Real Estate Services Bureau Chief

Policy

IDL will evaluate proposals for land exchange, whether with private parties or other public entities, using the legal authorities set forth above, guided by the criteria set forth in this policy. IDL may recommend approval of an exchange proposal, and the Land Board may approve an exchange, if the exchange is in the best interest of and maximizes the long-term financial return to endowment beneficiaries.

I. Land Exchange Initiation

- A. A land exchange proposal may be initiated by IDL, a private party, or a government entity. IDL and the exchange proponent(s) (Proponent) should meet prior to the exchange application's filing. That pre-application meeting may occur at the local Supervisory Area (Area) office or with the Real Estate Services (RES) Bureau in the Boise staff office. The pre-application meeting, although not mandatory, is critical in setting expectations.
- B. The optional pre-application meeting between the Proponent and IDL should focus on the exchange process, expense, and timeframe. IDL will provide guidance for desired outcomes in exchanges, including the criteria that IDL will use to evaluate the exchange proposal. If the Proponent does not own the land they would like to exchange, IDL will not direct the Proponent

regarding which lands the Proponent should acquire for exchange. Upon completing the pre-application meeting, the Proponent may submit an application and the required application fee of \$1,000.

II. Application Evaluation

- A. Upon receiving the application from the Proponent, the RES Bureau will review the application with the Area and check for completeness and accuracy including verification of land ownership with land records. If the application is complete and accurate, the RES Bureau and Area will begin the initial review of the proposed exchange, including estimating whether the land the Proponent wishes to exchange (Proponent's Land) is similar in value to the endowment land that is the subject of the proposed exchange (Endowment Land). The RES Bureau will rely on comparable properties that are active, pending, or sold to estimate the range of land values involved in the exchange. Additional valuation data may be obtained by studying statewide market conditions and consulting local real estate brokers regarding the local market conditions. If the Proponent's Land appears to be valued at 90% or less of the Endowment Land, the Proponent will be notified that the exchange application will be denied unless they include additional lands as part of the exchange. IDL may exchange into more valuable lands if the Proponent is willing to donate the remaining value to the endowments.
- B. The RES Bureau may, at its discretion, contract with third-party advisors to assist at any stage of an exchange evaluation.
- C. If the Proponent's and Endowment Lands are determined to be similar in value, the RES Bureau will further review the proposal using the following Land Exchange Criteria (Criteria):
 - **Equal or Greater Value:** Land acquired by the State must be at least as valuable as the Endowment Land. The value of Endowment Lands should be determined by the highest and best use of the land. For example, if the exchange were proposed in which the Endowment Lands were currently leased for grazing, and the land was in the path of urban or commercial development, the land would be appraised by a Member of the Appraisal Institute ("MAI") for its highest and best use rather than the existing use as grazing land.
 - **Consolidation of Endowment Lands:** Consideration will be given to a land exchange that results in the consolidation of existing endowment lands.
 - Consolidation should produce additional benefits that may be covered by other criteria such as economies of scale, reduced management costs, or access.
 - The land exchange should be neutral in its net effect on the consolidation of endowment land, and not further fractionalize endowment land holdings by creating isolated parcels of endowment land.
 - **Access:** Consideration will be given to a land exchange where the land acquired by IDL will improve access to existing endowment lands.
 - After the exchange, the lands acquired by the endowments must have feasible and legal access.

