

**DEPARTMENT OF THE INTERIOR****Bureau of Indian Affairs****25 CFR Part 162**

[Docket ID BIA–2011–0001]

RIN 1076–AE73

**Residential, Business, and Wind and Solar Resource Leases on Indian Land****AGENCY:** Bureau of Indian Affairs, Interior.**ACTION:** Final rule.

**SUMMARY:** The Bureau of Indian Affairs (BIA) is revising its regulations addressing non-agricultural surface leasing of Indian land. This rule adds new regulations to address residential leases, business leases, wind energy evaluation leases, and wind and solar development leases on Indian land, and removes the existing regulations for non-agricultural leases.

**DATES:** This rule is effective on January 4, 2013.

**FOR FURTHER INFORMATION CONTACT:** Elizabeth Appel, Acting Director, Office of Regulatory Affairs & Collaborative Action, (202) 273–4680; *elizabeth.appel@bia.gov*.

**SUPPLEMENTARY INFORMATION:**

- I. Executive Summary
- II. Summary of Substantive Revisions
- III. Responses to Comments on the Proposed Rule
  - A. Overview
  - B. Format of Regulations
  - C. General Provisions
    - 162.002—How the Part Is Subdivided
    - 162.003—Definitions
    - 162.004 (PR 162.006)—Applicability to Indian Land and Life Estates
    - 162.005 (PR 162.008)—When a Lease Is Needed
    - 162.006 (PR 162.007)—Land Use Agreements Subject to This Part
    - 162.007 (PR 162.004)—Permits
    - 162.008 (PR 162.005)—Applicability to Documents Submitted Before Effective Date
    - 162.009 (PR N/A)—Approval of Subleasehold Mortgages (New Section)
    - 162.010 (PR 162.009)—How To Obtain a Lease
    - 162.011 (PR 162.010)—Identifying and Contacting Indian Landowners
    - 162.013 (PR 162.012)—Consent
    - 162.014 (PR 162.013)—What Laws Apply to Leases
    - 162.015 (PR N/A)—Tribal Employment Preference Laws (New Section)
    - 162.016 (PR 162.014)—BIA Compliance With Tribal Laws
    - 162.017 (PR N/A)—What Taxes Apply (New Section)
    - 162.018 (PR 162.015)—Tribal Administration of Part 162
    - 162.019 (PR 162.016)—Access to Leased Premises

- 162.020 (PR 162.017)—Unitized Leases
- 162.021 (PR 162.018)—BIA Responsibilities in Approving Leases
- 162.022 (PR 162.019)—BIA Responsibilities in Enforcing Leases
- 162.023 (PR 162.020)—Trespass
- 162.024 (PR 162.021)—Emergency Action
- 162.025 (PR 162.022)—Appeals
- 162.026 (PR 162.023)—Contact for Questions
- 162.027 (PR 162.024)—NEPA & Records
- 162.028 (PR N/A)—Obtaining Information on Leased Land (New Section)
- D. Residential Leases
- E. Business Leases
- F. WEELs
- G. WSR Leases
- H. Cross-Cutting Comments
  1. Lease Term
  2. Option To Renew
  3. Mandatory Lease Provisions
  4. Improvements
  5. Due Diligence
  6. Legal Description—Surveys
  7. Compatible Uses
  8. Rental/Payment Requirements—Tribal Land
  9. Rental/Payment Requirements—Individually Owned Indian Land
  10. Rental/Payment Requirements—Valuations
  11. Rental/Payment Requirements—When Payment Is Due
  12. Rental/Payment Requirements—Direct Pay
  13. Rental/Payment Requirements—Payment Methods
  14. Rental/Payment Requirements—Types of Compensation
  15. Rental/Payment Reviews & Adjustments
  16. Bonding & Insurance
  17. Approvals—Documents Required
  18. Approval Process & Timeline
  19. How BIA Decides To Approve Lease Documents
  20. Effective Date of Leases
  21. Recording
  22. Appeal Bonds
  23. Amendments
  24. Assignments
  25. Subleases
  26. Leasehold Mortgages
  27. Appeals From Inaction
  28. Compliance and Enforcement
  29. Miscellaneous
- IV. Procedural Requirements
  - A. Regulatory Planning and Review (E.O. 12866 and E.O. 13563)
  - B. Regulatory Flexibility Act
  - C. Small Business Regulatory Enforcement Fairness Act
  - D. Unfunded Mandates Reform Act
  - E. Takings (E.O. 12630)
  - F. Federalism (E.O. 13132)
  - G. Civil Justice Reform (E.O. 12988)
  - H. Consultation With Indian Tribes (E.O. 13175)
  - I. Paperwork Reduction Act
  - J. National Environmental Policy Act
  - K. Effects on the Energy Supply (E.O. 13211)

**I. Executive Summary**

Federal statutes require the Secretary to approve leases of Indian land. The

rule establishing the procedures for obtaining Secretarial approval of leases and administration and enforcement of surface leases is at 25 CFR part 162, Leases and Permits. Currently, part 162 contains a subpart addressing all non-agricultural leases. This rule replaces that general subpart with subparts specifically addressing the following categories of leasing on Indian land: residential, business, and wind resource evaluation and wind and solar resource development. Specifically, this rule:

- Revises Subpart A, General Provisions;
  - Creates a new Subpart C, Residential Leases;
  - Creates a new Subpart D, Business Leases;
  - Creates a new Subpart E, Wind Energy Evaluation Leases (WEELs) and Wind and Solar Resource (WSR) Leases;
  - Deletes Subpart F, Non-agricultural Leases (because that subpart was intended to address residential and business leasing, which this rule addresses specifically in subparts C and D, respectively);
  - Moves the current Subpart E, Special Requirements for Certain Indian Reservations, to Subpart F; and
  - Creates a new Subpart G, Records.

The rule does not affect Subpart B, Agricultural Leases. Subpart B may be revised at a later time. In addition, to ensure that changes to the General Provisions do not affect agricultural lease regulations, the current General Provisions section is being moved to Subpart B, where they apply only to agricultural leases. Minor edits were made to the General Provision section to delete redundancies and clarify that they now apply only to agricultural leases.

This rule contains new provisions on residential, business, and wind and solar resource leasing that:

- Clarify the procedures for obtaining BIA approval of residential, business, and wind and solar resource lease documents;
  - Establish deadlines for BIA to issue decision on complete residential, business, and wind and solar resource lease applications;
  - Define what information and documents are necessary for a complete application; and
  - Provide greater deference to tribes for tribal land leasing decisions.

**II. Summary of Substantive Revisions**

This rule makes the procedures for obtaining BIA approval of residential, business, and wind and solar resource lease documents (leases, amendments, assignments, subleases, and leasehold mortgages) as explicit and transparent as

possible. The current regulations provide for the approval of these instruments, but do not specify the approval procedures, leading to possible inconsistencies nationwide, to the detriment of Indian landowners, lessees and lenders.

This rule continues to require Indian landowner consent for leases, consistent with the Indian Long Term Leasing Act and the Indian Land Consolidation Act of 2000 (ILCA), as amended by the American Indian Probate Reform Act (AIPRA). Because ILCA does not apply to tribes in Alaska, the consent requirements for Alaska remain the same as in the previous regulations governing leasing. The regulations also establish the standard for rental rates, providing that leases on tribal land may be approved for the compensation negotiated by the tribe and leases for less than fair market rental may be approved on individually owned Indian land under certain circumstances.

Subpart C, Residential Leases, addresses leasing for single-family homes and housing for public purposes on Indian land. The regulations provide for a 30-day time frame within which BIA must issue a decision on a complete residential lease application. The final rule eliminates the requirement for bonds and insurance for residential leases. Subpart C also includes provisions for enforcement of lease violations.

Subpart D, Business Leases, addresses leasing for business purposes, including: (1) Leases for residential purposes that are not covered in Subpart C; (2) leases for business purposes not covered by Subpart E (wind energy evaluation and wind and solar resource development); (3) leases for religious, educational, recreational, cultural, and other public purposes; and (4) commercial or industrial leases for retail, office, manufacturing, storage, biomass, waste-to-energy, and/or other business purposes. The regulations provide for a 60-day time frame within which BIA must issue a decision on a complete business lease application.

Subpart E, WEELs and WSR Leases, establishes procedures for obtaining BIA review and approval of WEELs and WSR leases. For wind energy, this rule establishes a two-part process whereby developers may obtain BIA approval of a short-term lease for possession of Indian land for the purposes of installation and maintenance of wind evaluation equipment, such as meteorological towers. The WEEL may provide the developer with an option to lease the Indian land for wind energy development purposes. The environmental reviews conducted for

the short-term lease, which would evaluate only the impacts of the evaluation equipment, not the full development of the wind project, may be incorporated by reference, as appropriate, into environmental reviews conducted for a lease for full development of the wind project. This two-part process is not necessary for solar resource development because solar resource evaluation does not require possession of the land. The regulations provide for a 20-day time frame within which BIA must issue a decision on a complete WEEL and a 60-day time frame within which BIA must issue a decision on a complete WSR lease application.

Some of the more notable cross-cutting substantive changes include the following.

#### *General Provisions*

- Clarifying when BIA approval of a lease is required
- Clarifying what taxes apply in the context of leasing Indian land
- Clarifying the applicability of the regulations
- Clarifying that leases may include a provision giving a preference to qualified tribal members, based on their political affiliation with the tribe

#### *BIA Approval Process*

- Eliminating the requirement for BIA approval of permits of Indian land
- Eliminating the requirement for BIA approval of subleases and assignments where certain conditions are met
- Imposing time limits on BIA to act on requests to approve leases, lease assignments, and leasehold mortgages
- Establishing that BIA has 30 days to act on a request to approve a lease amendment or sublease, or the document will be deemed approved
- Establishing that BIA must approve leases, amendments, assignments, leasehold mortgages, and subleases unless it finds a compelling reason not to do so, based on certain specified findings

#### *Compensation and Valuations*

- Providing that BIA will defer to the tribe's negotiated value for a lease of tribal land and will not require valuations of tribal land
- Automatically waiving valuation for leases of individually owned land if the individual landowners provide 100 percent consent
- Allowing for BIA waiver of compensation and valuation for residential leases of individually owned land under certain circumstances if the lessee is a co-owner that has been living on the tract for the past 7 years without objection

- Allowing for BIA waiver of valuation for leases where the lessee or tribe will provide infrastructure improvements to the leased premises and BIA determines it is in the best interest of the landowners

- Allowing short-term leases for wind resource evaluation purposes at the value negotiated by the Indian landowners (whether tribal or individual Indians)

- Providing that BIA will defer to the tribe's determination that allowing alternative forms of rental (other than monetary) compensation for tribal land is in its best interest

- Allowing alternative forms of rental (other than monetary) compensation for individually owned Indian land if the BIA determines it is in the best interest of the Indian landowners

- Allowing market analysis, competitive bidding, and other appropriate types of valuation, in addition to appraisals

- For tribal land, requiring BIA to defer to the tribe's determination that rental reviews and adjustments are not necessary

- For individually owned land, allowing for automatic rental adjustments and restricting the need for reviews of the lease compensation (to determine if an adjustment is needed) to certain circumstances

#### *Improvements*

- Requiring plans of development and schedules for construction of improvements to assist the BIA and Indian landowners in enforcement of diligent development of the leased premises

#### *Direct Pay*

- Allowing for direct pay (i.e., to the Indian landowners, rather than to BIA) for residential, business, and wind and solar resource leasing only where there are 10 or fewer landowners, and all landowners consent to direct pay

- Continuing direct pay unless and until 100 percent of the owners agree to discontinue direct pay, but suspending direct pay under certain circumstances

These changes are intended to increase the efficiency and transparency of the BIA approval process for the residential, business, wind energy evaluation, and wind and solar resource leasing of Indian land, support landowner decisions regarding the use of their land, support tribal self-determination, increase flexibility in compensation and valuations, and facilitate management of direct pay. These changes do not affect agricultural leasing.

### III. Responses to Comments on the Proposed Rule

Tribal consultation on the proposed leasing rule, published November 29, 2011 (76 FR 73784), occurred during January 2012. We held three consultation sessions on the proposed rule: January 10, 2012, in Seattle, Washington; January 12, 2012, in Palm Springs, California; and January 18, 2012, in Rapid City, South Dakota. The comment deadline was January 30, 2012. We received over 80 written submissions, and received written and oral comments from approximately 50 Indian tribes during this round of tribal consultation, as well as comments from tribal organizations, tribal housing authorities, and tribal corporations. We also received comments from community development financial institutions (CDFIs), tribal members, and members of the public.

The following is a summary of comments received during consultation and the public comment period on the proposed rule, and an explanation of how we addressed those comments in the final rule. We accepted a number of wording changes that are incorporated into the final rule, but may not be specifically mentioned here.

**Note:** The section numbers in this preamble refer to section numbers in the final rule. We have included a “PR” for “proposed rule” to indicate the corresponding proposed rule section where it differs from the final rule section number and may be helpful to the reader.

#### A. Overview

Many tribes and tribal organizations stated that they generally supported the proposed rule, and that the proposed rule was a significant improvement over the previous draft (which was released for consultation) because it more accurately reflected the intent of BIA to streamline and expedite the leasing process, advance economic development, and spur renewable energy development. Tribes stated that they supported the steps BIA took in the proposed rule to recognize tribal sovereignty and tribes’ achievements in terms of their ability to manage their own affairs on critical leasing issues. Tribes were particularly supportive of provisions for tribal waiver of appraisals, deadlines for BIA action, and BIA’s deference to the Indian landowners’ determination that the lease is in their best interest.

While tribes supported the proposed rule overall, they had suggestions for improvement, which are summarized below. A tribal organization stated, broadly, that the regulations should

better reflect an updated concept of trust responsibility that defers to tribes in financial matters. We have reviewed the regulation to ensure that the final rule requires BIA to defer to tribes in all possible cases, consistent with our trust responsibility.

One tribe suggested we review the regulation to reconsider each and every regulatory burden it imposes. Likewise, another tribe asked that we review the regulation to ensure tribes’ sovereign rights are recognized. We followed these recommendations and have deleted regulatory burdens that are not necessary for BIA to meet its statutory and trust responsibilities and have included provisions supporting tribes’ sovereign rights.

Several tribes stated that revision of the business leasing regulations was long overdue. Tribes had suggestions for limiting BIA’s role in the leasing process to an administrative role by, for example, limiting BIA’s independent review of tribal leasing decisions for financial prudence. Another tribe said that tribes should be able to rely on BIA to process lease documents but not make decisions affecting substantive lease contents or negotiations. We have limited BIA’s involvement in substantive lease contents, and left lease provisions and issue resolutions to negotiation, to the extent possible and consistent with our trust responsibility.

A few tribes requested deferring finalization of the residential leasing subpart, to allow for further consultation and more time for all comments to be considered. We will discuss these tribes’ comments in more detail, below.

Tribes had suggestions for communicating the final rule’s changes, including the following:

- Create a Web page dedicated solely to the new leasing regulations including a repository of guidance and informational materials. We are developing a Web site accessible from *www.bia.gov* and will populate the Web site with guidance and informational materials as they are developed.
- Provide checklists and sample lease provisions to assist in the lease negotiation process. We will develop checklists and make them available on the Web site.

#### B. Format of Regulations

A few tribes commented on the format of the regulations. The majority stated that they believe the common provisions of separate subparts should be kept separate because it is more user-friendly. A minority stated that this format results in regulations that are too

lengthy and redundant. We retained the separate subparts for user-friendliness.

Several tribes stated that the proposed rule made little distinction between individual Indian landowners and tribes or tribal agencies, and noted that BIA should defer to the tribe and tribal agency and exercise a lesser degree of oversight than for individual Indian landowners. To the extent consistent with the trust responsibility, we treated tribal and individual Indian landowners differently, providing more deference to tribal landowners in the lease approval process and in the lease enforcement process. We highlighted this difference in the final rule by breaking out questions regarding rental compensation and valuation according to whether the lease is of tribal land or individually owned Indian land.

#### C. Subpart A—General Provisions

We received the following comments on sections within subpart A.

##### 162.002—How the Part Is Subdivided

- Clarify the provision in 162.002 stating that Subpart F (Special Requirements for Certain Reservations) is subject to subparts A and G. In response, we added a sentence to 162.002 to clarify which provisions apply if there is a conflict between Subpart F (or any act of Congress under which a Subpart F lease is made) and Subparts A through G. Note that Subpart F is merely a redesignation of what was Subpart E.

- Explain the effect of deleting the former subpart addressing non-agricultural leases on tribal regulations modeled after that subpart. There will be no effect; the tribal regulations stand independent of Federal regulations.

##### 162.003—Definitions

- “Amendment”—Define this term to include any changes to the terms of a lease approved by BIA under part 162 that are not contemplated by or provided for in the lease during its initial or renewal period. We did not add this definition because it is self-evident.

- “Business day”—Include tribally recognized holidays out of respect for tribal sovereignty and to provide consistency for individuals and businesses dealing with tribes. We determined not to include tribally recognized holidays because the wide variation in tribally recognized holidays would make administration of the Federal regulations unworkable.

- “Court of competent jurisdiction”—Add that nothing in the definition alters preexisting allocations of jurisdiction over any matter as among State, Federal,

and tribal courts. While we agree this is true, we determined that explicitly including this in the definition could imply that, where this statement is not made explicitly, preexisting allocations of jurisdiction are altered.

