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January 22, 2021

Ben Davenport
Idaho Mining Association
802 W Bannock St., Suite 301
Boise ID 83702

via e-mail: bdavenport@mineidaho.com

Re: IDL Mineral Lease Templates and House Bill 547

Dear Ben:

This letter is in response to the Idaho Mining Association's ("IMA") concerns regarding the State Board of Land Commissioners ("Land Board") and Idaho Department of Lands' ("IDL") revised mineral lease templates, and their interplay with the amendments to Title 47, Chapter 7, Idaho Code, made by House Bill 547 during the 2020 legislative session ("HB 547"). I appreciate the opportunity to address those concerns.

Legal Background of the Obligations to Endowment Beneficiaries.

Before responding to your specific questions, it is imperative to remember the Land Board's and IDL's responsibilities to endowment beneficiaries, as found in the Idaho Constitution and Idaho Supreme Court decisions interpreting those responsibilities. The Idaho Constitution places the authority to manage Idaho's endowment lands with the Land Board. See Article IX, § 7, Idaho Constitution; see also I.C. § 58-119 ("IDL shall have power: (1) To exercise, under the general control and supervision of the [Land Board] all the rights, powers and duties vested by law in the [Land Board]; . . .") (bracketed material added). Additionally, Article IX, § 8 of the Idaho Constitution also provides the Land Board with authority regarding Idaho's endowment lands. With that constitutional authority comes significant and paramount responsibilities to the various endowment beneficiaries.

First, the Land Board and IDL have the duty "to provide for the location, protection, sale or rental of all [endowment lands] . . . in such manner as will secure the **maximum long term financial return** to the institution to which granted. . . ." Idaho Const. Art. IX, § 8 (emphasis added). That provision "requires that the State consider **only** the 'maximum long term financial return' to the schools in the leasing of school endowment public grazing lands." *Idaho Watersheds Proj. v. State Bd. of Land Comm'rs*, 133 Idaho 64, 67, 982 P.2d 367, 370 (1999) (emphasis added). The Idaho Supreme Court has explained that neither the Land Board nor IDL

may act for the benefit of lessees, operators, private companies or individuals, or even the State of Idaho. Therefore, while the provisions of endowment land mineral leases need to be fair to the lessee, the terms of the written contract cannot benefit the lessee to any possible detriment to the endowment beneficiary.

Second, the Land Board and IDL are the trustees for the endowment beneficiaries, and must act solely in their best interest. The Idaho Supreme Court has held that "[t]he State's endowment lands are part of a sacred trust reserved for the benefit of Idaho's public schools and public institutions. The Board, which manages those endowment lands, is the epitomic public trustee." *Wasden v. State Bd. of Land Comm'rs*, 153 Idaho 190, 195, 280 P.3d 693, 698 (2012); see also *Pike v. State Bd. of Land Comm'rs*, 19 Idaho 268, 113 P. 447, 453 (1911) (Article IX, § 8 "vests the control, management and disposition of state lands"). As the epitomic public trustee, the Land Board and IDL cannot act for the benefit of IMA's members. Therefore, the goal of the mineral lease template is to have a contract that, ideally, benefits the endowment beneficiary through payment of royalties and rents, and adequate reclamation of the land after operations are completed; while also enabling the lessee to run a successful mining operation on the leased premises.

Third, endowment lands may only be disposed of at a public auction. Idaho Const., Art. IX, § 8. The term "disposal" includes not only sales, but leases. *Wasden*, 153 Idaho at 196-97, 280 P.3d at 699-700. A century ago, the Idaho Supreme Court held that "[t]he dominant purpose of [Article IX, §§ 7 and 8] of the Constitution and of the statutes enacted thereunder is that the state shall receive the greatest possible amount for the lease of school lands for the benefit of school funds, and for this reason competitive bidding is made mandatory." *East Side Blaine Cty. Live Stock Ass'n v. State Bd. of Land Comm'rs*, 34 Idaho 807, 198 P. 760, 763 (1921). IDL cannot use a mineral lease that avoids the public auction requirement.