- A land exchange should not diminish the amount or quality of access to existing endowment lands.
 - **Equal or Greater Income to the Trust:** Consideration will be given to a land exchange that results in the State receiving equal or higher revenue for the endowments. The potential income from the Proponent's Land will be compared to the current income from leases, licenses, and other sources of the Endowment Lands. For comparison purposes, IDL will also consider identifiable future incomes, including income from the extraction of natural resources such as minerals and forest products.
 - **Potential for Long-term Appreciation:** Consideration will be given to a land exchange where the Proponent's Land is likely to increase in value or revenue potential at a greater rate than the Endowment Land. IDL and the Land Board must protect the long-term financial interests of the trusts.
 - **Proponent's Land:** The Proponent must show evidence of ownership or an ability to acquire through a valid, unredacted contract on the land they are proposing to exchange. In addition, the Proponent must provide proof of funds or a letter of credit confirming that the buyer has an adequate source of funding to complete the purchase. This requirement may be waived if the buyer is a government or tax-supported agency.
 - **Disguised Sale:** If any of the below criteria are met when reviewing applications, IDL should seek legal advice from the Office of the Attorney General to determine if the transaction may be considered a disguised sale.
 - The lands to be exchanged are significantly different in type or value.
 - The Proponent does not own the land being offered for exchange or cannot prove the ability to purchase and close prior to completion of the potential land exchange. The potential exchange would require a significant cash contribution due to differences in valuation.
 - The proposed exchange involves more than two parties.
 - The Endowment Land is located within a rapidly appreciating real estate market.
- D. IDL may determine whether to pursue or continue an exchange based on the most significant quantifiable benefit to the endowment. Applications that do not meet the criteria above, do not satisfy the constitutional mandates of Article IX, § 8 of the Idaho Constitution, or are likely to be considered a disguised sale, may be rejected by the RES Bureau Chief or Area Manager. If the application is determined to be in the best interest of the endowment by meeting some or all of the criteria, the RES Bureau Chief will present the exchange to the Asset Management Steering Committee.

III. Asset Management Steering Committee Review

- A. The Asset Management Steering Committee (AMSC), which is composed of the Director, the Deputy Director, the Division Administrator of Trust Land Management, and the Division Administrator of Operations, provides direction to the RES Bureau for land exchanges, acquisitions, dispositions, and complex leases.

- B. Land exchange proposals approved by the AMSC will be presented to the Land Board for its approval for IDL to proceed with due diligence, including but not limited to the appraisal and fair market value determinations described in Idaho Code § 58-138(5) and (6).
- C. IDL will provide the Proponent written notice within 30 days of the AMSC's decision to approve or deny the application.
- D. If the AMSC approves the land exchange concept, IDL will notify via certified mail the surrounding property owners of the Proponent's Land and the Endowment Land, the existing IDL lessees, and county commissioners. The initial request to complete the land exchange will include any comments received. Communications with potentially affected interests will continue throughout the process.

IV. Land Board Initial Approval

Acting under the direction of the AMSC, IDL will prepare a memorandum for the Land Board requesting approval to proceed with the formal due diligence analysis of the exchange.

The request to the Land Board will focus on the benefits and potential concerns identified in the criteria set forth in Section II. In addition, the proposal must include maps, a due diligence budget, a term sheet, and any other pertinent information that will assist the Land Board in determining if the land exchange is in the best interest of the endowments.

V. Formal Due Diligence

- A. Upon receiving Land Board approval, IDL will complete the due diligence required for the exchange, with assistance from the Proponent as needed. The due diligence must align with what a prudent investor would require for land acquisition and disposition. A list of the potential due diligence items is attached to this policy as Attachment 1. The due diligence reports must name IDL as a client, and the RES Bureau will draft the scope of work. If appropriate, the RES Bureau will work with third-party experts to develop a scope of work to ensure the endowment's interests are protected.
- B. Once the appraisals are completed, IDL will review the report with the Proponent to determine if adjustments to the land involved in the exchange are necessary. Exchanges may have a delta in appraised value, but if the Proponent's Land is appraised at 90% or less of the Endowment Land, the lands proposed in the exchange will need to be adjusted. The Proponent may bring up to ten percent (10%) of the appraised value in cash to equalize the value of the exchange.
- C. Upon completion of due diligence, the RES Bureau will present a detailed report and its recommendation to a third-party expert advisor for review and comment. Upon receipt of the advisor's comments, and report if one was requested, IDL will present the land exchange proposal to the Land Board for final consideration.
- D. If information obtained during or as a result of the formal due diligence process shows that the exchange is no longer in the best interest of the endowments, the Director may terminate the exchange. If the exchange is terminated or if the Proponent withdraws from the exchange, the Director will provide an update at the next regular Land Board meeting.

VI. Land Exchange Agreement

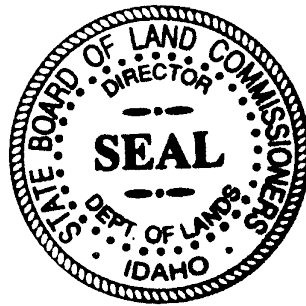
A land exchange agreement must be drafted and principally agreed upon by the Proponent and IDL before presenting the land exchange to the Land Board for final approval. This agreement will include, but is not limited to, the legal descriptions of the lands involved, appraised values, additional terms of the transactions, due diligence expenses, legal access, how title is conveyed, closing costs, title insurance, appurtenances to the land, mineral rights, encumbrances, representations, and warranties of both parties.