- “Fee interest”—Clarify this definition to state when restrictions on alienation attach, if at all, to tribally acquired fee land. We determined that this request is outside the scope of this rulemaking.
- “Government lands”—Clarify that this definition does not include tribal lands. We incorporated this change.
- “Housing for public purposes”—Clarify that this term includes programs administered or substantially financed by any entity (not just not-for-profit entities) organized for the purpose of developing or improving low income housing using tax credits. We incorporated this change.
- “Immediate family”—Leave this definition to tribes’ discretion. We incorporated this change by providing that the definition will apply only in the absence of a tribal law definition.
- “Indian landowner”—Include tribal corporations organized under 25 U.S.C. 477 (“section 17 corporations”) in this definition, to the extent they have the authorization to lease Indian land to third parties. We did not incorporate this change because section 17 corporations are exempt from the requirement to obtain BIA approval of leases under part 162. A few commenters also suggested defining “individual Indian landowner” and “tribal landowner” to emphasize their differences. We determined that these definitions were unnecessary.
- “Inherent Federal function”—See discussion of 162.018, below.
- “Lease”—Add that a lessee’s right to possession will limit the landowner’s right only to the extent provided in the lease to avoid any possible argument that common law definitions requiring exclusive right of possession be applied to part 162. We incorporated the suggested change.
- “Lease”—Expand the definitions of “lease” and “lessee” to include subleases and assignments from sublessees and assignees. We did not incorporate this change because it would expand the application of the regulations beyond what is intended.
- “Lease document”—Add a definition for this term (the proposed rule used this term without a definition) to expressly include a lease, amendment, assignment, sublease, and leasehold mortgage. We added this definition.
- “LTRO”—Revise to clarify that a tribe contracting or compacting LTRO

functions may be included in this definition. We did not make this change because these tribes are already included in the definition, as part of “BIA.”

- “Notice of violation”—Revise to account for situations in which a notice of violation is issued against the Indian landowner/lessor. We did not incorporate this change because BIA’s obligation is to the Indian landowner, not to enforce the lease on behalf of the lessee.
- “Orphaned minor”—Revise because the proposed rule’s definition inaccurately suggests that every minor without a court-appointed guardian is orphaned. We revised the definition to match the common understanding of this term.
- “Permit”—Revise to clarify that this term does not include tribal grazing permits. Because grazing permits are governed by another CFR part, 25 CFR part 166, this definition does not apply to them; therefore, we determined that no change to this definition is necessary.
- “Single family residence”—Restrict this term to one dwelling unit. We did not revise the definition, but the definition allows tribes to define the term differently. This definition is consistent with the scope of financing available under section 184 of the Housing and Community Development Act of 1992 (12 U.S.C. 1715z–13a). We also added this term to the definition of “housing for public purposes” to clarify that this housing may include a single family residence, rather than just developments. We incorporated a tribal housing authority’s suggestion that we add “or other tribal law” to allow tribal law beyond just zoning law to define this term.
- “Sublease”—Revise to indicate that the interest held by the sublessee should be “no greater than” that of the lessee, since the sublessee may hold the same rights as the lessee. We incorporated this change.
- “Tribal law”—Revise to add that the body of non-Federal law is “defined by each tribe.” We did not incorporate this change because it would be redundant, given that the definition clearly establishes that the tribe defines its own body of law.
- “TDHE” (tribally designated housing entity)—Expand to include tribally sponsored or tribally sanctioned not-for-profit entities. We incorporated this requested change. Expand to include a tribal council or other tribal departments fulfilling TDHE services. We did not incorporate this change because a tribal council or tribal department that fulfills the function of

a TDHE, but is not separate from the tribe, does not have to obtain a lease of tribal land (the tribe cannot lease to itself) while entities separate from the tribe must obtain a lease of tribal land.

162.004 (PR 162.006)—Applicability to Indian Land and Life Estates

- Clarify how BIA addresses leases of life estates where the land is fractionated. We revised this section to clarify the difference between a life estate that includes all of the interests in a tract, and a life estate of a fractional interest in a tract—including clarifying whose consent is required for the life tenant to lease in each case, and whether BIA approval of the lease is required in each case. Where the life estate covers only a fractional interest in a tract, the life tenant must obtain the consent of the co-owners and BIA approval.
- Restrict BIA services in collecting rents on behalf of a life tenant so that they do not exceed services provided to trust beneficiaries. In response, BIA is not responsible for collecting the rents on behalf of the life tenant, but may where the life tenant’s whereabouts are unknown. In these situations, the Trust Fund Accounting System (TFAS) will distribute rent to an account for the life tenant.
- Do not assume that all life estates are held by non-Indians, because tribes use life estates as a form of estate planning for tribal members. The revised regulations clarify that BIA treats life estates the same whether they are held by Indians or non-Indians; BIA’s trust responsibility is to the remaindermen.
- Delete provisions requiring lessees to pay life tenants directly, because that requirement exposes the life tenant’s rental income to State court judgments; whereas if BIA collected rent on behalf of the life tenant, the rental income would be protected from these judgments by an individual Indian money (IIM) account. While we note this point, the rule allows life tenants to enter into leases without BIA approval, and BIA does not administer such leases on behalf of life tenants. The requirement that lessees pay life tenants directly is consistent with the rights and responsibilities afforded to life tenants in the rule. As stated above, this rule treats life estates the same whether they are held by Indians or non-Indians.
- Reflect Congress’s intent to extend BIA’s trust responsibility to protect Indian descendants who are life tenants, without removing property from trust. BIA will protect the trust asset, but does not agree that Congress expressed its

intent to extend the fiduciary duty to life tenants.

- Protect remaindermen from a situation where a life tenant enters into a long-term lease for the duration of his or her life and receives up-front payments such that the life tenant enjoys the income to the detriment of the remaindermen. If a life tenant enters into a lease only for the duration of his or her life, he or she is entitled to enjoy the income, whether paid in a lump sum or over time, to the exclusion of the remaindermen. The rule protects remaindermen by making it clear that, upon the death of the life tenant, any lease of a life estate terminates. The remaindermen could evict the life tenant's lessee or negotiate a new lease with new payment terms. If either the lessee or the remainderman believed they had grounds to do so, they could attempt to recoup losses from the life tenant's estate.

#### 162.005 (PR 162.008)—When Lease Is Needed

- Add that an entity using a tribal land assignments or similar instruments and permit holders do not need a lease to possess Indian land. We incorporated this change.

- Exempt owners of a fractional interest from the requirement to obtain a lease from the owners of the other fractional interests in the same tract. We did not incorporate this change. Section 162.005(a)(2) allows the co-owner to use the tract if the other fractional co-owners agree; otherwise, the co-owner must obtain a lease from the other fractional owners to ensure that they consent (if leased, rent may not be necessary, as this situation is one in which fair market rental may be waived). We disagree with the commenters' claim that each owner has full rights to use the property in any manner, because one co-owner does not have the right to exclude the others without their consent. For this reason, we reject the commenters' claim that requiring a lease is diminishing the property rights of each co-owner by requiring him or her to pay rent for use of his or her own property.

- Clarify how 162.005(a)(2), which states that co-owners may agree to allow one co-owner to use the tract without a lease, will work and when a lease, rather than an informal agreement, is required. While a lease documenting the agreement is preferable, the rule provides for maximum flexibility by allowing for informal agreements. A lease is required if all the co-owners cannot agree to an informal agreement. Section 162.005(a)(2) is consistent with existing regulations, allowing for

owners' use when 100 percent of the landowners agree. If not all 100 percent agree, then a lease is required. The informal agreement may continue throughout the lives of the landowners, or for whatever period they agreed to, until they no longer agree.

- Incorporate the current language of 162.102(d) (regarding section 17 corporations) into the new subpart A. This provision is incorporated at 162.005(b)(3).

#### 162.006 (PR 162.007)—Land Use Agreements Subject to This Part

- Clarify whether the regulations apply to those tribes with tribe-specific statutory authority for leasing. We added provisions to 162.006 to clarify that tribes leasing Indian land under a special act of Congress that authorizes leasing without BIA approval are not subject to part 162.

- Clarify that tribes with special Federal statutory authority to lease under tribal regulations approved by the Secretary may adopt any of the part 162 regulations subject to Secretarial approval of the amendment to tribal regulations. We agree this is the case.

- Make Federal approval requirements, but not recording and enforcement provisions, inapplicable to leases issued by section 17 corporations. We clarified in 162.006 that leases of tribal land issued by section 17 corporations under their charters are not subject to the regulations (including enforcement provisions) for leases of 25 years or less, but the leases must be recorded.

- State that a land use agreement that encumbers tribal land and is authorized by 25 U.S.C. 81 is governed by 25 CFR part 84, rather than, as the proposed rule stated, that a land use agreement that encumbers tribal land is governed by 25 U.S.C. 81. We incorporated this change.

- Correct the erroneous suggestion in the table in 162.006 that all land use agreements that can be called by a certain name are governed by the corresponding CFR parts, because the statutory authority determines what the land use agreement is, and what the corresponding CFR part is. We considered adding the statutory authorities to this table but determined that it would be too voluminous and ultimately unhelpful. Instead, we clarified the statutory authorities for part 162 leases and provide that other statutory authority governs the agreements in the table.

- Add that tribal laws and customs must be deferred to in determining whether a use is "temporary" under a "tribal land assignment." We addressed

this comment by deleting the word "temporary," because a tribal land assignment may be for any appropriate period of time under tribal law.

- Clarify whether declarations of tribal land set-asides must be submitted to BIA for a determination that they are not leases, as permits must. Tribal land assignments and similar instruments allowing use of tribal land cannot be subject to part 162, and therefore do not need to be submitted to BIA for BIA's file or a determination that they are not leases.

- Clarify that tribal "dedications to a public use" and other means of setting aside tribal land for particular purposes do not require an approved lease under this part. Instruments such as these would fall under "tribal land assignments and similar instruments authorizing uses of tribal land," which are not subject to part 162.

- Clarify the applicability of the regulations to section 17 corporations. We have added provisions to 162.006 to clarify that part 162 does not apply to leases of tribal land by a section 17 corporation under its charter to a third party for a period not to exceed 25 years, and to 162.005 to clarify that a section 17 corporation managing or having the power to manage tribal land directly under its Federal charter or under a tribal authorization (not under a lease from the Indian tribe) does not need a lease under part 162 to do so. Several tribes stated that they disagree with the exemption for section 17 corporations leasing to third parties, because tribes would have to obtain BIA approval to lease to a third party. This exemption is established in 25 U.S.C. 477 and applies to BIA approval of any lease document that would otherwise fall under part 162.

#### 162.007 (PR 162.004)—Permits

Tribes nearly unanimously supported the proposed rule's removal of the requirement to obtain BIA approval of permits. The tribes stated that eliminating BIA permit approval increases tribal self-determination and streamlines the process. Some tribes also stated that requirements for the landowners to follow relevant environmental and cultural resource laws, and for BIA to confirm the document is a permit, protect Indian land without burdening landowners with an onerous approval process. In addition, we received the following comments:

- Reconcile 162.007's explanation as to what qualifies as a "permit" with the grazing regulations. Because grazing permits are issued under a separate statutory authority and are governed by

separate regulations at 25 CFR part 166, the description in part 162 does not affect grazing permits.

- Clarify that the requirement that permits comply with applicable environmental laws does not mean the National Environmental Policy Act (NEPA) applies. Because there is no Federal approval of permits, neither NEPA nor Section 106 of the National Historic Preservation Act applies to permits.

- Add a timeline or process by which BIA “confirms” whether a document is a permit or a lease. We incorporated this change by adding a 10-day timeline by which BIA may notify the Indian landowners that a lease is required because the permit grants an interest in Indian land.

- Clarify in the introductory paragraph to the table that the characteristics are merely “examples of common characteristics,” to ensure that permits that lack one or more characteristics are not necessarily excluded from being considered a permit. We incorporated this change.

- Delete the permit characteristic “does not grant an interest in Indian land” because permits typically grant non-possessory use rights, which are, in effect, an “interest.” BIA disagrees that a non-possessory use privilege is a “legal interest” in the Indian land. For this reason, we did not make the requested change.

- Narrow the permit characteristic, “unlimited access by others,” because it is too broad. Tribal members retain rights of access on permitted lands, including hunting privileges, cultural and spiritual use access, and easements. We revised this to clarify that a permittee has a “non-possessory right of access.”

- Clarify that BIA will no longer police compliance with permits or collect and distribute permit payments, and allow landowners to opt-in or opt-out of BIA approval for permits. BIA understands this is a significant change for some areas that heavily rely on permits. Once this final rule is effective, the landowner will be responsible for collecting permit payments, rather than BIA. BIA will not collect permit income from permittees, and BIA will not distribute permit income to Indian landowners. If there is a dispute regarding the permit or whether the permittees have made timely payments, the Indian landowners’ remedy is with a court of competent jurisdiction. We added a provision to clarify that BIA will not administer or enforce permits.

- Limit tribes’ ability to establish compensation and conditions to prevent permitting from being a separate

revenue opportunity for tribes beyond leases and rights-of-way. BIA did not incorporate this change because tribal landowners have the right to receive compensation for granting access through a permit, and tribal landowners may establish whatever compensation they like.

- Clarify whether 162.007 allows BIA to grant permits on tribal land, without tribal approval. The final 162.007 does not allow BIA to grant permits on tribal land, only on U.S. Government land covered by part 162.

162.008 (PR 162.005)—Applicability to Documents Submitted Before Effective Date

- Clarify that those leases that were submitted to BIA before the effective date of the rule, but not approved by BIA before the effective date of the rule, are governed by the rules in effect at the time of the submission. We reworded 162.008 to clarify that this is the case.

- Clarify what version of the regulations will apply to leases approved before the effective date of the rule. We reworded 162.008 to clarify that new regulations will apply to leases approved before the effective date of the rule, except that where the provisions of the lease conflict with the provisions of the regulation, the provisions of the lease will govern. Likewise, options to renew in leases approved by BIA before the effective date of the final rule will continue to be governed by the lease terms. Renewals after the effective date of the final rule of leases that were approved by BIA before the effective date of the final rule will not have to contain the final rule’s mandatory lease provisions.

- Add a qualifying clause in the beginning of 162.008 stating that it applies “except as provided in 162.006” (“To what land use agreements does this part apply?”) for clarity. We incorporated this change.

- Delete the provision in 162.008 stating that BIA has the right to amend the regulations at any time, because it may create uncertainty. BIA accepted the request to delete this provision since BIA retains the right to amend through the Administrative Procedure Act public notice and comment process, regardless of whether this right is stated in the regulations.

- Address the rule’s applicability to leases issued by section 17 corporations that are exempt from Federal approval. As stated below, we clarified in 162.006 that part 162 does not apply to these leases where the term is 25 years or less.

- Address the rule’s applicability to leases that a tribe or tribal corporation is obligated to issue upon exercise of a

legally binding option to lease on the effective date of the new rules. The fact that a party is obligated to issue a lease will not change the applicability of the regulations.

162.009 (PR N/A)—Approval of Subleasehold Mortgages (New Section)

- We added a new section to clarify whether subleasehold mortgages require BIA approval, in response to comments on subleases and leasehold mortgages.

162.010 (PR 162.009)—How To Obtain a Lease

- Narrow 162.010 so that only a tribe may submit a lease to BIA for approval. We did not add this restriction because a lease of Indian land must be signed by the Indian landowners (or the BIA on behalf of landowners in limited circumstances) and the lessee. BIA will accept the lease document from either the prospective lessee or the Indian landowner.

162.011 (PR 162.010)—Identifying and Contacting Indian Landowners

- Require prospective lessees to contact tribes directly, rather than going through BIA first in 162.011. We addressed this comment by narrowing application of this section to individual Indian landowners.

- Add language to this section requiring the prospective lessee to provide a written explanation of the need for obtaining Indian landowner information. We added this requirement.

162.013 (PR 162.012)—Consent

One tribe submitted extensive comments regarding its situation, wherein tribal members constructed homes without a lease so long as the member had a fractional interest in the tract. Any person who owns a fractional interest in a tract must obtain consent from all of the other owners (co-owners) of fractional interests in that tract in order to possess that tract without a lease, or must obtain consent from the co-owners representing the appropriate percentage of ownership in the tract to lease the tract. See 162.005(a) (PR 162.008(a)). Where a lease is required, and consent to lease cannot be obtained within 90 days, BIA may issue a lease under paragraph 162.013(c)(6) (PR 162.012(c)(6)). One Alaska tribe with a unique situation stated that BIA should add a provision to part 162 addressing consent requirements specifically for that tribe. Because the Indian Land Consolidation Act (ILCA) and its consent provisions do not apply to Alaska, we were unable to incorporate this requested change.

In addition, we received the following comments:

- Clarify that a section 17 corporation may consent to a lease. Because part 162 does not apply to section 17 corporations granting others the right to possess Indian land, we did not incorporate this change.

- A few tribes noted that where the consent of the landowners of 100 percent of the interests is required, it is difficult to obtain a lease. Under ILCA, if there are one to five landowners in a tract, then the owners of 90 percent of the interests in that tract must consent. In some cases, depending on the percentage of interests owned by each, this may mean that all of the landowners must consent. BIA recognizes the practical problems that are caused in those cases where all landowners must consent, but is constrained by statutory parameters.

- Clarify what tribal consent is needed for tribal lands and for fractionated lands where individual landowners owning the required percentage of interests under the ILCA have consented. If the tract is one in which 100 percent of the interests are owned by the tribe, the tribe must be a party to the lease of tribal land, and will need to authorize (i.e., consent to) the lease. If the tract is fractionated, and less than 100 percent of the interests are owned by the tribe and the lease is authorized by the Native American Housing and Self-Determination Act (NAHASDA), tribal consent is still required. If the lease for a fractionated tract is entered into under another statutory authority, then tribal consent is not needed; Congress provided for this situation in stating that where a tribe did not consent to a lease of fractionated land, it is not considered a party to the lease. See 25 U.S.C. 2218(d)(2).