Even with these constitutional obligations, IDL recognizes that the phrase "under such regulations as may be prescribed by law" means that the legislature may enact statutes regarding the management and disposition of endowment lands. Such legislation does not discharge, or remove, the constitutional duties. Therefore, IDL must still satisfy its constitutional obligations as the trustee for the endowments to: act solely for the benefit of the endowment beneficiaries; to maximize the long term financial return to endowment beneficiaries; and to dispose of endowment lands, whether via lease or sale, at public auction. When statutes conflict with IDL's paramount constitutional duties, a difficult situation is created. Unfortunately, many of the changes made by HB 547 create difficult or even untenable conflicts between those constitutional requirements and the statutory provisions.

New, Mandatory, Lease Continuation Provisions.

You expressed concern that the lease term in the mineral lease template was only ten years. I am not certain which template you reviewed, but the most recent versions have a blank for the length of the lease term. IDL acknowledges that the Idaho Code now provides that the lease term may be up to twenty (20) years. That change does not appear to be problematic, on its face, so long as the lessor's discretion is retained, and the lease term is not required to be twenty (20) years.

As you note, HB 547 resulted in the amendment of the "lease continuation" provisions of Idaho Code § 47-704(2) by adding several circumstances that result in the length of the lease being extended. The statute now provides that a mineral lease shall be continued if any of the following provisions are met:

- (a) Precious metals, minerals, mineral concentrates, mineral products, or ores are produced in paying quantities;
- (b) The lessee has negotiated and remitted a prepaid royalty no less than five dollars (\$5.00) per acre per year;
- (c) The lessee in good faith conducts exploration, prospecting, work, or mining operations thereon;
- (d) The mineral lease is undergoing a regulatory approval process for exploration, prospecting, or mining; or
- (e) The lessee conducts work on land adjacent or near the leased premises as a single mining operation, including construction of infrastructure associated with mining.

I.C. § 47-704(2). Fundamentally, **requiring** a lease continuation may create a conflict with Article IX, § 8, because it removes the discretion of the Land Board and IDL to review a lessee's performance and other factors and determine whether it is in the best interest of the endowment beneficiaries to continue the lease past the lease term.

That said, I note that IDL's mineral lease templates allow for extensions, providing that:

The Lease may be extended by Lessor beyond its ____ () year Lease Term according to applicable Idaho law, including Title 47, Chapter 7, Idaho Code ("Term Extension"). Lessor and Lessee must enter into a written lease extension agreement that will state any readjustment of terms and conditions of the Lease during the Term Extension. Upon failure or refusal of Lessee to accept the lease extension agreement, the Lease will terminate at the end of the Lease Term.

Some of the provisions set forth in the amended § 47-704(2) are unlikely to present a conflict with the constitutional obligations. First, if minerals or the other listed materials are being produced in paying quantities on endowment land, income is being generated for the endowment beneficiaries, which is consistent with the constitutional requirements. A "produced in paying quantities" extension term has been part of Title 47, Chapter 7 for quite some time. IDL has consistently informed mineral lessees that if they are producing in paying quantities at the end of a lease term, and are otherwise in good standing regarding their mineral lease, IDL would be able to extend the lease term. Second, and relatedly, if the lessee is conducting good faith exploration, prospecting or mining operations on the leased endowment land, the lessee is working diligently toward going into or continuing production on endowment lands, and a lease extension would not be constitutionally problematic. Third, a lease extension would be acceptable if the lessee is undergoing the regulatory approval process for the leased endowment lands, because the lessee is undertaking a step necessary to go into production. Please note, however, that if the lessee has delayed exploration or seeking regulatory approval and would be starting that process late in the original lease term, a finding of good faith actions by the lessee may prove to be problematic.

Other parts of the amended § 47-704(2) are proving to be problematic for IDL in upholding its constitutional obligations. For example, the benefit to the endowment beneficiary in continuing a lease merely because the lessee has made minimum annual royalty payments is negated by HB 547 maintaining the royalty/rent set-off for the life of the lease and any extension. Had the set-off been omitted from the statute (as IDL attempted to do during the 2018 legislative session) subsection (b) might be consistent with IDL's constitutional obligations. However, the set-off was maintained, and now it is very unlikely that allowing a lessee to continue a lease based upon payment of a mere \$5 per year in minimum annual royalty would be consistent with the duty to maximize long term financial return to endowment beneficiaries. In addition, the new subsection (b) appears to require IDL and the Land Board to consider the interests of the lessee, rather than the interests of the endowment beneficiaries.

