

## No. 403

## STATE LANDS—STATE BOARD OF LAND COMMISSIONERS—LEASES OF STATE LANDS

**Held:** When a lease on a certain acreage of state land expires, and the land is again offered for lease, the competitive bid of a new applicant need not be on the entire acreage of the former lease, but can be upon a portion of the acreage, if it is determined by the state board of land commissioners the largest measure of legitimate advantage to the state, as trustee of the trust for which the lands were granted, will reasonably result from accepting bids on a less tract of state lands than is included in the former lease.

April 18, 1942.

Honorable J. W. Walker  
Commissioner of State Land and Investments  
State Capitol Building  
Helena, Montana

Dear Mr. Walker:

You have asked this office the following question:

“When a lease on a certain acreage of state land expires, and the land is again offered for lease, must the successful bid be upon the entire acreage of the former lease or can it be on a portion only?”

The preference right of former lessees is set out in Section 1805.21 of the Revised Codes of Montana, 1935, as amended by Section 1 of Chapter 20, Laws of 1941, which gives the right of renewal to a lessee of state land, “providing no other application or applications for lease of land have been received thirty (30) days before the expiration of the lease.” The section, as amended, further provides:

“In case such other application or applications have been received, the holder of the lease, if he has paid all rentals due to the state and not violated the terms of his lease, shall have the preference right to lease the lands covered by his former lease to the extent that he may take the lease at the highest bid made by any other applicant.”

There does not seem to be any indication the term “application or applications for lease of the land” includes only applications for lease of the entire tract and excludes applications for a portion or portions of the tract included in the former lease.

Under Section 1 of Article XVII of the Constitution of Montana, no estate or interest in state land may be disposed of except in pursuance of general laws, nor unless the “full market value of the estate or interest disposed of, to be ascertained in such manner as provided by law, be paid or safely secured to the state. . . .” A lease is the disposal of an interest or estate in the lands within the meaning of the Constitution. (*Rider v. Cooney, et al.*, 94 Mont. 295, 308, 23 Pac. (2nd) 261.)

It is also provided—in Section 4 of Article XI of the Montana Constitution—the state board of land commissioners “shall have the direction, control, leasing and sale of the school lands of the state . . . under such regulations and restrictions as may be prescribed by law.”

It was held in the case of *Rider v. Cooney, et al.*, 94 Mont. 295, 307, 23 Pac. (2nd) 261, and in the cases cited therein:

“The grant of lands for school purposes by the federal government to this state constitutes a trust (citing cases); and the State Board of Land Commissioners, as the instrumentality created to administer that trust, is bound, upon principles that are elementary, to so administer it as to secure the largest measure of legitimate advantage to the beneficiary of it.”

In the case of *Rathbone v. State Board of Land Commissioners*, 100 Mont. 109, 122, 47 Pac. (2nd) 47, the Montana Supreme Court said:

"There is no question but that the state board, in the discharge of its trust, should, when leasing these state lands, 'secure the largest measure of legitimate advantage to the beneficiary of it.' (*Rider v. Cooney*, 94 Mont. 295, 23 Pac. (2nd) 261, 263.) Nor can it be successfully maintained that the board has power or authority to renew an expiring lease at the noncompetitive leasing price when there is another applicant willing and able to pay a higher rental, for the statutory rate is recognized as the 'full market value' which has been ascertained 'in the manner provided by law,' as required by section 1, Article XVII, of the Constitution (*Rider v. Cooney*, supra), only when there is no competition. (Chapter 42, Laws of 1933.)"

In other states it has been held the preferential right to lease state lands, granted by statute, is not, and could not, be absolute, but is qualified. (*Kerrigan v. Miller* (Wyo.), 84 Pac. (2nd) 724, 726; *State v. Vesely*, 40 N. M. 19, 52 Pac. (2nd) 1090, 1091; *Manning v. Perry*, 48 Ariz. 425, 62 Pac. (2nd) 693, 695.)

Generally, acts of Congress granting lands to states contain limitations on terms of leases as well as other limitations, as, for example, the limitations contained in Section 11, as amended, of the Enabling Act for Montana, limiting the terms of leases to ten years.

In the State of Wyoming, in considering preferential rights with respect to state land leases, the Wyoming Supreme Court said in the case of *Wyodak Chemical Co. v. Land Commissioners*, 51 Wyo. 265, 65 Pac. (2nd) 1103, 1105:

"But in considering the preferential right granted in connection with grazing lands we have held that the right granted is not absolute but qualified. *State ex rel. v. Board*, 20 Wyo. 162, 122 Pac. 94; *Mercer v. Thorley*, 48 Wyo. 141, 43 Pac. (2nd) 692. It is, as held in New Mexico and Arizona, an equity—a better or superior right which must be taken into consideration without violating an enabling act similar to ours. *Manning v. Perry* (Ariz.), 62 Pac. (2nd) 693; *Campbell v. Cattle Co.*, 24 Ariz. 620, 212 Pac. 381; *Boice v. Campbell*, 30 Ariz. 424, 248 Pac. 34; *State v. Vesley*, 40 N. M. 19, 52 Pac. (2nd) 1090. Under such a right, as may be gathered from the foregoing cases, the old lessee must meet all reasonable terms and conditions which may be laid down from time to time by the board, and which other persons are willing to meet, thus making the lease, not a continuing one in violation of the enabling act and the Constitution, but in fact a new one."

We have found no authorities which hold a "preferential right," such as is provided for in Section 1805.21, as amended by Chapter 20, Laws of 1941, is an absolute right which would require an interested bidder to bid on all the lands and the identical land held under the former lease or, in other words, to meet the terms of the former lessee instead of the terms of the statute, Constitution and of the state board of land commissioners. It is not reasonable to suppose the "market value" of the various parcels of land included in a single lease must in all cases be determined by the bidding on all the land included in the said lease. It is not likely in all cases the land included in one lease for one operator will be equally suitable for the purposes of another operator who is ready and willing to bid upon a portion of the land included in the former lease.

When an application is made for a lease on a portion of the land included in an expiring lease, the discretion of the state board of land commissioners must be exercised in order that the "largest measure of legitimate advantage" be secured. This would mean, of course, the said board would not allow a new applicant to lease the water holes, for example, and refuse to lease or bid for the other land under an expiring

lease. However, if the land applied for includes a reasonably usable unit, the application should be considered, notwithstanding the fact it may not include all the land covered by the expiring lease and, of course, provided the splitting of the acreage does not render valueless the remaining acreage not bid upon by the new applicant. The including of a quantity of state lands in one lease should not constitute such land the only unit thereafter available for leasing or for which applications will be received.

To answer your specific question, it is my opinion that, when a lease on a certain acreage of state land expires, and the land is again offered for lease, the competitive bid of a new applicant need not be on the entire acreage of the former lease but can be upon a portion of the acreage, if it is determined by the state board of land commissioners the largest measure of legitimate advantage to the state as trustee of the trust for which the lands were granted will reasonably result from accepting bids on a less tract of state lands than is included in the former lease.

Sincerely yours,

JOHN W. BONNER  
Attorney General