- Revise the consent provisions to apply to tribes, in addition to individual Indian landowners. Because the term "Indian landowners" includes both tribal landowners and individual Indian landowners, we did not revise these provisions. Another tribe asked that we add "individual" before "Indian landowner" everywhere the rule discusses consent. We did not incorporate this change because a tribal landowner must also consent to a lease of its land.

- Limit the parties' ability to allow for "deemed consent" in a lease to individual landowners. The regulations limit deemed consent lease provisions to individual Indian landowners only. One tribe requested adding tribes to allow for tribes to be deemed to have consented. We did not incorporate this

change out of respect for tribal sovereignty and because other comments requested that it be limited to individual Indian landowners.

- Replace the term "consent" with "grant" because the landowners actually "grant" the lease. While it is true that landowners grant the lease, we adopted the language of ILCA in referring to "consent" to avoid potential confusion where there are several owners of fractional interests and one "grants" the lease but the others do not.

- Delete paragraph (c)(6), which empowers BIA to consent to a lease if the landowners have been unable to reach an agreement for 3 months, because it favors the prospective lessee rather than the landowner where a non-consenting landowner has legitimate reasons for not consenting. We did not delete this paragraph because it implements statutory authority (25 U.S.C. 380) and BIA will determine whether the lease is in the best interest of the landowners before exercising this authority.

#### 162.014 (PR 162.013)—What Laws Apply to Leases

- Clarify when tribal laws apply to leases under part 162, and when BIA may waive part 162 due to conflicting or inconsistent tribal law. We revised this section by incorporating the tribes' suggested language to allow tribal laws to supersede or modify part 162 provisions, as long as certain conditions are fulfilled (e.g., the tribe notifies BIA of the modifying or superseding effect).

- Revise the proposed rule's language about when State law would be applied because a Federal court could read the proposed rule's provisions as providing authority for a court to apply State law. We revised the section to clarify that State law may apply where a Federal court made it applicable in the absence of Federal or tribal law. Another concern was that tribes should have the flexibility to apply State law in certain circumstances. The final rule's language clarifies that a tribe may apply State law.

- Clarify that the phrase "parties to a specific lease may subject it to State or local law in the absence \* \* \*" does not give individuals the authority to establish that the State or locality has jurisdiction. We added language to clarify that the individuals will be subjecting only their lease to this jurisdiction.

- Add provisions that require BIA to recognize and acknowledge tribal laws regulating activities on land under a lease, including land use, environmental protection, and historic preservation, as in the 2004 draft

regulations. The additional language in 162.016 regarding the applicability of tribal law covers this.

#### 162.015 (PR N/A)—Tribal Employment Preference Laws (New Section)

- Add language recognizing the applicability of tribal preference laws to lessees. To clarify this applicability, we added a new section 162.015. Tribe-specific employment preferences as provided in these regulations are political preferences, not based on race or national origin. They run to members of a particular federally-recognized tribe or tribes whose trust or restricted lands are at issue and with whom the United States holds a political relationship. These preferences are rationally connected to the fulfillment of the federal government's trust relationship with the tribe that holds equitable or restricted title to the land at issue. These preferences also further the United States' political relationship with Indian tribes. Tribes have a sovereign interest in achieving and maintaining economic self-sufficiency, and the federal government has an established policy of encouraging tribal self-governance and tribal economic self-sufficiency. A tribe-specific preference in accord with tribal law ensures that the economic development of a tribe's land inures to the tribe and its members. Tribal sovereign authority, which carries with it the right to exclude non-members, allows the tribe to regulate economic relationships on its reservation between itself and non-members. See, generally, *Equal Employment Opportunity Commission v. Peabody Western Coal Company*, No. 2:01-cv-01050 JWS (D. Ariz., Oct. 18, 2012) (upholding tribal preferences in leases of coal held in trust for the Navajo Nation and Hopi Tribe, but also citing with approval the use of such preferences in business leases). These regulations implement the established policy of encouraging tribal self-governance and tribal economic self-sufficiency by explicitly allowing for tribal employment preferences.

#### 162.016 (PR 162.014)—BIA Compliance With Tribal Laws

- Restrict when BIA will defer to tribal law by changing "making decisions regarding leases" to "making the decision to approve or disapprove the proposed lease." We did not incorporate this change because BIA will defer to tribal law in decisions regarding leases beyond just the approval decision.

## 162.017 (PR N/A)—What Taxes Apply (New Section)

All tribal commenters supported proposed provisions clarifying that improvements on trust or restricted land are not taxable by non-tribal entities; however, many tribes requested clarification regarding other taxation arising in the context of leasing Indian land. For this reason, we separated this topic into its own section and moved it from the residential, business, and WSR leasing subparts to subpart A. This section now addresses not only taxation of improvements on leased Indian land, but also taxation of the leasehold or possessory interest, and taxation of activities (e.g., excise or severance taxes) occurring or services performed on leased Indian land.

Tribes have inherent plenary and exclusive power over their citizens and territory, which has been subject to limitations imposed by Federal law, including but not limited to Supreme Court decisions, but otherwise may not be transferred except by the tribe affirmatively granting such power. *See, Cohen's Handbook of Federal Indian Law*, 2012 Edition, § 4.01[1][b]. The U.S. Constitution, as well as treaties entered into between the United States and Indian tribes, executive orders, statutes, and other Federal laws recognize tribes' inherent authority and power of self-government. *See, Worcester v. Georgia*, 31 U.S. 515 (1832); *U.S. v. Winans*, 198 U.S. 371, 381 (1905) (“[T]he treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted.”); *Cohen's Handbook of Federal Indian Law*, 2012 Edition, § 4.01[1][c] (“Illustrative statutes \* \* \* include [but are not limited to] the Indian Civil Rights Act of 1968, the Indian Financing Act of 1974, the Indian Self-Determination and Education Assistance Act of 1975 \* \* \* [and] the Tribe Self-Governance Act \* \* \* In addition, congressional recognition of tribal authority is [also] reflected in statutes requiring that various administrative acts of... the Department of the Interior be carried out only with the consent of the Indian tribe, its head of government, or its council.”); *Id.* (“Every recent president has affirmed the governmental status of Indian nations and their special relationship to the United States”).

With a backdrop of “traditional notions of Indian self-government,” Federal courts apply a balancing test to determine whether State taxation of non-Indians engaging in activity or owning property on the reservation is preempted. *White Mountain Apache*

*Tribe v. Bracker*, 448 U.S. 136, 143 (1980). The *Bracker* balancing test requires a particularized examination of the relevant State, Federal, and tribal interests. In the case of leasing on Indian lands, the Federal and tribal interests are very strong.

The Federal statutes and regulations governing leasing on Indian lands (as well as related statutes and regulations concerning business activities, including leases, by Indian traders) occupy and preempt the field of Indian leasing. The Federal statutory scheme for Indian leasing is comprehensive, and accordingly precludes State taxation. In addition, the Federal regulatory scheme is pervasive and leaves no room for State law. Federal regulations cover all aspects of leasing:

- Whether a party needs a lease to authorize possession of Indian land;
- How to obtain a lease;
- How a prospective lessee identifies and contacts Indian landowners to negotiate a lease;
- Consent requirements for a lease and who is authorized to consent;
- What laws apply to leases;
- Employment preference for tribal members;
- Access to the leased premises by roads or other infrastructure;
- Combining tracts with different Indian landowners in a single lease;
- Trespassing;
- Emergency action by us if Indian land is threatened;
- Appeals;
- Documentation required in approving, administering, and enforcing leases;
- Lease duration;
- Mandatory lease provisions;
- Construction, ownership, and removal of permanent improvements, and plans of development;
- Legal descriptions of the leased land;
- Amount, time, form, and recipient of rental payments (including non-monetary rent), and rental reviews or adjustments;
- Valuations;
- Performance bond and insurance requirements;
- Secretarial approval process, including timelines, and criteria for approval of leases;
- Recordation;
- Consent requirements, Secretarial approval process, criteria for approval, and effective date for lease amendments, lease assignments, subleases, leasehold mortgages, and subleasehold mortgages;
- Investigation of compliance with a lease;
- Negotiated remedies;
- Late payment charges or special fees for delinquent payments;

- Allocation of insurance and other payment rights;
- Secretarial cancellation of a lease for violations; and
- Abandonment of the leased premises.

The purposes of residential, business, and WSR leasing on Indian land are to promote Indian housing and to allow Indian landowners to use their land profitably for economic development, ultimately contributing to tribal well-being and self-government. The legislative history of section 415 demonstrates that Congress intended to maximize income to Indian landowners and encourage all types of economic development on Indian lands. *See Sen. Rpt. No. 84-375 at 2 (May 24, 1955)*. Assessment of State and local taxes would obstruct Federal policies supporting tribal economic development, self-determination, and strong tribal governments. State and local taxation also threatens substantial tribal interests in effective tribal government, economic self-sufficiency, and territorial autonomy. The leasing of trust or restricted land is an instrumental tool in fulfilling “the traditional notions of sovereignty and [] the federal policy of encouraging tribal independence.” *Bracker*, 448 U.S. at 145 (citing *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 174-75 (1973)). The leasing of trust or restricted lands facilitates the implementation of the policy objectives of tribal governments through vital residential, economic, and governmental services. Tribal sovereignty and self-government are substantially promoted by leasing under these regulations, which require significant deference, to the maximum extent possible, to tribal determinations that a lease provision or requirement is in its best interest. *See Joseph P. Kalt and Joseph William Singer, The Native Nations Institute for Leadership, Management, and Policy & The Harvard Project on American Indian Economic Development, Joint Occasional Papers on Native Affairs, Myths and Realities of Tribal Sovereignty: The Law and Economics of Indian Self-Rule*, No. 2004-03 (2004) (“economically and culturally, sovereignty is a key lever that provides American Indian communities with institutions and practices that can protect and promote their citizens interests and well-being [and] [w]ithout that lever, the social, cultural, and economic viability of American Indian communities and, perhaps, even identities is untenable over the long run”).

Another important aspect of tribal sovereignty and self-governance is taxation. Permanent improvements and



activities on the leased premises and the leasehold interest itself may be subject to taxation by the Indian tribe with jurisdiction over the leased property. The Supreme Court has recognized that “[t]he power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management.” *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982). State and local taxation of lessee-owned improvements, activities conducted by the lessee, and the leasehold interest also has the potential to increase project costs for the lessee and decrease the funds available to the lessee to make rental payments to the Indian landowner. Increased project costs can impede a tribe’s ability to attract non-Indian investment to Indian lands where such investment and participation are critical to the vitality of tribal economies. An increase in project costs is especially damaging to economic development on Indian lands given the difficulty Indian tribes and individuals face in securing access to capital. A 2001 study by the U.S. Department of the Treasury found that Indians’ lack of access to capital and financial services is a key barrier to economic advancement. U.S. Dept. of the Treasury, Community Development and Financial Institutions Fund, The Report of the Native American Lending Study at 2 (Nov. 2001). Along the same line, 66 percent of survey respondents stated that private equity is difficult or impossible to obtain for Indian business owners. *Id.*

In many cases, tribes contractually agree to reimburse the non-Indian lessee for the expense of the tax, resulting in the economic burden of the tax ultimately being borne directly by the tribe. Accordingly, the very possibility of an additional State or local tax has a chilling effect on potential lessees as well as the tribe that as a result might refrain from exercising its own sovereign right to impose a tribal tax to support its infrastructure needs. Such dual taxation can make some projects less economically attractive, further discouraging development in Indian country. Economic development on Indian lands is critical to improving the dire economic conditions faced by American Indians and Alaska Natives. The U.S. Census Report entitled *We the People: American Indians and Alaska Natives in the United States*, issued February 2006, documented that a higher ratio of American Indians and Alaska Natives live in poverty compared to the total population, that participation in the labor force by

American Indians and Alaska Natives was lower than the total population, and that those who worked full-time earned less than the general population.

162.017(a). Subject only to applicable Federal law, permanent improvements on trust or restricted land are not taxable by States or localities, regardless of who owns the improvements. Permanent improvements are, by their very definition, affixed to the land. Accordingly, a property tax on the improvements burdens the land, particularly if a State or local government were to attempt to place a lien on the improvement. Numerous provisions in the regulations address all aspects of improvements, requiring the Secretary to ensure himself that adequate consideration has been given to the enumerated factors under section 415(a). These include the height, safety, and quality of improvements; provisions requiring the lease to address ownership, construction, and removal of improvements; provisions imposing due diligence requirements on the construction of improvements, and provisions requiring plans of development for business and WSR leases. *See, e.g.*, 162.314 through 162.316, 162.414 through 162.416, 162.514 through 162.516, and 162.543 through 162.545. In addition, the regulations require the BIA to comply with tribal law, including tribal laws regulating improvements, when making decisions concerning leases of trust or restricted land. *See* 162.016. State and local taxation of improvements undermine Federal and tribal regulation of improvements.

162.017(b). Subject only to applicable Federal law, activities conducted under a lease of trust or restricted land that occur on the leased premises are not taxable by States or localities, regardless of who conducts the activities. An example of this principle is in the trading business where the courts have held that taxation of such activities is preempted by the Indian Trader Statutes, *see* 25 U.S.C. 261, and the all-inclusive regulations under them, *see* 25 CFR 140.1–26. Federal statutes and regulations are “sufficient to show that Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for State laws imposing additional burdens upon traders.” *Warren Trading Post Co. v. Arizona State Tax Comm’n*, 38 U.S. 685, 690 (1995) (precluding imposition of State sales taxes); *Central Machinery Co. v. Arizona State Tax Comm’n*, 448 U.S. 160 (1980) (preemption applies even if vendor is not licensed as long as goods or services are traded to a tribe or its members in a transaction occurring

predominately on the reservation). As a general matter, myriad activities on leased lands related to economic development, infrastructure building, and governmental operations provide important revenue and services to the tribal economy and the generation of economic activity on leased land is an essential component of tribal self-sufficiency. State and local taxation undermines that important objective of federal regulation of the leasing of Indian lands. This subsection, like 162.017(a), is intended to achieve the dual purposes of supporting tribal economic development and promoting tribal self-government. The additional burden of State and local taxation on lease activities would significantly affect the marketability of Indian land for economic development, as noted above in the introductory paragraphs. In addition, tribes, as sovereigns, have inherent authority to regulate zoning and land use on Indian trust and restricted land, and the regulations require BIA to comply with tribal laws relating to land use. *See* 162.016. Such regulation is undermined by State and local taxation.

162.017(c). Subject only to applicable Federal law, the leasehold or possessory interest itself is not taxable by States or local governments. The ability of a tribe or individual Indian to convey an interest in trust or restricted land arises under Federal law, not State law; Federal legislation has left the State with no duties or responsibilities for such interests, even recordation (25 U.S.C. 5); and the leasehold interest is exhaustively regulated by this rule, as noted above. For example, a leasehold interest may not be conveyed, mortgaged, assigned, or subleased without Secretarial approval, with limited exceptions. Compelling Federal interests in self-determination, economic self-sufficiency, and self-government, as well as strong tribal interests in sovereignty and economic self-sufficiency, are undermined by State and local taxation of the leasehold interest.

Nothing in these regulations is intended to preclude tribes, States, and local governments from entering into cooperative agreements to address these taxation issues, and in fact, the Department strongly encourages such agreements.

In addition, we received the following comments:

- Move the language regarding the justification for the taxation provisions to the regulatory text. We did not make this change because the justification is explanatory and therefore more

appropriate in the preamble than in the regulatory text.

- Correct the ambiguity caused by the location of the phrase “without regard to ownership” in the proposed rule, because it could be construed as describing the State tax such that the section would bar only those State taxes imposed without regard to ownership of the improvements. Because that interpretation was not the intent of this provision, we have clarified the provision by moving the phrase “without regard to ownership” to indicate that no improvements on leased Indian land are subject to State taxation, regardless of who owns the improvements.

- Delete the language following the provision stating that improvements are subject to 25 CFR 1.4. We deleted the cross-reference to 25 CFR 1.4 and instead added the crux of section 1.4 directly into 162.014.

#### 162.018 (PR 162.015)—Tribal Administration of Part 162

- Clarify the phrase “inherent Federal function.” We accepted this comment by deleting the phrase and instead providing a list of functions that cannot be contracted or compacted by tribes in the leasing context.

#### 162.019 (PR 162.016)—Access to Leased Premises

- Exempt roads and other infrastructure lease provisions from requiring part 169 approval where the access is incidental to the development and use of the leased lands. Rights-of-way across Indian land require Secretarial approval, by statute. If access to the leased premises is a new right-of-way across Indian land, then the access will require Secretarial approval through a right-of-way permit. If the leased premises include access roads, then no separate right-of-way permit is needed. We added the sentence “[r]oads or other infrastructure within the leased premises do not require compliance with 25 CFR part 169, unless otherwise stated in the lease” to clarify this.

- Provide for review of infrastructure for roads, etc., within the leased premises under part 162 because it can be done more efficiently than under part 169. Section 162.019 allows for the lease to cover roads and other infrastructure that are on the leased premises.

- Account for “implied access.” Section 162.019 states that a lease may expressly address access. It is the obligation of the parties to a lease (not BIA) to ensure access to leased premises. We anticipate addressing other rights-of-way issues in future revisions to part 169.

#### 162.020 (PR 162.017)—Unitized Leases

- Delete provisions basing rent of a unitized lease on acreage because different tracts may have different value. We did not make any change to the regulation in response to this comment because the regulation states “unless the lease provides otherwise,” which allows the lease to establish a different rental scheme. The appraised value of an individual tract may be identified when consent is obtained or upon request.

#### 162.021 (PR 162.018)—BIA Responsibilities in Approving Leases

- Add “and applicable tribal law” to recognize the need to comply with tribal law. We accepted this change.