At first glance, continuing a lease on the basis of "work", under I.C. § 47-704(2)(c) and (e) might not appear problematic. However, the definition and applicability of "work" was changed significantly through HB 547. First, the definition of "work" found in Idaho Code § 47-703 was initially applicable only to that section, which pertains to exploration location activities, not leasing for mining operations. See HB 547, p. 2, ll. 5 ("Work, within the meaning of this ~~section~~, chapter . . ."). Second, the definition was greatly broadened by removal of the word "not" in the second sentence of I.C. § 47-703(5) ("Work shall ~~not~~ include roads, trails, buildings, machinery or other surface improvement."). As an example of the difficulty IDL is now facing, with that broadened definition applied to Idaho Code § 47-704(2)(c) and (e), IDL must continue

a lease beyond the maximum twenty-year term if the lessee has built a "trail" on the leased premises or has moved a piece of "machinery" onto non-endowment land "near" the leased premises that the lessee believes is a "single mining operation" with the state leased premises. There is no time limitation to the possibility of lease continuations resulting from activities on or near the leased premises that are not producing minerals and not paying royalties to the endowment beneficiaries. Such a result creates a conflict with Idaho Constitution, Art. IX, § 8.

The Preferential Right to Renew Avoids the Constitutional Obligation to Hold Public Auctions for Mineral Leases.

Over the course of several years, IDL and members of the mining industry have had numerous discussions regarding the preferential right to renew, as found in Idaho Code § 47-704(3). As noted above, disposals of endowment lands include leases, and all disposals must be at public auction. The preferential right to renew allows an existing lessee to avoid the public auction requirement at the end of a lease term, even if the lessee does not meet one of the bases for a lease extension. Therefore, it is IDL's position, on the advice of the Office of the Attorney General, that the preferential right to renew is contrary to and conflicts with the constitution's public auction requirement.

Statutory Lease Terms Created in the New Idaho Code § 47-704(9).

HB 547 added a new subsection (9), which provides as follows:

Mineral leases granted according to this section, including but not limited to leases that have been awarded but not executed, shall comply with the following terms and conditions:

- (a) After granting of a lease, no fees or payments shall be charged to lessees except for royalty payments, including prepaid and production, and rent per acre per annum.
- (b) Rent per acre per annum may be indexed for inflation, but no more than three percent (3%) per annum. The rental paid shall be deducted from the royalties as they accrue for the life of the lease.
- (c) No more than one (1) lease may be issued for the same mineral on the same land.
- (d) Only one (1) lessee may hold multiple mineral leases on the same land.
- (e) In the event of an exchange or sale involving leased lands, the purchaser shall accept and be assigned to perform the exact terms and conditions set forth in the lease as the lessor.

(f) The leaseholder demonstrates a mineral resource is present on the public lands using industry standard to estimate or project a mineral resource that is likely viable for future mineral development. The board shall recognize its role as a partner on behalf of state lands and provide confidentiality to the leaseholders regarding resource estimates that may be reported. If the leaseholder determines in the future to drop any mineral lease, the board may use this information for public consumption to encourage and support mineral development on those leases.

You expressed concern that those provisions are not contained (or contained verbatim) within the mineral lease templates. As you note, Section 2.3 of the lease template is a "non-exclusive use" provision, which you have indicated is contrary to Idaho Code § 47-704(9)(c) and (d). However, the lease template does provide for exclusive use related to the specific mineral or minerals being leased; and, if other unleased minerals are found, the lease enables their production by the existing lessee at IDL's direction. Moreover, from a practical perspective, IDL would not issue more than one lease for the same mineral on the same land. Particularly in the case of minerals such as phosphate or others that are mined with a large footprint, issuing more than one lease for the same mineral on the same land would be impossible. In addition, the lease template further provides that: "Lessor shall condition and exercise its rights in such a manner that shall not unreasonably interfere with the rights of Lessee. Lessor will provide Lessee written notice of any third-party uses, whether pre-existing or granted during the Lease Term."