VII. Land Board Final Approval

- A. The memorandum seeking the Land Board's final approval to close the exchange will highlight the benefits to the endowments related to the land exchange criteria, a third-party review and recommendation, the draft land exchange agreement, and any relevant due diligence that the Land Board should consider when deciding whether to approve the land exchange. The Land Board may disapprove of any exchange, which, in its discretion, would not be advantageous to the endowments or is otherwise inconsistent with the Land Board's trustee obligations as set forth in Article IX, § 8 of the Idaho Constitution.
- B. Following the Land Board's final approval, the RES Bureau will work with the appropriate internal departments (e.g., Fiscal, Land Records) and the Office of the Attorney General to prepare final documentation for signature by the Director and Proponent.

Revision History (Board Action)

12/20/2022 First approved iteration of this policy. Approved with a caveat that the Land Board will further consider and refine two of the Land Exchange Criteria listed in Section II.C. of the proposed policy: Equal or Greater Value and Disguised Sale.



DUE DILIGENCE CHECKLIST

“Due Diligence” is a broad term that business, real property professionals and real estate attorneys use. What is “due diligence”? The term is used here to refer to the inspection and investigation of real property being considered for acquisition. Due diligence is conducted and is very important to assist the buyer in making an informed purchase decision. Items considered under due diligence vary with each property type. The following checklist is a reference used to identify documents and conditions that should be considered in the purchase of real property.

 Commitment for Title Insurance (All Properties). A commitment for title insurance (Preliminary Title Report) should be obtained as soon as reasonable after the AMSC has decided to acquire a particular property. This document includes the legal description for the property and provides a list of all current exceptions to title on the property such as property owner, unpaid taxes, easements, options to purchase, judgments, mortgages, recorded liens, deed of trust, timber harvest rights, mineral rights, water rights. The title review process is used to determine the condition of the title to be transferred to the buyer at closing, as well as identifying any potential title problems.

 Phase One Environmental Site Assessment (Phase One ESA) (All Properties). The Phase One ESA provides the buyer an overview of the environmental condition and environmental history of the property. The report is intended to identify actual and potential RECs and HRECs (Recognized Environmental Condition & Historic Recognized Environmental Conditions). For example, contamination by hazardous substances, leaking underground storage tanks, landfills, etc., based primarily on a review of historical use documentation, regulatory agency databases and a physical on-site investigation. If environmental conditions or potential environmental conditions are discovered during the investigation, the report will generally recommend specific follow-up testing, remediation and/or studies. A Phase One ESA typically does not include specific inspections for asbestos, lead paint, mold, radon, or wetland delineation. The final report has four components including: Records Review; Site Reconnaissance; Interviews with present and past owners, operators, occupants of the property and local government officials; and a Narrative Report. A Phase I ESA is intended to satisfy AAI (All Appropriate Inquiries) requirements to qualify for the innocent landowner defense to potential Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) liability. The AAI can be met by conducting a Phase I ESA in accordance with the American Standard for Testing and Materials (ASTM) Standard E1527-21, Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process.

 Access (All Properties). There are five (5) classifications for consideration. Evaluate the adequacy of access and determine whether additional rights may be obtained as part of an exchange or purchase transaction at closing.

- 1) **Public Use Access:** A permanent public access typically from a county road, state or Federal highway, which has an approved approach designated for the purpose of which the property is currently being used, or designated for its current zoning. Width of approach needs to be sufficient for the properties designated use.
- 2) **Full Legal Administrative Access:** A designated permanent easement specifically identified for access to property for all management activities and access is transferable.
- 3) **Limited Legal Administrative Access:** A designated temporary or permanent access limited for specific activities that would be non-transferable. (Such as Timber harvest, for maintenance access, irrigation)

- 4) Physical access: Properties where there is an existing road to or across the property, but no permanent legal access is recorded. The road may be designated on a county map. The existing road may be primitive, in poor condition, or currently unusable.
- 5) No Access: Property with no legal or physical access established or identified by a recorded document or a county map.