#### 162.022 (PR 162.019)—BIA Responsibilities in Enforcing Leases

- Add that an Indian landowner may exercise remedies available under a lease or applicable law. To address this comment, we added a provision clarifying that nothing in the section prevents an Indian landowner from exercising remedies available under applicable law.

- Add a cross-reference to 162.024 (PR 162.021) (regarding emergency action) in paragraph (d). We added this cross-reference.

- Add a new paragraph stating that BIA will carry out the duties assigned to it in the lease provisions. Because BIA’s mission and duties are established by statute, we were unable to add this provision.

- Add a statement that tribes and TDHEs have independent authority to administer and enforce subleases, to prevent sublessees from arguing that only BIA can take enforcement action. We did not add a statement to this section, because BIA does not enforce subleases and therefore will always defer to the TDHE’s enforcement of a sublease. We have clarified in each of the subparts (see 162.365, 162.366, 162.465, 162.466, 162.590, and 162.591) that BIA will defer to ongoing lease enforcement actions by the tribes where the lease provides for the tribe to address violations.

- Limit BIA’s role in enforcing residential leases where its enforcement overlaps with enforcement by tribes and TDHEs, in the context of residential leasing. As stated above, TDHEs may enforce subleases without BIA interference, and each of the subparts clarifies that BIA will defer to ongoing enforcement actions to avoid overlap.

- Add a new paragraph stating that BIA will take prompt action to evict trespassers after lease expiration and upon consultation with the Indian

landowner, to include an explicit duty to act and prevent situations like those that have led to litigation. Section 162.023 of the final rule addresses this situation. In that section, we did not assume a duty to evict because the circumstances may require different approaches (e.g., where there is a holdover in negotiation with the landowner); however, we did add an explicit mention of eviction as an action BIA may take.

- Expand the rule to provide that BIA will enforce the lease against the Indian landowner if the landowner does not comply with the terms and conditions of the lease. Because BIA is the trustee for the Indian landowner, rather than the lessee, we did not incorporate this change.

#### 162.023 (PR 162.020)—Trespass

- Change the sentence stating that the Indian landowners may pursue any remedies under “tribal law” to “applicable law” to ensure that the landowners are not restricted to tribal law remedies. We incorporated this change.

- Provide that BIA will act when the Indian landowners make a written request. This provision is already included in each specific subpart at 162.364, 162.464, and 162.589; therefore, we did not add it to 162.023.

#### 162.024 (PR 162.021)—Emergency Action

- Notify individual Indian landowners, but contact the Indian tribe with jurisdiction before taking emergency action. We incorporated this change.

- Require BIA to make reasonable efforts to give actual notice to all Indian landowners before taking emergency action, not just constructive notice. The final rule requires BIA to provide written notification to the tribe before taking emergency action, but not individual Indian landowners because of the practical difficulties in contacting all Indian landowners quickly enough to take emergency action.

- Require notification “in writing” to individual Indian landowners after taking emergency action. Because the requirement for “constructive notice” already means that the notice must be in writing, we did not incorporate this wording; however, we added that BIA may choose to give actual notice in lieu of constructive notice.

#### 162.025 (PR 162.022)—Appeals

Several tribes supported the proposed rule’s limitation of “interested party” in 162.025 to those whose direct economic interest is adversely affected. A few

tribes prefer a more expansive definition allowing for non-economic interests. We retained the proposed rule's limitation to direct economic interests. In response to comments regarding deemed approval and appeals, we note that deemed approvals occur by operation of law, and because there is no BIA action, the parties may not appeal under part 2. We also clarified that BIA decisions to disapprove a lease are appealable only by the Indian landowner, and decisions to disapprove any other lease document are appealable only by the Indian landowners and lessee.

#### 162.026 (PR 162.023)—Contact for Questions

- Add that the prospective lessee should contact the tribe for a lease of tribal land, to encourage early communication. If BIA is fulfilling the leasing function, BIA will direct the prospective lessee to the tribe, for tribal land. We added that the prospective lessee should contact the tribe that is contracting or compacting the leasing function for answers to questions about the leasing process.

#### 162.027 (PR 162.024)—NEPA & Records

- Expressly include the Department of Housing and Urban Development (HUD) in paragraph (b), which states that BIA will adopt environmental assessments and environmental impact statements of other Federal agencies, etc. We incorporated this change by including documents prepared under NAHASDA (25 U.S.C. 4115).
- Allow BIA to accept NEPA documentation from tribes, in addition to other Federal agencies. We added this requested language.
- Allow the use of pre-existing NEPA documentation, when appropriate. BIA encourages the use of pre-existing NEPA documentation, when appropriate, but we did not explicitly add this to 162.027(b) since the statement allowing the use of NEPA documentation from other entities addresses this.
- State that environmental review for an amendment will be required only if the amendment adds lands to the leased premises. We did not incorporate this change because an amendment may trigger the need for environmental review even if it does not add land (e.g., change in use).
- Restrict the WEEL phase of environmental review to study only the actual site locations used to install facilities and equipment, which is a fraction of the land studied at the WSR lease phase. BIA agrees this may be the case, depending on the circumstances, but encourages the parties to discuss each lease's scope with the BIA, as early

as possible, to ensure the environmental review process is as focused as possible.

- Streamline the environmental review process to allow for expedited review under NEPA, the National Historic Preservation Act (NHPA), the Endangered Species Act, and other Federal laws. While we are bound by statutory requirements, BIA will use categorical exclusions where applicable, and has proposed a categorical exclusion for leasing and funding for single family homesites on Indian land, including associated improvements and easements, that encompass five acres or less of contiguous land. See 77 FR 26314 (May 3, 2012).

- Instead of stating in this section that all approved leases must include disclosure provisions, move the disclosure provisions to the sections in each subpart listing mandated lease terms. We incorporated this change.

- Add language requiring BIA to return documents once a lease is approved. Under the Federal Records Act, once a Federal agency is provided documents, the agency must archive and retain them in accordance with the Federal records schedule, although certain originals may be returned (e.g., BIA will return the deed of trust for recording in the county land titles and records office). For this reason, we could not accept this requested change.

- Define documents submitted to BIA in a way that they would fall under a Freedom of Information Act (FOIA) exemption from disclosure, to ensure that they are kept confidential. We did not incorporate this change. Even if we define the category of documents as "confidential" in part 162, it will not guarantee their exemption from disclosure because the final rule cannot override the FOIA statute; rather, we encourage each party submitting documents to clearly indicate whether they fall under a FOIA exemption.

- Provide a mechanism for BIA review that would not place the documents into BIA custody. Because BIA needs a record of the documents on which it makes its decision, generally, BIA will need custody of the documents.

- Add a cross-reference to FOIA rules (43 CFR part 2) to clarify that tribes and tribal entities will be given advance notice and opportunity to challenge any disclosure of their documents. We incorporated this suggested change in paragraph (c).

- Require a reasonable nexus between a BIA request for disclosure and an opportunity to consult if the lessee or tribe objects, to alleviate any negative impacts on project financing, constructability, and operational issues

from the language that documents marked confidential proprietary are protected from disclosure "to the extent allowed by law." The FOIA rules require BIA to consult with the tribes before disclosure. Much of the information may be subject to the fourth FOIA exemption covering trade secrets or commercial or financial information. See, *Utah v. U.S. Department of the Interior*, 256 F.3d 967 (10th Cir. 2001).

- Make it mandatory for BIA to exempt confidential information to the extent allowed by law. The regulation states that BIA will exempt confidential information to the extent allowed by law.

#### 162.028 (PR N/A)—Obtaining Information on Leased Land (New Section)

- Clarify how tribes may obtain information about leases on their land so that they do not have to file FOIA requests for basic information regarding leases on trust land. We added a new 162.028 to clarify how a tribe may obtain information about leases on its land.

#### D. Residential Leases

A number of tribes, tribal organizations, and tribal housing authorities requested further revision to the residential leasing regulations to ensure they are compatible with the low-income housing programs carried out by tribes and TDHEs and avoid a "substantial disruption of longstanding Indian housing programs." One tribe requested that we withdraw the residential leasing subpart because of the requirement for valuations and fair market rental payments to non-consenting owners, periodic rental reviews, and bonding and insurance requirements. Some other tribes requested we defer promulgation pending further consultation and a comprehensive examination of the existing statutory and regulatory framework governing Native American housing and consideration of real world constraints. Withdrawal or deferral of promulgation of this subpart would leave in place on-size-fits-all non-agricultural leasing regulations that have been in place since 1961. We find that to be unacceptable and not at all supportive of Indian housing programs. While we are not withdrawing or deferring promulgation of this subpart, we incorporated many of the requested revisions and made additional revisions to address these concerns, including:

- Adding that a lease for housing for public purposes is a basis for granting a waiver of fair market value on individually owned Indian land (the

tribe may waive fair market value on tribal land—see 162.320(a));

- Deleting the requirement for periodic rental reviews for leases for housing for public purposes on individually owned Indian land (the tribe may waive periodic rental reviews on tribal land—see 162.328(a));

- Allowing for waiver of valuations and fair market rental for non-consenting landowners under certain circumstances—see 162.321(c); and

- Deleting the requirement for bonding and insurance for all residential leases—see 162.334 and 162.335.

One tribe stated that these regulations will do more harm than good by being administratively and financially burdensome, impractical, and heavy handed. We have made the revisions noted above to remove the specified administrative and financial burdens. Because we incorporated as many changes as legally possible to address these concerns, we decided to move forward with finalizing these regulations.

A tribe requested that we delete the requirement to obtain a valuation and pay fair market rental to owners who did not consent to the lease because the requirement to obtain 100 percent consent to waive a valuation is not feasible in many circumstances. We are unable to delete this requirement because all Indian landowners are entitled to just compensation for use of their land (and a valuation is required to determine what just compensation is), not just consenting landowners. However, we added provisions in 162.321(c) for a waiver of valuations and fair market rental under certain circumstances to account for the practical issues. Specifically, we added that we may waive the requirement for valuation and fair market rental for residential leases if:

- The lessee is a co-owner who, has been residing on the tract for at least 7 years as of the final rule's effective date, and no other co-owner raises an objection to his or her continued possession of the tract within 180 days after the final rule's effective date; or

- The tribe or lessee will construct infrastructure improvements on, or serving, the leased premises, and we determine it is in the best interest of all the landowners.

The tribe that was the biggest opponent of the residential leasing subpart also requested that BIA approve and record consent lists from before 2003; date them the year the home was constructed; and provide the lessees with a 50-year lease with renewal. Ultimately, this tribe's concern was the

practical obstacle posed by requiring all landowners to consent to waiving the requirement for a valuation. Because it is sometimes impossible to obtain consent of all the landowners, the proposed rule would have required that the lessee/homeowner obtain a valuation and pay fair market rental to all the nonconsenting landowners, which the tribe argued was beyond what the lessee/homeowner could afford.

To address this situation, we are allowing in the final rule for waiver of valuations and fair market rental in the circumstance described above, where the lessee is a co-owner who has been living on the tract without objection from the other co-owners. In these cases, the co-owner will need to obtain the consent of the owners of the appropriate percentage of interests in the tract under ILCA, as amended by AIPRA. The lease may provide for less than fair market value if certain conditions are met, and the lessee need not obtain a valuation or pay non-consenting landowners fair market value.

In addition, we received the following comments specific to residential leasing:

- Add an expedited review and approval of leases for housing for public purposes and exempting subleases, assignments, and amendments of leases for housing for public purposes from BIA review. We made several revisions to expedite review of leases for housing for public purposes, but we did not include a separate approval timeline because the timeline established by this regulation is intended to be expedited for all residential leases, including leases for housing for public purposes.

- Make leases for housing for public purposes, as well as assignments, “deemed approved.” Although we agree that allowing for “deemed approved” leases and assignments in these instances would expedite the process, we cannot incorporate this change because we are statutorily required to review and approve leases of Indian land.

- Defer to the Indian landowners' determination that the lease is in their best interest when the lease is for housing for public purposes. The proposed rule stated that BIA would defer where the lease is negotiated; we deleted this limitation and now provide that BIA will defer in all instances. (Note that we moved this provision to a new 162.341 addressing the standard BIA will use to determine whether to approve a lease).

- Clarify the applicability of the leasing regulations to tribal housing entities. We added a new 162.303 to address this. A number of housing authorities noted that if a public

housing program is part of a tribal government (rather than a separate TDHE), each lease with an individual lessee must be approved by BIA. We note that this is the case, but we are statutorily required to review and approve leases of Indian land. One tribal housing authority asked what happens to tribal leases with a TDHE if the tribe abolishes the TDHE. The tribal documentation creating the TDHE would govern what happens with the leases and whether they merge with the tribal ownership and terminate by law.

- Revise 162.301(a)(2) to allow for office complexes supporting housing for public purposes. This would allow the current practice of TDHEs developing offices to house their operations within the housing project and subleasing office space to community development financial institutions (CDFIs). We incorporated this change.

- In 162.302, include the Department of Treasury as a partner in developing a model lease template to ensure inclusion of CDFIs and tax credit financing tools. This section refers to a form that was developed in coordination with HUD. We plan to engage the Department of Treasury, Federal Reserve, and tribes (in addition to the agencies listed in this section) in revising this form. Another tribe suggested the development of numerous model forms to improve processing times, including one for low-income housing tax credit-financed projects in which the general partner is a tribe or TDHE. BIA will consider this comment in implementation of the final rule.

- Clarify why, in 162.338, which requires submission of a lessee business's organizational documents, a business would obtain a residential lease. The purpose of the lease, rather than the lessee's identification, dictates whether residential or business leasing procedures apply; for example, a business that is obtaining a lease of Indian land to develop housing for public purposes would need to follow residential leasing procedures.

- Delete 162.340(e) (PR 162.339), which requires NAHASDA leases to be approved by both BIA and the tribe because it could be construed to require BIA to approve agreements between TDHEs and tenants. We did not delete this provision because it properly reflects statutory requirements, while other provisions of the rule exempt subleases for housing for public purposes between TDHEs and tenants from BIA approval. Another commenter asked whether this provision requires a tribe to approve leases even on individually-owned Indian land. Where the authority for the lease is NAHASDA,

NAHASDA requires that the tribe approve the lease.

- Include provisions requiring BIA to recognize tribal laws regulating activities on land under a residential lease, including laws governing land use, environmental protection, and historic or cultural preservation. This provision is included in the general provisions at 162.016.

- Adopt a standard for residential leasing to acknowledge the role of the United States in helping tribes improve housing conditions and socioeconomic status. We added an explicit standard for the approval of residential and other leases.

- Better account for the landlord-tenant relationships in the housing for public purposes context. Where public housing is provided through a TDHE that has leased land from the tribe, BIA will not be involved in enforcement of the individual subleases (because BIA does not enforce subleases). Where public housing is provided directly by a tribe (or TDHE, where the TDHE holds the land through some mechanism that is not a lease), BIA may be involved in enforcing individual leases, but the final rule provides that BIA will consult with the tribe before taking action and will defer to ongoing proceedings. These provisions should ensure that BIA does not interfere with tribal enforcement.

- Revise residential leasing provisions to require BIA to assist TDHEs in enforcing subleases. We did not incorporate this change because TDHEs will be responsible for enforcing their own subleases. BIA does not enforce subleases.

- Revise provisions treating individuals who stay after cancellation of a lease as “trespassers” because it is contrary to tribal law that provides for a hearing before eviction. To address this comment, in 162.371 (PR 162.368), we added that BIA will consult with the Indian landowners in determining whether to treat the unauthorized possession as a trespass.

- Require BIA to defer to the tribe’s determination that a violation has occurred because tribes often know of violations before BIA, and a tribe’s determination that a violation has occurred should be dispositive. We did not incorporate this change because BIA retains independent authority to determine whether there has been a violation. If a tribe learns of a violation, it may notify BIA that a violation has occurred (see 162.364).

- Require BIA to defer to applicable tribal law regarding landlord-tenant relations and due process in 162.366 (PR 162.363). BIA will first look to whether the lease allows tribal

proceedings to address violations under 162.365(e) (PR 162.362), and whether these proceedings are occurring or have occurred. If there are no such proceedings, or if it is not appropriate for BIA to defer to the proceedings, then BIA will take action to address the violation. We clarified this process in 162.366 (PR 162.363).

- Include in 162.370 (PR 162.367) (governing effective date of a lease cancellation) language indicating that a tribe or TDHE may terminate a lease. Section 162.365 (PR 162.362), governing negotiated remedies, provides that the parties may include this option.

- Amend residential provisions to allow for incorporation of specific enforcement terms for tribes, TDHEs and others without BIA approval. The section allowing the lease to provide for negotiated remedies allows this; therefore, we did not revise the regulation as a result of this comment.

- Clarify whether BIA plans to evict individuals who are living on land but are in trespass. This commenter also asked who will undertake eviction of trespassers where the tribe contracts the realty program. If the tribe is contracting the realty functions, the tribe will be responsible for enforcement actions. Otherwise, we will implement and enforce our regulations, including eviction in appropriate cases.

#### *E. Business Leases*

Most tribes stated their support for the business leasing revisions. One commenter stated that clarifying and making uniform the business leasing regulations injects more predictability, reduces costs, and increases transparency for investors. One tribe stated that the regulations will frustrate Congress’s desire to promote orderly and expeditious development through their long-term leasing authority. The regulations allow for long-term leasing where statutorily authorized, and we have reviewed the regulations and revised them where needed to ensure that they will not frustrate orderly and expeditious development. In addition, we received the following comments.

- Clarify, in 162.401, the scope of what is included in the business leasing subpart. We added language clarifying that any lease that is subject to part 162 but does not fit under another subpart is considered a “business lease.”