Ultimately, if a leased area can successfully be leased for multiple purposes concurrently, the Land Board and IDL must maintain the discretion to do so in order to satisfy their constitutional obligations, particularly the obligation to maximize long term financial return to the endowment beneficiaries.

The same is true regarding Section 23 ("Surface Estate Rights Reserved by Lessor"). That section specifies that "any use of the surface estate so disposed of (which, again, means sales and leases) shall not unreasonably interfere with the mining activities conducted pursuant to the Lease," IDL disagrees that reservation of surface rights "yank(s) the lease out from under the" lessee. For example, if the activities under the mineral lease are underground, and such that IDL could lease the surface for grazing or other purposes without unreasonably interfering with the mineral lease, prohibiting IDL from doing so creates a conflict with the constitutional obligations.

Section 25.3 of the lease template provides a place for IDL to identify the need for financial assurance for specific situations necessitated by a specific lease. A bond for road repair necessitated by a lessee is merely an example of a lease-specific circumstance. You suggest that the provision conflicts with Idaho Code § 47-704(9)(a), which provides that after the lease is granted, Lessees are only required to pay royalty payments (prepaid or production) and annual rent. First, that new statutory provision ignores the financial assurance requirements within Title 47, Chapter 7; and of the Mined Land Reclamation Act, Title 47, Chapter 15, Idaho Code. HB 547 did not alter the sound business practice of requiring a lessee to post financial assurance for its operations. Those forms of financial assurance must be paid. In addition, subsection (9)(a) sets up a situation (as illustrated by the road damage example) where the endowments would be required to pay for damage or wear to improvements caused by the lessee's exploration or operations. Acting for the sole benefit of the endowment beneficiary, the mineral lease enables an arms-length relationship where the endowment is paid royalties and rents; while the lessee is provided the exclusive opportunity to develop and sell certain minerals, and must bear the costs of exploration and operation. This basic exchange should be common to the business practices of IMA's members. However, requiring the endowment to bear the costs of the lessee's operations creates a constitutional conflict.

Section 31 of the lease template provides IDL the right to remove access and cancel a lease, which you find to be in conflict with the new statutory subsections (d) and (e). IDL disagrees with that interpretation, especially since the sale and land exchange provisions of lease Section 31 simply reference the fact that a disposition may occur "as allowed by law" and references applicable Idaho Code chapters. Moreover, the Land Board retains the legal right to change a designated use of any parcel of endowment land to a different use that will further maximize the long-term financial return to the endowment beneficiary, and allow the Land Board to fulfill its fiduciary obligations.

Finally, you mentioned your concern regarding the frequency of the submission of the required production reports. The production report is a simple form that should not be difficult for any lessee or mining company to complete. Submission of the form apprises IDL of what is happening, or not happening, related to the leased endowment land; thereby creating a record of the lessee's activities on endowment land. Having that information is imperative to ensuring that IDL appropriately manages endowment lands, and that it is able to provide documentation of that management.

Ben, I appreciate the opportunity to respond to your concerns. The mining industry is important to the State of Idaho and mineral leases are an important component of generating revenue for the endowment beneficiaries. However, the Land Board and IDL must have the ability to manage endowment lands, including leases, in a manner that is consistent with the

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significant constitutional obligations to endowment beneficiaries. We do not believe that those obligations are inherently inconsistent with the ability of the Idaho Mining Association's members to conduct successful mining operations on endowment lands, but open and clear communication is imperative.

To that end, I look forward to working with you and your members on these issues, and to finding solutions that will provide more assurances to the mining industry, and not present a conflict with the provisions of Article IX, §§ 7 and 8 of the Idaho Constitution.

Sincerely,

A handwritten signature in blue ink that reads "Dustin T. Miller". The signature is written in a cursive style with a large, stylized initial "D".

Dustin T. Miller
Director