_____ **Utilities (All Properties).** Identify existing utility infrastructure located on or adjacent to property such as power, water/well, septic/sewer, phone, natural gas, hot water, solar, wind and if they are provided by city services or located on site. Identify the capacity of the utilities; are they major transmission facilities which would encumber future use or development of the property, or are they of a capacity which could enhance the property for future development

_____ **Production Data (All Properties).** Obtain production information associated with the property being considered for purchase. Examples of production data for some property types:

- 1) **Cropland.** Acres within parcel, farmable acres, non-farmable acres, commodities grown, yields, total production, price per unit, and crop rotation. If the property will be acquired subject to a lease, name of tenant, term of lease, and type of lease (i.e. cash or crop share).
- 2) **Timberland.** Total acreage; delineation of acreage used for commercial timber, plantation, non-commercial timberland, and non-stocked; estimated timber volumes by species (i.e. MBF), and mean annual increment (MAI).
- 3) **Rangeland.** Parcel acreage, animal unit months (AUM's) of forage, season of use.
- 4) **Commercial.** Property operating data including cash flow analysis, vacancy rates, operating costs, rent vs. market rent, existing leases and lease terms.

_____ **Mineral Rights (All Properties).** The terms "mineral lands," "mineral," "mineral deposits," "deposit," and "mineral right," as used herein is construed to mean and include all coal, oil, oil shale, gas, phosphate, sodium, asbestos, gold, silver, lead, zinc, copper, antimony, geothermal resources, salable minerals, and all other mineral lands, minerals or deposits of minerals of whatsoever kind or character. This includes "salable minerals," meaning a mineral substance that can be taken from the earth and that has a value in and of itself separate and apart from the earth. The potential of mineral lands should be evaluated on annual rental, the amount of royalty, the basis upon which the royalty shall be computed and such other details as it is deemed necessary in the interest of the state.

Determine whether the property to be acquired excludes mineral rights. To the extent that the mineral rights have been severed from fee ownership, determine to what extent, if any, those severed rights affect the use and value of the property by the buyer. Prior to purchase, determine who owns the mineral rights and what the owners intent is regarding use and development of the mineral estate.

_____ **Water Rights (All Properties).** The constitution and statutes of the State of Idaho declare all the waters of the state, when flowing in their natural channels, including the waters of all natural springs and lakes within the boundaries of the state, and ground waters of the state, to be public waters. A water right is the right to divert the public waters of the state of Idaho and put them to a beneficial use, in accordance with one's priority date. Beneficial uses include such uses as domestic use, irrigation, stock-watering, manufacturing, mining, hydropower, municipal use, aquaculture, recreation, fish and wildlife, among others. The amount of the water right is the amount of water put to beneficial use. Determine the scope and nature of any water rights related to the property. If a property is fully serviced by water and sewer utility service, water rights will

not be an issue. If water rights for the property have been separated from the fee interest or come from an off-site source, the purchase and sale agreement must address the transfer of necessary rights to the buyer at closing. The Idaho Department of Water Resources maintains a website to research water rights within the state of Idaho.

_____ Physical Improvements (All Properties). Improvements include buildings, fences, ponds, spring developments, and real property fixtures that are permanently part of the land. Improvements are generally attached to, embedded in or permanently resting on the land and cannot be removed without substantially damaging an improvement or the real property with which it is being used. An inventory of physical improvements on the property and who owns or claims to own the improvements will be made prior to requesting an appraisal.

_____ Approvals and Entitlements (All Properties). Determine the regulatory status of proposed property, and if it is based on the type or types of uses currently being made of the land. Review the current zoning, potential zoning, areas of impact, proposed future growth, any restrictive covenants or proposed restrictions which would encumber the property and its utilization in its highest and best use. Confirm that the existing use of the property complies with applicable zoning, building and life safety codes. Determine which land use entitlements will be necessary for intended use of the property.

_____ Personal Property (All Properties). Identify within the Purchase Sale Agreement what personal or intangible property will be included in the purchase. For example, furniture, trade fixtures, equipment, sprinkler pipe, pumps, etc. that is necessary for the buyer's use of the property. Determine any third party security interest in any of the personal property. Assess the need to purchase or transfer permits or licenses required to operate the property or related equipment and fixtures (e.g. franchises, trademarks, patents, copyrights, liquor licenses, etc.)