- Clarify proposed 162.412(a)(6) (“any change to the terms of the lease will be considered an amendment”). We deleted this provision as unnecessary.

- Amend business leasing requirements for telecommunications facilities on tribal lands to better serve tribal people. The intent of these

regulations is to streamline and clarify business leasing procedures for all intended uses to better serve tribes and individual Indian landowners.

- Clarify what effect the business leasing regulations will have on overlapping regulatory regimes for power generation, infrastructure, and transmission. We have limited our involvement in these matters under part 162 to what is required by statute and our trust responsibility. This commenter also had questions about the applicability of the regulations to leases under the Tribal Energy Resource Agreements (TERAs). These leases are not subject to part 162 (see 162.006), providing that land use agreements entered into under a special act of Congress are not subject to part 162.)

- Treat reviews of business leases of retail and office space within existing facilities on tribal land differently by exempting them from BIA approval. We have included a provision at 162.451(b) allowing for subleases without our approval. Leases of space within existing facilities on tribal land that is not already leased (i.e., not subleases) require BIA approval because they are a lease of the underlying land.

#### *F. WEELS*

Several tribes requested that we preserve the tribal permit option in the context of wind energy evaluation. We addressed this comment in 162.502 to clarify that a WEEL is not required in certain circumstances, including when the Indian landowners have granted a permit under 162.007 (PR 162.004) or a tribe authorizes wind energy evaluation activities on its own land under 25 U.S.C. 81. It is conceivable that there may be instances where possession to evaluate wind energy resources does not rise to the level of requiring a lease; parties should look to the guidance in 162.007 (PR 162.004) in light of planned activities and infrastructure. Several tribes stated their support for the two-phase WEEL/WSR lease process, and one stated that the WEEL approach is flexible and workable in the present environment, allowing a short-term lease while parties are engaging in due diligence and resource analysis. In addition, we received the following comments:

- Expand WEELS to include any type of evaluation for alternative energy uses (e.g., solar or biomass). We did not include other alternative energy uses in the WEEL because, generally, one does not need possession of the land to evaluate solar or biomass resources. This commenter also requested clarification on whether WSR leases include other alternative energies, such

as biomass. We added a cross-reference in 162.538 to clarify that leases for biomass are addressed in business leasing.

- Explain how the leasing process for a WEEL is fundamentally different from that of a WSR lease and why parties would have the incentive to pursue a WEEL. The process for a WEEL is different from a WSR lease in the following ways: (1) To obtain approval of a WEEL, as opposed to a WSR lease, the parties need not obtain a valuation or justify compensation at less than fair market rental; (2) BIA has a shorter timeframe for its review of a WEEL; and (3) obtaining a WEEL allows for a limited NEPA review, so BIA conducts a NEPA review only of the wind energy evaluation activities. This NEPA review can then be incorporated by reference, as appropriate, into a broader WSR review, whereas if no WEEL is obtained, the full NEPA review would be necessary at the time BIA reviews the WSR lease.

- Clarify whether there is an acreage limit to a WEEL. There is no acreage limit.

- Strengthen 162.520 (PR 162.519) to force the lessee to submit any wind energy data gathered if the WEEL is terminated. We did not make any change to the proposed rule in response. As written, the rule allows the parties to negotiate this point in order to afford maximum flexibility; but it provides that if they don't, then the information becomes the property of the Indian landowner.

- Clarify how BIA will enforce the provision in 162.520 (PR 162.519), establishing that wind energy data becomes the property of the Indian landowners in the absence of lease provisions stating otherwise. BIA may enforce this provision by refusing to release the bond.

- Delete provisions regulating the option to enter into a WSR lease because the time needed for the option period should be subject to negotiation and the option agreement is separate from a "lease" that BIA is statutorily required to approve. These commenters also stated that the provision limiting the WSR lease to only that land covered by the WEEL is unreasonable because the parties do not have enough information as to what land is needed at the time the option is entered into and would result in overly expansive WEELs. We addressed these comments by deleting conditions for approval of an option in 162.522 (PR 162.521).

- Limit the scope of environmental and archeological reports required by 162.528(f) to only the actual testing and monitoring locations and access routes

for WEELs. We agree with this comment, but determined that no change to the regulation is necessary.

- Limit the total time allotted to BIA for review of a WEEL to 30 days. The final rule limits the time allotted to BIA to 20 days.

#### G. WSR Leases

A few tribes stated that BIA appears to bootstrap authority over business matters commonly governed by other agreements. In response to this comment, we made several revisions to limit BIA's role to only what is necessary for leasing approval. We deleted the requirement for BIA approval of option agreements, expressly provide for alternatives to WEELs (such as section 81 agreements), and loosened BIA review of technical capability where the lessee is owned and operated by the tribe.

One tribe asked whether a tribe could use business leasing procedures rather than WSR leasing procedures for a wind or solar energy project. Other tribes stated that WSR should not be treated separately from business leasing. We note the need for maximum flexibility, but we have tailored the WSR subpart to the unique issues raised by wind and solar energy projects; therefore, this subpart will generally provide the more appropriate procedures. While many of the business leasing and WSR provisions are the same, our intent in making WSR leasing a separate subpart is to encourage future WSR development of Indian land through making the procedures as transparent as possible.

One commenter questioned the efficacy of having the Office of Indian Energy and Economic Development (IEED) involved in valuation of a WSR lease and asked whether a landowner could instead obtain a valuation from a private entity with expertise in the economics of wind energy development. We addressed this comment by adding that a landowner may obtain its own economic analysis, as long as IEED approves it. Because tribes may negotiate their own compensation for tribal land, this will generally apply only to individually owned Indian land.

One commenter requested that BIA issue a policy statement exempting agreements with carbon offset sales from part 162. Whether an agreement is subject to part 162 depends upon whether the specific terms of the agreement meet the requirements for a lease in this part. This commenter also requested that BIA take a clear position on whether State rules apply to tribes seeking to sell carbon credits generated

on Indian lands. We are not taking a position on these issues at this time.

One public commenter expressed concern that wind farms will result in bird kills. The NEPA analysis will consider this issue on a case-by-case basis.

In addition, we received the following comments:

- Add language allowing a tribe to enter into a simplified agreement with allottees, where a tribe is considering a wind or solar energy project that covers both tribal and individually owned Indian land. Tribes and individual Indian landowners are encouraged to enter into these agreements; however, the tribe will still be required to lease the land from the individual Indian landowners.

- Lengthen the 90-day delay in any phase of development before requiring a revised resource development plan. We revised this provision to require only submission of a revised plan to BIA, rather than requiring re-approval by BIA. We retained the 90-day period to ensure that BIA is kept apprised of any major delays.

- Waive the requirement for documents demonstrating technical capability for tribal corporations. We incorporated this change by limiting the requirement to instances where the lessee is not an entity owned and operated by the tribe. We also note that documents from an entity's parent corporation may fulfill this requirement.

- Clarify how these leases will interact with 169.27, which provides a process for obtaining approvals of rights-of-way for electric poles and lines greater than 66 kilovolts. This commenter requested language to allow part 162 to encompass transmission facilities directly associated with the WSR infrastructure. As written, 162.543 (PR 162.540) contemplates that the lease will include associated infrastructure necessary for the generation and delivery of electricity. We added a cross-reference to 162.019 (PR 162.016) to clarify that no rights-of-way approval is needed for infrastructure addressed in the lease and on the leased premises.

- Define the "resource development plan." Since this term is used so infrequently, we included the definition with the term at 162.563(i). This commenter also requested that we add a process for obtaining BIA approval if changes to the plan are made after approval of the lease. One tribe stated that requiring BIA to approve plan changes would be burdensome. In response to these comments, we revised 162.543(b) (PR 162.540) to require only submission of the revised plan for BIA's

file, rather than requiring BIA approval of the plan changes.

#### H. Cross-Cutting Comments

##### 1. Lease Term

- Specifically allow a month-to-month term for residential leases authorized by NAHASDA. In response to these comments, we clarified the term of NAHASDA leases (leases approved under 25 U.S.C. 4211) versus the term of leases approved under 25 U.S.C. 415(a). Note also that many of these month-to-month arrangements are actually occupancy agreements not requiring BIA approval because they are essentially tribal land assignments.

- Remove the restriction to one renewal for tribes with authority to lease lands up to 99 years because this one-size-fits-all approach does not work for many lease situations. We revised this provision to allow for flexibility in the number of renewals where authorized by statute.

- Remove the two-year term restriction where the owners of trust and restricted interests are deceased and their heirs and devisees have not yet been determined. We deleted this provision as unnecessary.

- Allow parties the flexibility to negotiate holdover provisions for residential leases. We added this flexibility by adding that the prohibition on holdovers applies only if the residential lease does not provide otherwise.

- Clarify whether a lease amendment that extends the term of the lease is limited to a 25-year term and whether this amendment could include an option term. An amendment can amend the lease and include an option term, as long as the term meets statutory constraints.

- Restrict long lease terms because they may result in more permanent uses by non-Indian lessees that threaten preservation of tribal culture and society. There are statutory limitations to lease terms, but to the maximum extent possible, BIA will defer to the Indian landowners' decision that a lease is in their best interest.

##### 2. Option To Renew

- Add to the requirement for providing BIA with a confirmation of a renewal the phrase "unless the lease provides for automatic renewal." We accepted this language.

- Clarify the proposed rule's provision requiring a lease with an option to renew to state that "any change in the terms of the lease will be considered an amendment," including whether this means that BIA must

approve of payments due upon exercise of a renewal option. We deleted this provision as unnecessary.

##### 3. Mandatory Lease Provisions

- Delete the provision requiring the lease to cite the authority under which BIA is approving the lease under because BIA, rather than the parties to the lease, should know the citation. We deleted this provision because we agree that it is BIA's responsibility to know its authority.

- Delete the mandatory lease provision stating that nothing would prevent termination of the Federal trust responsibility because there is no statutory requirement that this provision be included in leases and it reflects an offensive and outdated approach to tribal relations. In response, we deleted this provision.

- Clarify that wind energy projects shall not be deemed a "nuisance" for the purposes of BIA's review. While this statement is true, we did not add it to the mandatory lease provisions. These regulations anticipate and encourage the development of wind energy projects; BIA does not deem wind energy projects to be a nuisance.

- Restrict the mandatory provision stating that BIA has the right to enter the leased premises upon reasonable notice to allow BIA to enter only when it is consistent with notice requirements under applicable tribal law and lease requirements. We incorporated this language.

- Delete the mandatory provision stating that the lease is not a lease of fee interests because it places responsibility on the lessee to pay fee owners. Although this is the case, we deleted this provision from the mandatory provisions as unnecessary to include in the lease.

- Regarding the mandatory provisions requiring lessee to indemnify and hold harmless the Indian landowners and the United States:

- Make it discretionary whether to include them in a lease because their inclusion could be contrary to law in certain contexts. We did not make inclusion of these provisions discretionary, but we moved these provisions to a new paragraph to clarify that they are not required where prohibited by law.

- Make it discretionary whether to include the provision related to hazardous materials where there is no evidence that hazardous materials are present on the land. We retained this as a mandatory lease provision to account for any instances in which hazardous materials are discovered after the lease is signed or the lessee or other party

introduces hazardous materials onto the leased premises during the term of the lease.

- Delete the provision requiring lessees to indemnify the United States and Indian landowners for loss, liability, and damages because many lessees are not willing to assume liability for a tribe's simple negligence, and the indemnity provision requires the lessee to assume liability except in cases of gross negligence by the tribe. We narrowed the indemnification provision, in response.

- Exempt leases for housing for public purposes from having to include these provisions because a tribal member seeking affordable housing may hesitate to enter into a lease with this requirement. We did not add an exemption because this provision is necessary to protect trust assets, the Indian landowners, and the United States.

- Loosen these provisions because they are too restrictive and should be subject to negotiation. We retained the indemnification provisions, as revised, to protect the trust assets, the Indian landowners, and the United States.

- Delete the provision stating that BIA may treat any lease provision that violates Federal law as a violation of the lease, and instead provide that the parties may elect to terminate the lease or agree that Federal law will replace the superseded provisions. We did not incorporate this suggested change. We cannot approve a lease that violates Federal law and, during the cure period, the parties may agree to address the provision; and if, after the fact, we discover that a lease provision violates Federal law, we need the ability to correct the problem. Using the lease violation regulations (e.g., 162.366 and 162.367) affords the parties notice and an opportunity to either cure or dispute the violation. As part of this process, the parties are free to agree that Federal law will replace the offending lease provision.

##### 4. Improvements

- Delete the requirement for the lease to generally describe the location of the improvements to be constructed. We require this information because it is necessary for NEPA and NHPA review and we are statutorily required to review, among other things, the relationship of the use of neighboring lands, the height, quality, and safety of any structures or other facilities to be constructed on these lands. See 25 U.S.C. 415(a).

- Allow lessees the right to make improvements on their houses without having to get the consent of other

owners. Nothing in the final rule states that lessees must obtain the consent of other landowners to make improvements to their houses; however, the lease may require consent for the construction of permanent improvements. The regulations require only that the lessee provide reasonable notice to the landowners of the construction of any permanent improvements not generally described in the lease.

- Clarify that the lessee does not have to obtain consent for replacement air conditioners, etc. We agree and clarified that the regulations are addressing “permanent improvements.” A few tribes suggested including a new term, “major improvements,” with a dollar limit, but we instead are referring to permanent improvements, which are affixed to the real property.

- Clarify whether a lease with phased development would require amendments to the lease for development phases after the initial phase. The lease may provide for development of a plan to avoid having to amend the lease to update the plan. The plan only needs to be as detailed as necessary for us to do a NEPA and NHPA review.

- Add that the lease may provide that improvements may remain on the leased premises “in compliance with minimum building and health and safety requirements of the tribe with jurisdiction.” The lease may specify this, but we did not prescribe it in the regulation.

- Delete provisions regarding removal of improvements because they may dissuade outside developers. We did not delete the regulatory provisions because they apply as a default, only in the absence of lease provisions. The parties may negotiate other requirements regarding removal of improvements in the lease.

#### 5. Due Diligence

- Revise due diligence provisions to confirm that the “schedule for construction of improvements” in the business leasing subpart requires only tentative commencement and completion dates, rather than a detailed schedule. We incorporated this change at 162.414 by adding “general” before “schedule for construction.”

- Allow more flexibility in the construction schedule, including allowing a way for the construction schedule to be modified at later phases, as the parties may not be able to identify all improvements to be constructed over the course of a phased development and a construction schedule may lock them into an uneconomic schedule. We

incorporated this suggestion at 162.417, by clarifying that the schedule may be a separate document from the business lease, and that the parties must agree to a process for modifying the schedule. For WSR leases, the resource development plan sets out the schedule for improvements. We revised 162.543 (PR 162.540) to provide that parties may make changes to the resource development plan, and they merely have to provide BIA with a copy if the changes affect certain items (rather than having to wait for BIA approval of the changes). Through these revisions, we added flexibility by allowing for a separate construction schedule and allow a process for obtaining the landowners’ consent to changes in the schedule.

- Delete requirements for construction schedules, as BIA’s interest in the timing of improvements should be minimal. We did not delete the requirements for providing a construction schedule (although we clarified that only a general schedule is necessary) because BIA’s interest in the timing of the construction is to ensure that anticipated development occurs.

- Revise 162.417 to make it discretionary for the parties to include due diligence provisions in the lease. We did not incorporate this change because these provisions protect the Indian landowners by ensuring development consistent with landowners’ intent when they signed the lease.

- Delete the requirement for BIA approval of a waiver of due diligence obligations because the time involved in obtaining a waiver could chill investment and requiring BIA approval of a waiver is paternalistic. We did not delete this provision because any waiver of the requirements will occur at the time of lease approval, so the waiver process will not cause a delay and BIA will defer to the landowners’ determination that the lease (including the waiver) is in their best interest, to the maximum extent possible.

- Loosen the timelines in 162.546 (PR 162.543) for wind energy projects because it can take up to 9 months in northern climates to replace a substation. We addressed this comment by allowing the lease to define the time periods during which facilities or equipment must be repaired, placed into service, or removed.

#### 6. Legal Description—Surveys

- Allow the use of survey grade global positioning system (GPS) for land descriptions. We revised the regulations to allow this because the Land Title and

Records Office (LTRO) is now capable of accepting these descriptions.

- Delete the requirement for an official or certified survey, to be reviewed under the DOI Standards for Indian Trust Land Boundary Evidence, because it will be too costly to implement, result in fewer leases, and is redundant where BIA already has survey data available. In response to these comments, we added flexibility to the survey requirements, providing that where reference to an official or certified survey is not possible, the lease must include a legal description, a survey-grade GPS description, or other description prepared by a registered land surveyor that is sufficient to identify the leased premises.

#### 7. Compatible Uses

- Retain the flexibility allowed by the proposed rule’s wording because it leaves room for the lease to define compatible uses. We accepted this suggestion.

- Revise to allow for compatible uses by the landowner or someone authorized by the landowner, regardless of whether the lease specifies that the compatible use is allowed. We did not incorporate this change because the lease should specify if the Indian landowners will allow compatible uses. Another commenter suggested requiring the lease to identify what uses the landowner is reserving. While the lease may specify the uses, the final rule is not requiring it.

#### 8. Rental/Payment Requirements—Tribal Land

Nearly all the tribal commenters supported the proposed rule’s provisions allowing a tribe to negotiate its own rental amount and determine whether it wants a valuation, stating that they make the rules more workable, especially for housing for public purposes. One tribe did not support these provisions, stating that the tribe should not have to request a valuation in writing and BIA should require valuations to meet its trust responsibilities. Because most tribes were in support, we retained this provision. A tribal commenter stated its support of the language allowing for less than fair market rental during predevelopment stages of a business lease. Several tribes expressed their support of the proposed rule’s flexibility for valuations of tribal land and allowing for alternative valuations in lieu of appraisals. Another tribe stated their support of the provisions requiring waivers to be in writing, to clarify the landowners’ intent. In addition, we received the following comments:



- Allow a tribe to submit a certification, rather than a tribal authorization, stating that it determined that receiving less than fair market rental is in its best interest, for business and WSR leases (in addition to residential leases). We have addressed this comment by providing that the tribe may submit either a certification (meaning a statement signed by the appropriate tribal official or officials) or a tribal authorization.

- Remove the requirement for a tribal certification or authorization stating that the tribe has determined the amount to be in its best interest because it is an additional layer of bureaucracy. We added a provision to each of the subparts to clarify that one tribal authorization may meet several purposes (see 162.338, 162.438, and 162.563). The tribe need not submit multiple tribal authorizations; in fact, we encourage the tribe to provide this information and any other tribal authorization statements in the same authorization that it passes to authorize the lease (e.g., a single tribal authorization may authorize the lease and do any or all of the following: Allow for less than fair market rental, waive valuation, allow for alternative forms of compensation, waive rental reviews, and waive rental adjustments).

- Remove the requirement for the tribe to provide a certification or authorization to set the rental amount where the lease is for housing for public purposes. Many tribes noted that tribes use NAHASDA programs to provide housing for public purposes and that HUD already has provisions regarding rent. We incorporated this change at 162.320(a).

- Clarify that a tribe may use market analyses or other methods of determining fair market value. We incorporated this change.

- Encourage tribes to pursue a “zero charge” policy for permits and leases to service providers to place communications facilities infrastructure in tribal communities. BIA did not make any change to the regulation in response to this comment because tribes determine whether such a policy is appropriate for them. This commenter also requested a mechanism for adopting a market-based appraisal’s determination of fair market rental where the Indian landowners and lessees cannot agree on compensation. We did not incorporate this change because a lease requires the agreement of the Indian landowners and the lessees to all terms of the lease, including compensation. This commenter stated its concern that allowing tribes to establish their own

rental rates could cause an impasse between the lessee and the tribe. BIA notes that tribal landowners have the right to establish compensation.

#### 9. Rental/Payment Requirements—Individually Owned Indian Land

- Add “the land is to be used for housing for public purposes” as a basis for BIA to waive fair market value for individually owned Indian land. We incorporated this change.

- Remove the requirement for non-consenting individual Indian landowners to receive fair market rental. We have determined that all non-consenting landowners are entitled to fair market value, as our trust responsibility is to all landowners, not just those who have consented. This requires a valuation to determine the amount of the fair market rental. However, as described above, we added that, for residential leases, BIA may waive valuation and fair market rental if the lessee is a co-owner who has been living on the tract for at least 7 years and no other co-owner raises an objection to his or her continued possession of the tract by a certain date. In addition, for all leases, we added that BIA may waive valuation and fair market rental if the lessee or tribe will provide infrastructure improvements and it is in the best interest of the landowners.

- Exempt housing for public purposes from the requirement for a valuation. We did not categorically exempt leases for housing for public purposes on individually owned Indian land from valuations. BIA will waive the requirement for a valuation of individually owned land if all individual Indian landowners agree. We retained the requirement for 100 percent of the landowners to waive the valuation for individually owned Indian land to ensure that each owner who did not consent to leasing for less than fair market rental (“non-consenting owner”) obtains fair market rental, unless that non-consenting owner waived the right to a valuation. However, as described above, we added that, for all residential leases, BIA may waive valuation and fair market rental if the lessee is a co-owner who has been living on the tract for at least 7 years and no other co-owner raises an objection to his or her continued possession of the tract by a certain date.

- Balance the risk of exploitation by unscrupulous developers against increased flexibility when allowing less than fair market rental for business leases of individually owned Indian land. We did not make any change to the regulations in response to this

comment because the best interest determination of whether to waive fair market rental allows BIA to balance this risk on a case-by-case basis. The risk of exploitation is higher for business leases; therefore, we explicitly require the balancing test in 162.421, while for residential leases we automatically waive fair market rental if all landowners request the waiver.

#### 10. Rental/Payment Requirements—Valuations

Several tribes noted that requiring all landowners to waive the right to a valuation is unworkable in some instances, and may result in having to conduct a valuation in order to ensure that non-consenting landowners are paid fair market rental even when other landowners have agreed to less than fair market rental. Tribes stated that BIA is in effect forcing consent of all landowners for the lease. One tribe alleged that if this consent is required, homesite leasing on allotted land will stop. This tribe stated that the consent requirements will change the tribal members’ way of life and will cause a hardship, especially where co-owners’ whereabouts are unknown. The tribe has over 400 leases that don’t have proper consent, but which followed the procedures at the time, and tribal members constructed homes on those tracts. We added flexibility by allowing BIA to waive the requirement for valuation for non-consenting landowners in certain circumstances, described above.

- Apply the ILCA percentages to consent for waiving fair market rental and valuations. BIA has determined that these percentages in ILCA apply to consents for a lease, but has determined to require the payment of fair market rental to non-consenting landowners because we have a trust responsibility to all landowners, not just the consenting ones. Each individual can waive his or her own right to receive fair market rental; however, even if a majority waives their right to fair market rental, they may not waive the right of the other, non-consenting owners to fair market rental.

- Allow the option to use competitive bidding as a form of valuation. We added this option.

- Delete the provision stating what type of valuation may be used in 162.322, because appraisal costs and delays negatively affect the ability to provide homesites. We retained this provision, but note that it is drafted to allow as much flexibility as possible in allowing valuations other than appraisals.

- Ensure the appraiser meets education, licensure, and experience requirements. We agree with this requirement but did not make any change to the regulation since appraiser competence will be necessary to comply with the Uniform Standards of Professional Appraisal Practice (USPAP).

- Add provisions stating when an appraisal expires and how much time can lapse from its completion. We did not address this issue in the regulations because the Office of the Special Trustee for American Indians (OST), rather than BIA, is responsible for conducting and reviewing appraisals. We also received a number of other questions regarding payment for appraisals, preparation of income tax forms, timing of appraisals, and returning the appraisal function to BIA from OST that were beyond the scope of this rulemaking.

#### 11. Rental/Payment Requirements—When Payment Is Due

- Revise 162.323 to apply only when rent is required periodically throughout the life of the lease, so that lessees may make a one-time (“lump”) rental payment when a home is constructed and incorporate the amount of the rental payment into their mortgage. We did not revise this section in response to these comments because the regulations, as written, allow for this situation. Section 162.323 provides that a lease can provide for the timing of rental payments (which may include one lump sum) and that the lease can provide that payments be made more than a year in advance.

- Delete the provision that prohibits payments from being made more than one year in advance because lessees should be allowed to make advance payments. We did not delete the section because it implements 25 U.S.C. 415b, and the phrase “unless the lease provides otherwise” means the parties may include in the lease an allowance for payments more than one year in advance.

#### 12. Rental/Payment Requirements—Direct Pay

- Delete provisions allowing for “direct pay” because the number of landowners should not have an impact on whether BIA is complying with its trust responsibility. Allowing for direct payment of rent to the landowners is not a derogation of the trust responsibility. We have limited direct pay to 10 or fewer landowners to ensure that direct pay is administratively workable.

- Delete direct pay provisions because they impose a burden on the lessee to know about the individual

status of each landowner at all times throughout the lease. We did not make any changes in response to this comment because the regulations provide that direct pay is optional, and available under limited circumstances. The addresses to which the payments should be sent will be provided in the lease and, because direct pay is limited to 10 or fewer landowners, the burden on the lessee to know the status of each is limited.

- Delete the limit on the number of landowners and allow all landowners the option for direct pay. We did not incorporate this change because the Assistant Secretary made a policy decision to limit when direct pay is available to those situations when there are 10 or fewer landowners who all consent to direct pay for administrative efficiency.

- Exempt crop share leases from direct pay consent requirements. The direct pay requirements included in this final rule do not affect agricultural leases and therefore do not affect crop share leases.

- Clarify the timeframe for locating a landowner whose whereabouts are unknown so the lessee can send his or her direct pay to BIA instead. The lessee will know when a landowner’s whereabouts are unknown because the direct payment will be returned as undeliverable. This commenter also asked when a lessee making direct payments will know that a landowner has been declared non compos mentis. A court of competent jurisdiction must make a determination of non compos mentis. Once BIA receives notice of a landowner’s non compos mentis status, the BIA will notify the lessee that all future payments under the lease must be sent to BIA.

#### 13. Rental/Payment Requirements—Payment Methods

- Allow cash rental payments for residential leases, and make any necessary adjustments to the lockbox system to accept cash, because the refusal to accept cash imposes a hardship. This request is outside the scope of this rulemaking, but BIA has passed the request on to the Office of the Special Trustee for American Indians (OST).

- Allow personal checks for business and WSR lease payments because BIA’s refusal to accept personal checks for business and WSR leasing imposes a hardship. We accepted this comment by allowing for payment by personal check for all types of leasing because many lessees rely on personal checks as a form of payment.

#### 14. Rental/Payment Requirements—Types of Compensation

- Clarify “in-kind consideration” to reduce the subjectivity in determining its value. We have allowed for alternative forms of consideration, such as “in-kind consideration” in order to afford the maximum flexibility to Indian landowners in negotiating leases. BIA will not determine the value of in-kind consideration. We have revised 162.326 to provide that we will defer to a tribe’s determination that alternative forms of consideration are in its best interest, and we will determine whether the alternative forms of consideration are in individual Indian landowners’ best interest on a case-by-case basis.

- Do not force lessees to provide in-kind consideration. The regulations provide the parties the freedom to negotiate for monetary or in-kind consideration.

- Consider, in 162.555 (PR 162.552), the value of the energy generated back to the community as in-kind consideration. In-kind consideration is not considered in the valuation because the valuation is a monetary figure. The final rule allows for alternative forms of compensation, and BIA will consider whether energy generated back to the community is an alternative form of compensation that is in the landowners’ best interest for individually owned Indian land.

#### 15. Rental/Payment Reviews and Adjustments

- Remove the requirement for rental reviews, in 162.328, where a tribe negotiates and certifies a rental amount. We addressed this comment by excluding residential, business, and WSR leases of tribal land from the periodic rental review and adjustment requirements, where the tribe states in its authorization or certification that it has determined that rental reviews and adjustments are not in its best interest. In addition, there are a number of circumstances in which rental reviews are not required for residential leases of individually owned Indian land, including where the lease provides for automatic adjustments and where the lease is for less than fair market rental.

- Exempt residential leases from rental review and adjustment requirements because it is burdensome when applied to tribes and TDHEs and NAHASDA already provides limits on the rent, its review and adjustment. In response, we added that no periodic review of the adequacy of rent or periodic adjustment is required if the lease is for housing for public purposes (or, as stated above, if the tribe’s

authorization or certification states that it is in the tribe's best interest not to have these requirements for tribal land).

- Change the phrase "at least every fifth year" to "no less frequently than every fifth year." We did not incorporate this change because these phrases are equally clear.

- Add a requirement for a landowner to consent to a waiver of rental adjustments in the lease, because when the lease is for housing for public purposes, the amount of rent affects the amount investors are willing to invest. We did not add this requirement because the landowner may refuse to waive rental adjustments as part of their lease negotiations.

- Revise the factors in 162.428(b)(3) and parallel WSR provisions (factors for determining that waiving the Federal review of the adequacy of compensation is in the landowners' best interest) to add a factor that reflects the needs of large investments that may only be recouped over a period of many years. We added a factor to account for these situations where "the lease provides for graduated rent or non-monetary or various types of compensation."

- Delete or limit 162.424(b)(4), which allows the lease to provide for payment to parties other than the Indian landowners. We retained this provision to allow the parties maximum flexibility in negotiating lease terms, but note that the parties may include limits on who receives payments in the lease. Other tribes requested that we revise this provision to add the phrase "unless otherwise provided by these regulations." We did not incorporate this change because the regulations do not restrict to whom rental payments may be made.

#### 16. Bonding & Insurance

Commenters overwhelmingly opposed requiring insurance and bonding for residential leases because they create barriers to homeownership due to credit requirements, availability of liquid assets, and income thresholds. In response to these comments, we deleted the requirements in these regulations for insurance and bonding for residential leases. We received one other comment for residential leasing that requested we revise 162.369 (PR 162.366) (stating that landowners get proceeds from an insurance policy in the absence of lease provisions) to protect the lessee's interests. We did not revise the rule in response to this comment because the parties may agree to a different approach, while the rule provides a default rule in the absence of an agreed-to approach in the lease. In addition, we addressed the following

comments regarding insurance and bonding for business and WSR leases:

- Clarify that a tribe may waive the insurance requirement upon certifying that a waiver is in its best interest. We added that BIA will defer to the tribe's determination that a waiver is in its best interest.

- Add alternative forms (other than performance bonds) of securing payment for lessee obligations, in order to avoid placing Indian lands at a disadvantage, to allow tribes to retain their sovereign immunity (some bonding companies require tribes to provide broad waivers of sovereign immunity for a bond), and to provide maximum flexibility. We incorporated this change by allowing for alternative forms of security.

- Revise business leasing provisions to state that any bond may be made payable to the tribe and that BIA may adjust the bond only based on consultation with the tribe. We incorporated these revisions at 162.434(b) by allowing a lease to include these requirements.

- Revise the process for waiving the bonding requirement, because BIA's decision to waive is based on its determination as to the best interest of the landowners, which introduces uncertainty and delay. To address this comment, the final rule provides that BIA will defer to the tribe, for tribal land, that the waiver is in its best interest, to the maximum extent possible.

- Allow cash as a form of security. We did not incorporate this change because the lockbox cannot accept cash, but clarified that it is not an acceptable form of security in the regulations. This commenter also stated that any interest earned on a security posted as a bond shall be payable to the lessee. We did not incorporate this change because the parties may negotiate this point.

- Revise 162.559(c) because allowing BIA to adjust security or bonding requirements at any time creates too much unpredictability. We revised this provision and the parallel provision in the business leasing subpart at 162.434(c) to state that the lease must specify conditions under which BIA may adjust security or bonding requirements, including consultation with the tribe for tribal land before making adjustments.

#### 17. Approvals—Documents Required

The final rule defines with as much certainty as possible exactly what documents BIA will require. We reviewed each category and provided as much specificity as possible while

attempting to be flexible enough to account for all types of leases.

- Revise the requirement for a statement from the appropriate tribal authority that the proposed use is in compliance with tribal law because some tribes do not currently examine proposed leases to determine whether the lease complies with land use regulations and, further, do not consider such examination to be within the scope of their responsibility. To accommodate situations where the tribe may not require such a statement, we added the qualifier "if required by the tribe."

- Delete the requirement for environmental and archeological reports because this requirement causes lessees to expend resources before even knowing if a lease will be approved. One tribal corporation also stated that the documents required may cause a potential lessee to spend several months conducting due diligence and negotiating a lease, with no certainty of BIA approval. We did not delete this requirement because environmental and archeological assessments are required by statute. To help provide some guidance in the BIA approval process, we added an "acknowledgment process" whereby the parties may submit to BIA a proposed lease while still preparing NEPA documentation or obtaining a valuation. BIA will respond within 10 days identifying any provisions that may justify BIA's disapproval of a lease. Although this provision does not preclude BIA from identifying other issues at a later time in exceptional circumstances or disapproving the lease, it does provide some measure of certainty that the lease would be acceptable if NEPA, valuation, and any other issues BIA identifies are adequately addressed).

- Requiring a restoration and reclamation plan:

- Revise this requirement because this plan may not be appropriate, depending on the land use. We added that a restoration and reclamation plan is required only "if appropriate."
- Require only a preliminary plan. We did not incorporate this change because the plan will form the basis for setting the reclamation bond amount, if appropriate.

- A tribe stated that the requirements for a restoration and reclamation plan, bonding, and a survey may be overwhelming to a new entrepreneur and may cause delays, making it difficult to establish sustainable small Indian-owned businesses on tribal land. BIA requires plans and bonding, where

- appropriate, to protect the Indian land and the interests of the Indian landowner. We have replaced the requirement for a survey with a requirement for a legal description of the land.
- Delete the requirement for providing documentation of the lessee's history with similar projects because many commercial lessees are single-project companies formed specifically for that project, with no previous development history, and, in the WSR context, many renewable energy companies are new and do not have such a history. We addressed this comment by replacing "history in" with "ability to."
  - Explain BIA's authority to question a lessee's technical capability, especially given that the landowner investigates these factors in choosing a lessee. BIA will examine the technical capability only to determine if there is a compelling reason not to approve the lease, and will defer, to the maximum extent possible, to the Indian landowners' determination that the lease is in its best interest.
  - Explain whether an aliquot part description based on a BLM survey will be acceptable without providing an additional survey. An aliquot part description will be acceptable; however, we have added flexibility to allow for other methods of obtaining a legal description.
  - Delete the requirement for a preliminary plan of development because such a plan may be premature when a tribe or TDHE is working with lending institutions to arrange financing for housing for public purposes. We removed this requirement in those cases in which the tribe certifies the lease is for housing for public purposes.
  - Delete the provision allowing BIA to request "any additional documentation \* \* \* reasonably necessary for approval" or require BIA to provide a compelling reason for the additional documentation. We deleted this provision in an effort to better define what a complete lease proposal package includes.
    - Allow tribes to waive the mandatory provisions where inappropriate. Tribes can seek a waiver of one or more of these provisions under 25 CFR 1.2.
    - Revise the mandatory provisions to require compliance with all tribal business licensing, land use, permitting, and zoning laws. Compliance with these

tribal laws is already required by section 162.014 (PR 162.013).