_____ Rights-of-Way (Easement) Impacts (All Properties). Rights-of-way are temporary or permanent property rights that have been either granted or acquired, for roads, utilities, or public use access. These are often conveyed through an easement and may or may not be recorded. In addition to roads and utilities some more obscure examples include:

- 1.) Conservation easements – limits the amount and type of development that can occur on a property in order to preserve its productive capacity and open character while keeping the property in the landowner's ownership and control.
- 2.) Solar/Scenic easements – protect an owner's view shed or path of sunshine and generally restrict the height of building construction.
- 3.) Airspace easement – permits the area above the surface of property to permit an imposition upon such property from excessive noise, vibration, discomfort, inconvenience, etc. that consequently reduces market value. Generally used for airport impact areas but can also apply to bridges and walkways.
- 4.) Maintenance easement – permits an individual to cross onto the property of another for the purpose of maintaining something owned or controlled by the dominant estate owner, such as, irrigation ditches, canals, culverts, power lines, water lines, etc.

_____ Endangered species (All Properties). The Endangered Species Act of 1973, as amended, is one of the most far-reaching wildlife conservation laws ever enacted by any nation. The presence of threatened/endangered or potentially threatened/endangered species may significantly restrict the development potential, other potential uses, and market value of a property.

_____ **Copies of all leases affecting the property (All Properties).** Review all leases having an effect on the future use of or income from the property. For state lands involved in an exchange, ensure a land exchange addendum is signed by the lessee.

_____ **Appraisals and Appraisal Review (All Properties).** A real estate appraisal is required for all property types to determine the market value for the property or property rights or interest being disposed or acquired. At a minimum the appraisal is prepared in compliance with the *Uniform Standards of Professional Appraisal Practice (USPAP)*. Appraisals will be independently reviewed by IDL or another appraiser to ensure compliance with USPAP and to determine the adequacy and appropriateness of the report.

_____ **Property Boundary Survey (Optional).** Obtain copies of recorded Records of Survey for the property, if available. If a survey is necessary it should be initiated immediately after the Purchase and Sale Agreement has been executed to allow time to address any potential title problems identified by the survey prior to closing.

_____ **Timber Rights (Timberland).** Determine who has the legal right to harvest the timber on a parcel of land. A seller of forestland can choose to include or exclude timber rights as part of a fee ownership sale. Such rights can be severed for a specific period of time or permanently transferred.

_____ **Timber Cruise/Harvest/Road analysis and Check Cruise (Timberland).** Forested properties with merchantable timber being considered for acquisition will require a timber cruise to determine the quality and quantity of harvestable timber. The cruise will identify tree species and measurements within each plot. Sufficient plots must be measured to obtain a statistically reliable sample for estimated gross volume, defect, piece size, general stand information, net merchantable volume etc.

_____ **Conservation Reserve Program (Agriculture/Timberland).** Determined if the property is eligible for and currently enrolled in a variety of farm and agriculture programs. What is the impact in ownership change to enrollment eligibility? There are currently five (5) areas which can receive payment, including:

- 1) Wildlife Habitat Incentives (WHIP)
- 2) Wetland Reserve Program (WRP)
- 3) Forestry Incentive Program (FIP)
- 4) Farmland Protection Program (FPP)
- 5) Environmental Quality Incentives Program (EQIP)

_____ **Architecture/Engineering Analysis (Properties with Buildings).** Acquisition of properties with business related structures require an analysis by architectural and engineering professionals to determine the condition of the building and identify any potential problem areas, such as deferred maintenance and necessary repairs. Such analysis will typically consider, but is not limited to an analysis of: structural integrity; roof, electrical, plumbing and HVAC systems age and condition; Americans with Disabilities Act (ADA), fire and safety code compliance; general service and maintenance logs; parking area requirements and surface age and condition; review of Phase One Environmental Site Assessment; and testing for asbestos, lead paint, or mold issues. If work is performed on improvements prior to closing, obtain copies of any design and construction drawings and contracts and determine whether the seller's rights under those contracts are assignable to the buyer. Ensure proper lien waivers have been obtained by the seller for work performed prior to closing.