- Allow the lessee and tribe the option to develop a cultural mitigation plan in case archeological resources are encountered. Tribes have the option of developing this plan under the NHPA. We did not revise the regulations to include this as it is outside the scope of this rulemaking.

#### 18. Approval Process & Timelines

Most commenters stated their strong support for including timelines for BIA decisions on lease documents. In addition, we received the following comments:

- Require BIA to provide notice to the landowner of the date it received the complete lease proposal package. We incorporated this change and now require BIA to notify the parties of the date of receipt, so all are aware of when the timeline for approval begins. The timeline will still begin upon BIA's receipt of the complete lease proposal package.

- Clarify that the timelines do not begin to run until BIA has received all supporting documents, and address the fact that it could take BIA years to determine that it has received all the documents. This comment is correct that the timelines do not begin to run until BIA has received all supporting documents. To provide certainty as to the timeline, BIA will provide the parties with the date on which the timeline begins to run. Also, the final rule establishes a limited list of documents that must be submitted in support of a lease. The final rule also includes new sections (see 162.339, e.g.) to allow for BIA review of a lease pending completion of any required NEPA and valuation documentation. The intent of this new provision is to provide some guidance as to whether there are any red flags that would prevent BIA approval of the lease.

- Clarify how BIA will meet its timelines for approval when it may take much longer to obtain landowner consent. The timeline for BIA approval begins when BIA receives the lease and all supporting documents, including the required consents.

- Require BIA to show good cause for extending its review of a residential lease beyond 30 days because residential leases are generally not voluminous or complex; alternatively, delete the second review period or decrease both the initial and second review period. We addressed these comments by deleting the extra 30 days for residential lease review. We also deleted the extra 30-day review time for

subleases and amendments to residential leases.

- Shorten the 60-day timeline to approve a residential lease plus the 30-day timeline for review of leasehold mortgages because it is too long, considering that the lessee may only submit a leasehold mortgage for approval after the lease has been approved. As stated earlier, we decreased the total time period for review of a residential lease to 30 days. In response to this comment, we also decreased the time period for leasehold mortgage approval for residential leases to 20 days.

- Shorten the timelines for review of business leases (BIA has an initial 60-day period in which to issue a decision, plus 30 days if it exercises its option for additional time) because this time may cost the landowner almost 3 months of revenue while waiting for a BIA decision and may not be commercially feasible. Because these timelines are intended to be the outer bounds of the time it will take for BIA review of business leases and are intended to cover all business leases, from the simplest to the most complex, we did not make any changes to the timeline in response to these comments.

- Define the additional period for review as beginning either from the day BIA sends the notification that it needs more time, or from the end of the initial 60-day period, whichever is earlier. Because BIA is required to send its notification during the initial 60-day period, the date BIA sends its notification will always be earlier than the end of the initial 60-day period. For this reason, we did not incorporate this change.

- Delete provisions allowing BIA to unilaterally decide it has an additional 30 days to issue a decision. We deleted this option for residential leasing and WEELs, but have retained it for business and WSR leases because we believe this option is necessary to account for particularly complex leases.

#### 19. How BIA Decides To Approve Lease Documents

Several tribes supported provisions exempting lease actions from further BIA approval where the lease so provides. A few tribes opposed the "deemed approved" result because it may result in uncertainty about whether a provision of the lease is consistent with Federal law. These tribes believe BIA must take affirmative action. Because most tribes support the "deemed approved" provisions, we are retaining them for amendments and subleases. In addition, we received the following comments:

• Extend “deemed approved” provisions to leases, assignments, and leasehold mortgages. We did not accept this request for leases because we are statutorily required to review and approve leases of Indian land. We did not accept this request for assignments because we believe we are also statutorily bound to review them as they are, in effect, new leases. Many of these commenters did not agree that lenders would rely only on affirmative BIA approval of leasehold mortgages. We did not incorporate “deemed approved” for leasehold mortgages because, based on our consultation with representatives of HUD, affirmative BIA approval is required by mortgagees and lenders even if the regulations were to provide for a deemed approved process.

• Include a written BIA approval with a “deemed approved” amendment or sublease. We did not make a change to the regulation in response to this comment but note that the parties may request written confirmation from BIA that a document has been deemed approved and/or that its provisions are consistent with Federal law.

• Clarify whether the qualification that a document is “deemed approved” only “to the extent consistent with Federal law” devours the whole deemed approved process, such that there may be pieces of what has been “deemed approved” that are not actually approved. Our goal is to have affirmative approvals by BIA, so that the “deemed approval” acts only as a guarantee that a decision will occur by a certain time. To reduce potential uncertainty that could result from a deemed approved action, we added a provision stating that any amendment or sublease provision that is inconsistent with Federal law will be severed and the remainder of the amendment or sublease will be enforceable.

• Clarify whether, after an amendment or sublease is deemed approved, BIA will review it to determine whether any provisions conflict with Federal law. We did not revise the regulation in response to this comment, but note that the deemed approval provisions are intended as backstops, and we anticipate that BIA will be actively reviewing amendments and subleases before the deadline to ensure consistency with Federal law.

• Delete the requirement for BIA to determine that a lease is in the best interest of the Indian landowners because leases should automatically be in the best interest of Indian landowners. In response to these comments, we clarified the approval process for leases. We were unable to provide that leases are always in the

best interest of the Indian landowners because BIA is required to determine whether this is true.

• Always defer to the tribe’s discretion that something is in its best interest, not just “to the maximum extent possible.” We retained this qualifier because it is necessary in light of our statutory obligation to review leases.

• Automatically consider leases for housing for public purposes to be in the best interest of the Indian landowner. We expect that BIA will determine that leases for housing for public purposes are in the best interest of the landowner. But in order to implement its statutory mandate to review leases, BIA must examine whether there is some reason the lease is not in the landowners’ best interest, even while deferring to the landowners’ determination to the maximum extent possible.

• Consider in the “best interest” determination factors beyond just fair market rental, including traditional and cultural values, the need for adequate housing in Indian country, and the ability of tribal member lessees to pay fair market rental for residential leases. We agree that the best interest determination includes factors beyond monetary compensation and that it will vary according to circumstances.

• Add a provision requiring BIA to approve leases unless there is a compelling reason not to do so. In response to this comment, we added a new section at 162.341 (and parallel sections for business, WEEL, and WSR leases) specifically addressing the standard by which BIA will determine whether to approve a lease. The rule requires BIA to approve leases unless there is a compelling reason not to do so and to provide a basis for its determination.

• Add examples of what a “compelling reason” to disapprove may be. We could not identify an example, but believe the provision is necessary if a unique situation arises that is not contemplated by these regulations but would clearly warrant disapproval. Two other tribal commenters objected to the “compelling reason” standard as paternalistic and effectively standard-less. The rule uses the “compelling reason” standard as the highest administrative standard of review; the rule also requires that BIA articulate its basis for disapproval, so if it relies on a “compelling reason,” it must state what that reason is in writing. This determination may be appealed.

• Delete the factors of what BIA will consider in determining whether there is a compelling reason to disapprove a lease document to protect the best

interest of the Indian landowners. We did not delete these factors because others had requested clarification of the “compelling reason” standard.

• Provide that short-term leases will be routinely approved but that BIA will find a compelling reason to withhold approval for long-term leases only when the lease could imperil the tribal land base or tribal community. Because there may be other compelling reasons to withhold approval, we did not incorporate this change. The timelines and standards for approval are intended to provide the certainty associated with routine approvals, while still allowing BIA the ability to fulfill its responsibilities in reviewing leases.

• Clarify that provisions governing the BIA approval process for amendments, assignments, subleases, and leasehold mortgages apply only to leases approved under part 162, and that documents that can be agreed to without BIA approval are exempt from these approval procedures. We did not make any change to the rule in response to this comment because the general provisions establish the applicability of part 162 to certain lease documents, including amendments, assignments, subleases, and leasehold mortgages. As written, the regulation does not allow BIA to require approval of amendments, assignments, subleases, and leasehold mortgages related to documents that are not otherwise governed by part 162.

• Require BIA to inquire into whether a lease applicant has complied with all pertinent tribal laws before approving a business lease. A tribe may choose to require the lessee to obtain a statement from the tribal authority that the proposed use is in conformance with tribal law. Where the tribe requires this, BIA will require the statement from the tribe to be included in the package submitted to BIA. See 162.438.

• Restrict BIA approval to a “confirmation that the lease is within the tribe’s authority under applicable tribal law,” without considering compliance with Federal law, in those situations where BIA approval of a specified tribe’s lease is not required under 25 U.S.C. 415(b), but tribal law requires BIA approval of the lease. We did not accept this change. The criteria, if any, for approval of these leases will be those in the applicable tribal law.

## 20. Effective Date of Leases

• Clarify provisions regarding the effective date of lease documents, by adding that documents not requiring BIA approval are effective upon execution by the parties unless the document provides for a different effective date. We incorporated this

change (see 162.342, 162.442, 162.532, and 162.567).

## 21. Recording

- TDHEs and CDFIs stated that the requirement to record residential subleases should be removed as onerous. In response, we deleted the requirement to record residential subleases.
- Clarify that “lease documents” rather than just “leases” must be recorded in 162.343, 162.434, 162.533, and 162.568. We clarified that all lease documents must be recorded except for residential subleases.
- Several tribes asked whether the LTRO will record a document that has been “deemed approved” or a lease document that does not require BIA approval (e.g., an assignment to a leasehold mortgage acquiring through foreclosure). BIA realty staff will work with the LTRO to ensure that these documents are recorded. One tribe stated that the absence of an affirmative BIA approval will prevent maintaining accurate records at county offices because the county recorder may not record something without BIA approval. We are working on implementation issues to ensure that it is clear on the face of a document that it has been approved (either through affirmative approval or deemed approval).
- Allow recording of an original memorandum of lease rather than the full lease. This is a broader issue regarding title records, which is governed by another regulation, 25 CFR 150.11.

- Address alternative recording with tribal and State recording offices because the tribe has had difficulty recording with the LTRO where the lease is on restricted fee lands. The LTRO records leases on restricted fee lands.

- Clarify whether there is a lease tracking system in place with lease amounts and details on each lease that is readily available to realty offices. BIA realty staff uses the Title Asset Accounting and Management System (TAAMS) as the lease tracking system.

## 22. Appeal Bonds

- Delete the proposed rule’s requirement that the lessee post an appeal bond for residential leasing as unnecessary. We deleted this requirement.
- Revise appeal bond requirements for business leases to state that an appeal bond will not be required for an appeal of a decision on a leasehold mortgage or if the tribe is a party to the appeal and the tribe requests a waiver. We incorporated these changes and also

simplified the definition of “appeal bond” and provisions regarding appeal bonds to refer to 25 CFR part 2.

## 23. Amendments

- Define “amendment” to clarify that it does not include an alteration of lease provisions that was expressly contemplated in the original lease. We did not incorporate this change because any amendment of the provisions of the original lease will be an amendment, whereas compliance with provisions of the original lease would not.
- Delete the provision stating that a lease may not be amended if the lease prohibits amendments because it is unlikely a lease would state this. We deleted this provision.
- Add that landowners may not be deemed to have consented, and their representatives may not consent on their behalf, to any amendments that would modify the dispute resolution provisions. We incorporated this change.
- Clarify that a lease may be amended to secure financing of the project that is the subject of the lease. We did not incorporate this change because a lease may be amended for any reason.
- Add that BIA will approve amendments where the lease is for housing for public purposes and is in the tribe’s best interest. To address this comment, we added that we will defer, to the maximum extent possible, to the Indian landowner’s determination that the amendment is in their best interest.
- Exempt amendments that are not material from the requirement for consent. We did not incorporate this change because, unless the lease provides for deemed consent or consent by representatives, the landowners must consent to all amendments.

## 24. Assignments

- Authorize assignments without further BIA approval or landowner consent if the lease is for housing for public purposes and the assignee is a TDHE or other tribal entity. We incorporated this change at 162.349 (PR 162.347).
- Delete the provision at 162.352(c) (PR 162.350) requiring the assignee to pay fair market rental to the landowner where the assignee is not a member of the landowner’s immediate family, because it would limit assignments in the housing for public purposes context. The final rule provides that assignments of leases for housing for public purposes do not require BIA approval, so this restriction will not affect assignments of leases for housing for public purposes.
- Delete provisions allowing assignments to subsidiaries without

consent or BIA approval because they circumvent due diligence to ensure the assignee is suitable and capable of performing; alternatively, limit these provisions to only those of lessee’s subsidiaries that are solvent and in good standing in the State where the corporation is registered. We did not make any changes to this section because the regulations provide that assignments do not need consent or approval in these circumstances only if the lease so provides; the parties have the opportunity to negotiate this.

- Clarify that a lessee may assign the lease as collateral for any financing or refinancing of the project. We did not incorporate this change because a lease may be assigned for any reason.
- Add a process by which a financing party can obtain acknowledgment from the tribe that the assignment provisions are valid. Because this is a matter between the tribe, lessee, and mortgagee, we did not incorporate this change.
- Allow a lease to provide for assignments without BIA approval or landowner consent to any number of distinct legal entities identified in the lease. We rejected this change to keep BIA review of the original lease manageable, but increased the number of distinct legal entities that may be identified from two to three.
- Treat assignments of residential, business and WSR leases the same. We reorganized the provisions related to assignments of residential leases to address this comment.

## 25. Subleases

Nearly all tribes opposed the conditions for residential subleasing without consent or BIA approval, which required an approved rent schedule, plan of development, and sublease form. They objected to these provisions because, for leases for housing for public purposes, HUD already regulates these items. We deleted these conditions so that a lessee may sublease without obtaining BIA approval or landowner consent, as long as the lease so provides.

Several commenters expressed their concern with regard to tribes that operate their housing programs as departments, rather than as separate entities such as TDHEs. These tribes directly lease to individuals and, under the regulations, must obtain a BIA approval for each individual lease. While this is true of the proposed and final rule, it is also true of the current regulations. Because BIA is statutorily obligated to review and approve each lease, we could not identify a legally

permissible means of exempting these leases.

In addition, we received the following comments:

- Exempt commercial leases of retail and office space within existing facilities from BIA review. The final rule provides that the lease may allow for subleasing without BIA review. A tribe noted that mall developers who sublease for retail or office space need flexibility to meet the needs of individual retailers, and asked that these types of review be exempted. While we did not categorically exempt these, they may be exempt from BIA approval if the lease so provides.

- Exempt subleases between parents and children from the requirement for BIA approval and landowner consent. Because the final rule states that all residential subleases are exempt from approval and consent where the lease provides, we determined this change was unnecessary.

- Establish a default rule that subleases do not need BIA approval unless the lease specifically requires. The regulations are intended to be as flexible as possible, consistent with our trust responsibility, by allowing for trust responsibility, by allowing for subleasing without further approval if the lease so provides.

- Delete the provision allowing lessees to sublease without BIA approval if the lease so provides, as inconsistent with the Department's trust responsibility. BIA did not incorporate this suggestion because of tribal comments stating that flexibility in subleasing is necessary to meet housing and economic development needs.

- Limit or prohibit subleasing because it can result in the lessee's obtaining rental income far in excess of what the landowner receives. The comment related to leasing for oil and gas, which is not subject to this rulemaking, whereas in the residential context this is generally not an issue.

- Involve the tribe in any assignment or sublease decision if it owns any portion of the affected land. We added a provision to require notification to all Indian landowners of these actions, unless the lease provides otherwise.

- Add that BIA will defer, to the maximum extent possible, to the Indian landowners' determination that the sublease is in their best interest. We added this provision.

- Delete the proposed rule's provision requiring the sublessee to be bound by the terms of the lease because it is overly restrictive and would prohibit partial subleases. We deleted this provision and instead included a provision requiring the lessee to remain liable under the lease.

## 26. Leasehold Mortgages

- Clarify what is meant by the lease providing a "general authorization" for leasehold mortgages, to exempt the leasehold mortgage from consent requirements. We clarified the final rule to state that no landowners' consent is required if the lease so provides.

- Delete the requirement for obtaining consent from all landowners for a leasehold mortgage because there may be privacy issues related to the lessee's financial situation. We clarified that the lease may allow for leasehold mortgages without landowner consent.

- Exempt leasehold mortgages from BIA approval where the lease is for housing for public purposes because of situations where a TDHE records a mortgage and may file an additional mortgage if the costs exceed the original projected amount. We did not include an exemption because BIA approval of leasehold mortgages is required in all instances to ensure that only the leasehold is encumbered.

- Add that where the leasehold mortgage is for a lease for housing for public purposes, BIA will defer, to the maximum extent possible, to the judgment of the tribe and will complete its review in 30 days. Because we defer to the judgment of the tribe with regard to all leasehold mortgages, and we have reduced the timeline for BIA approval of leasehold mortgages to 20 days (see approvals and timelines section, above), we did not incorporate this suggested language.

- Clarify the role of BIA staff, and whether they have the knowledge to determine if a leasehold mortgage is in the lessee's best interest or are assuming the role of an underwriter. The scope of BIA's review of the leasehold mortgage is limited to determining whether the landowners have consented, the requirements of the subpart have been met, and there is a compelling reason to disapprove the leasehold mortgage. We deleted several factors and replaced them with a factor regarding whether mortgage proceeds would be used for purposes unrelated to the lease to clarify this limited scope of BIA's review. We also revised the provision stating that BIA "will" consider certain factors in determining whether there is a compelling reason to disapprove to instead state that BIA "may" consider those factors. This revision provides BIA with flexibility to rely on another Federal agency's approval or guarantee of the leasehold mortgage. Likewise, when a leasehold mortgage is associated with housing for public purposes, BIA's review of the compelling reasons will be less intensive.

## 27. Appeal From Inaction

- Include a different remedy for BIA's failure to act on a lease proposal package because the appeals process under 25 CFR part 2 is so slow that it is not an effective remedy for delays in BIA's decisions on lease documents. In response, we added a new process to enforce timelines on BIA whereby the matter is first elevated from the Superintendent to the Regional Director, and from the Regional Director to the Director of BIA. This will instill more accountability for issuing timely decisions and will provide a more effective remedy for parties seeking a decision. These procedures are intended to supplant 25 CFR 2.8 entirely, so a party is not required to submit a section 2.8 demand letter giving the official a certain time period to act before allowing an appeal. We acknowledge that the formal adjudication process before the Interior Board of Indian Appeals may not be the most appropriate or expeditious process when a BIA official fails to meet regulatory deadlines. Our hope is that inserting a supervisory official, the BIA Director, into the process will obviate the need for any further relief; and we may consult with tribes on the Board's role with respect to instances of BIA inaction in the future.

- Revise the appeal process to allow for an informal conference process similar to 25 CFR 900.153, rather than the part 2 process. We did not incorporate this process for appeals from inaction because an informal conference would likely further delay issuance of a decision. We did incorporate an abbreviated form of this process for appeals of disapprovals of WEELS because these are intended to be short-term leases on a particularly expedited approval schedule.

## 28. Compliance and Enforcement

- Clarify cancellation versus termination. We added definitions for each of these terms to clarify that only BIA may cancel a lease, but an Indian landowner may terminate a lease.

- Clarify how BIA will "defer" to tribal court judgments, because if BIA can take unilateral action regardless of tribal court proceedings addressing the same issue, then it will undermine parties' efforts to provide for appropriate forums to resolve disputes. If the parties are addressing a lease compliance issue in tribal court or other court of competent jurisdiction, through a tribal governing body or an alternative dispute resolution method, BIA generally will wait for those

proceedings to close and defer to the outcome.

- Restore the current rule's provision that BIA will assist Indian landowners in the enforcement of negotiated remedies. We added a provision in 162.365(d), 162.465(d), and 162.590(d) to provide that landowners may request BIA assistance in enforcing negotiated remedies.

- Delete the requirement for BIA to contact each individual Indian landowner to ensure removal of improvements because it is unrealistic. We did not change the rule in response to this comment because the rule provides that BIA will contact individual Indian landowners, where feasible, and other commenters had requested that BIA attempt to contact individual Indian landowners to ensure removal.

- Clarify the statement that BIA may order the lessee to "stop work." We revised this provision to clarify that BIA may order the lessee to "cease operations under the lease."

- Restrict BIA's ability to enforce leases so that BIA action is triggered only by a "material" violation. We did not restrict BIA's authority to material violations, but note that BIA will consult with Indian landowners regarding violations.

- Require written notice of nonpayment from Indian landowners in 162.366(c)(1)(ii) (PR 162.363). We did not incorporate this change because "actual notice" provides more flexibility to the Indian landowners, allowing them to notify BIA either in writing, in person, or by phone.

- Allow the tribe, rather than BIA, to establish fees. The fees referred to in 162.368 (PR 162.365) and parallel provisions are those due to the United States under the Debt Collection Act. This section does not affect whether tribes may impose their own fees.

Another tribe stated that if a lessee doesn't have the resources to pay rent on time, they won't have the resources to pay the fees. These fees are required under the Debt Collection Act. The parties to a lease may agree not to charge late payment charges or other fees under the lease.

- Include mandatory language to force BIA to make a trespass finding or take other enforcement action. We did not incorporate this change in order to retain enforcement discretion.

- Require BIA, in 162.464 (PR 162.461), to coordinate with other Federal, tribal, or State law enforcement officials as needed to evict, in order to prevent litigation on this matter. We did not make a change to the regulation in response to this comment, but note that

BIA may coordinate with other law enforcement officials, as necessary.

- Add timeframes for BIA to provide a notice of violation. We did not incorporate these changes because BIA has enforcement discretion in determining when to issue a notice of violation. This commenter requested that the timeframe for the lessee to cure a violation be extended from 10 days to 30 or 60 days. We did not incorporate this change because the regulations allow the lessee to request a longer time period to cure.

- Require the lessee to notify the tribe, in addition to BIA, that it has cured a violation. We incorporated this change.

- Add specific timeframes (rather than "promptly") for BIA to investigate a potential violation. Because BIA's ability to investigate potential violations varies with the availability of resources, we did not add a specific timeframe.

- Allow financing parties the right to cure on behalf of the lessee. The regulations allow financing parties this right, as they continue to be responsible for the obligations in the lease.

- Clarify that enforcement of program occupancy documents is left to the tribes. BIA does not enforce program occupancy documents.

- Provide that tribal courts should be the ultimate arbiter of land disputes. We did not make a change to the rule in response to this comment, but note that the parties may include in the lease that the tribal court is the ultimate arbiter of any lease disputes between the parties.

- Allow a one-time lump sum rental payment, to render much of the compliance and enforcement process unnecessary. The regulations do allow for a one-time lump sum rental payment, but the compliance and enforcement process is still necessary for violations other than failure to pay rent.

#### 29. Miscellaneous

- Carefully consider the implication of the Helping Expedite and Advance Responsible Tribal Home Ownership Act of 2012 (HEARTH Act) on implementation of these regulations, to avoid two conflicting systems. These regulations would allow for two independent, consistent processes, if a tribe develops its own leasing regulations under the HEARTH Act. One tribe suggested that instead of promulgating leasing regulations, BIA should incorporate the essence of the HEARTH Act. BIA is statutorily required to approve leases; the HEARTH Act removes that requirement under certain conditions (e.g., the tribe develops its own leasing regulations).

To the extent we can do so within the current statutory framework, we have attempted to remove BIA as a barrier to fostering business opportunities and economic development through leasing on Indian land.

- Add a new section to allow BIA to amend or correct a lease due to a mistake, such as an incorrect legal land description, a mistake allowing a party to avoid legal obligations under an approved mortgage, or other mistake as necessary to protect the interests of the Indian landowners. We did not add this section because the parties must agree to any amendments of the lease; BIA has no authority to interfere with the contractual agreement of the parties even where it determines that a "mistake" has occurred.

- Develop a model lease to expedite the review and approval process. A model lease has been developed for residential leases of tribal land. BIA has not developed a model lease for business or WSR because the leases vary widely; however, we will develop checklists for guidance.

- Allow for the right to receive lease income from exchange assignments, which had been encouraged by BIA. The parties may address exchange assignments in the lease.

- We received several comments regarding rights-of-way, utility easements, encouraging broadband network investment, agricultural leasing, BIA resources, assisting tribes in preparing their own tax regulations, LTROs, TAAMS, Government Performance and Results Act (GPRA) reporting, carbon sequestration and cap-and-trade programs, administration of individual Indian money (IIM) accounts, procedures for contacting landowners whose whereabouts are unknown, and background checks; we are not addressing these comments here because they are outside the scope of this rulemaking.

#### IV. Procedural Requirements

##### A. Regulatory Planning and Review (E.O. 12866 and 13563)

Executive Order (E.O.) 12866 provides that the Office of Information and Regulatory Affairs (OIRA) at the Office of Management and Budget (OMB) will review all significant rules. OIRA has determined that this rule is significant because it raises novel legal or policy issues.

E.O. 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome



tools for achieving regulatory ends. The E.O. directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements. This rule is also part of the Department's commitment under the Executive Order to reduce the number and burden of regulations.

#### *B. Regulatory Flexibility Act*

The Department of the Interior certifies that this rule will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Small entities are not likely to enter into residential leases on Indian land because tribal housing authorities and tribal members usually enter into these leases. It is possible that small entities may enter into business leases or wind or solar resources leases but this rule does not impose any requirements in obtaining or complying with a lease that would have a significant economic effect on those entities.

#### *C. Small Business Regulatory Enforcement Fairness Act*

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. It will not result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector of \$100 million or more in any one year. The rule's requirements will not result in a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions. The rule continues to require lessees to pay at least fair market rental, with certain exceptions, and adds that lessees may agree to some other amount negotiated by the Indian tribe. Nor will this rule have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of the U.S.-based enterprises to compete with foreign-based enterprises because the rule is limited to Indian land and is intended to promote economic development.

#### *D. Unfunded Mandates Reform Act*

This rule does not impose an unfunded mandate on State, local, or

tribal governments or the private sector of more than \$100 million per year. The rule does not have a significant or unique effect on State, local, or tribal governments or the private sector. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*) is not required.

#### *E. Takings (E.O. 12630)*

Under the criteria in Executive Order 12630, this rule does not affect individual property rights protected by the Fifth Amendment nor does it involve a compensable "taking." A takings implication assessment is not required.

#### *F. Federalism (E.O. 13132)*

Under the criteria in Executive Order 13132, this rule has no substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. This rule governs leasing on Indian land, which is land held by the Federal Government in trust or restricted status for individual Indians or Indian tribes. This land is subject to tribal law and Federal law, only, except in limited circumstances and areas where Congress or a Federal court has made State law applicable. This rule therefore does not affect the relationship between the Federal Government and States or among the various levels of government.

#### *G. Civil Justice Reform (E.O. 12988)*

This rule complies with the requirements of Executive Order 12988. Specifically, this rule has been reviewed to eliminate errors and ambiguity and written to minimize litigation; and is written in clear language and contains clear legal standards.

#### *H. Consultation With Indian Tribes (E.O. 13175)*

In accordance with the President's memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments," Executive Order 13175 (59 FR 22951, November 6, 2000), and 512 DM 2, we have evaluated the potential effects on federally recognized Indian tribes and Indian trust assets. During development of the proposed rule, the Department discussed the rule with tribal representatives at several consultation sessions. We distributed a preliminary draft of the rule to tribes in February 2011 and held three consultation sessions: Thursday, March 17, 2011 at the Reservation Economic Summit (RES) 2011 in Las Vegas; March

31, 2011 in Minnesota; and April 6, 2011, in Albuquerque, New Mexico. We requested that tribes submit written comments by April 18, 2011. We received written and oral comments from over 70 Indian tribes during tribal consultation. We reviewed each comment in depth and revised the rule accordingly. The proposed rule incorporated those revisions. We also compiled a summary of tribal comments received and our responses to those comments and are making that document available to tribes at <http://www.bia.gov/WhoWeAre/AS-IA/Consultation/index.htm>. We notified tribes of the publication of the proposed rule on November 28, 2011, provided them with a Web site link to responses to tribal comments and other materials, and announced additional consultation sessions. Following publication of the proposed rule, we held additional tribal consultation sessions on January 10, 2012, in Seattle, Washington; January 12, 2012, in Palm Springs, California; and January 18, 2012, in Rapid City, South Dakota. We received written and oral comments from approximately 50 tribes, and several tribal organizations and tribal members and took them into consideration in formulating this final rule, as described above.

#### *I. Paperwork Reduction Act*

The Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, prohibits a Federal agency from conducting or sponsoring a collection of information that requires OMB approval, unless this approval has been obtained and the collection request displays a currently valid OMB control number. No person is required to respond to an information collection request that has not complied with the PRA.

In the **Federal Register** of November 29, 2011, the Department published the proposed rule and invited comments on the proposed collection of information. The Department submitted the information collection request to the Office of Management and Budget (OMB) for review and approval. OMB did not approve this collection of information, but instead, filed comment. In filing comment on this collection of information, OMB requested that, before publication of the final rule, the Department provide all comments on the recordkeeping and reporting requirements in the proposed rule, the Department's response to these comments, and a summary of any changes to the information collections. We did not receive any public comments regarding the information collection burden estimates in response to publication of the proposed rule in

the **Federal Register**; however, some of the comments on the rule related to comments on information collections, including comments on NEPA documentation and supporting documents. These are discussed in Section III.C. under the heading for section 162.027, above, and Section III.H.17, above. Because the changes made as a result to these comments do not change the overall estimates of how long it takes to collect and provide

information, these did not affect the burden estimates.

OMB has approved the revision to the information collections approved under OMB Control No. 1076–0155 to reflect the information collections in this final rule. This approval will expire on XX/XX/XXXX. Questions or comments concerning this information collection should be directed to the person listed in the **FOR FURTHER INFORMATION CONTACT** section of this preamble.

OMB Control No. 1076–0155 currently authorizes the collections of information in 25 CFR part 162, totaling an estimated 106,065 annual burden hours. The final rule increases the annual burden hours by an estimated 2,910 hours. Because the sections where the information collections occur changes, we are including a table showing the section changes and whether a change to the information collection requirement associated with those sections has changed.

Current CFR cite	New CFR cite	Information collection requirement	Explanation of change
162.109, 162.204, 162.205	162.109, 162.204, 162.205, 162.338(e), 162.438(e), 162.528(d), 162.570(e). 162.320, 162.420, 162.549	Provide notice of tribal leasing laws, regulations, exemptions.	No change. Previously required, but now listed in specific subparts.
	162.321, 162.421, 162.550	Request for fair market rental/valuation on tribal land.	New.
	162.324, 162.424, 162.553	Request for waiver of fair market rental/valuation for individually owned land.	New.
	162.371, 162.471, 162.596	Agreement to suspend direct pay .....	New.
		Notification of good faith negotiations with holdover.	New.
162.207, 162.242–244, 162.604(a), 162.610.	162.009, 162.207, 162.242–244, 162.347, 351, 355, 359, 162.447, 451, 455, 459, 162.529, 534, 565, 572, 576, 580, 584.	Submit lease, assignment, amendment, leasehold mortgage for approval.	No change. Previously required, but now listed in separate subparts.
162.213, 162.604(a) .....	162.024 162.213, 162.338, 162.438, 162.528, 162.563. 162.007 .....	Provide supporting documentation .....	No change. Previously required, but now listed in separate subparts.
		Submit permits to BIA for file .....	Permits must now be submitted to BIA for file.
162.217, 162.246 .....	162.217, 162.246, 162.343, 162.443, 162.568.	Submit lease for recording .....	No change. Previously required, but now listed in separate subparts.
162.234, 162.604(c) .....	162.234, 162.434, 162.525, 162.559.	Provide a bond .....	No change. Previously required, but now listed in separate subparts.
162.237, 162.604(d) .....	162.237, 162.437, 162.527, 162.562.	Provide information for acceptable insurance.	No change. Previously required, but now listed in separate subparts.
162.241 .....	162.241 .....	Administrative fees .....	No change.
162.247, 162.613 .....	162.247, 162.325, 329, 162.425, 429, 162.523, 551.	Pay rent .....	No change. Previously required, but now listed in separate subparts.
162.248, 162.616 .....	162.248, 162.368, 162.468, 162.593.	Pay penalties for late payment .....	No change. Previously required, but now listed in separate subparts.
162.212, 162.606 .....	162.009, 162.212 .....	Bidding on advertised lease .....	No change. Previously required, but now listed in separate subparts.
162.603 .....	162.005(b)(2) .....	Use of minor's land .....	No change. Previously required, but now listed in separate subparts.
162.251, 162.618 .....	162.251, 162.366, 162.466, 162.591.	Provide notice of curing violation .....	No change. Previously required, but now listed in separate subparts.
162.256, 162.623 .....	162.256, 162.371, 162.471, 162.596.	Respond to notice of trespass .....	No change. Previously required, but now listed in separate subparts.
162.113 .....	162.025, 162.113 .....	Appealing decisions .....	No change. Previously required, but now listed in separate subparts.

The table showing the burden of the information collection is included below for your information.

CFR cite	Description	Respondent type	Number respondents	Annual responses	Burden hours per response	Total annual burden hours
162.109, 162.204, 162.205, 162.338(e), 162.438(e), 162.528(d), 162.570(e).	Provide notice of tribal leasing laws, regulations, exemptions.	Tribal .....	500	500	0.5	250
162.320, 162.420, 162.549.	Request for fair market rental/valuation on tribal land.	Tribal .....	50	50	0.5	25
162.321, 162.421, 162.550.	Request for waiver of fair market rental/valuation for individually-owned land.	Individuals .....	5,000	5,000	0.5	2,500
162.324, 162.424 162.553	Agreement to suspend direct pay.	Individuals .....	20	20	0.5	10
162.371, 162.471, 162.596.	Notification of good faith negotiations with hold-over.	Tribal .....	100	100	0.5	50
162.009, 162.207, 242–244, 162, 347, 351, 355, 359, 162.447, 451, 455, 459, 162.529, 534, 565, 572, 576, 580, 584.	Submit lease, assignment, amendment, leasehold mortgage for approval.	Individuals .....	500	500	0.5	250
		Individuals .....	10,000	10,000	1	10,000
		Businesses .....	2,500	2,500	1	2,500
162.024, 162.213, 162.338, 162.438, 162.528, 162.563.	Provide supporting documentation.	Tribal .....	2,000	2,000	1	2,000
		Individuals .....	5,000	5,000	0.25	1,250
		Businesses .....	2,000	2,000	0.25	500
162.007 .....	Submit permits to BIA for file.	Tribal .....	250	250	0.25	62.5
		Individuals .....	100	100	0.25	25
		Businesses .....	100	100	0.25	25
162.217, 162.246, 162.343, 162.443, 162.568.	Submit lease for recording	Tribal .....	100	100	0.25	25
		Individuals .....	10,000	10,000	0.5	5,000
		Businesses .....	2,500	2,500	0.5	1,250
162.234, 162.434, 162.525, 162.559.	Provide a bond .....	Tribal .....	2,000	2,000	0.5	1,000
		Individuals .....	10,000	10,000	0.5	5,000
		Businesses .....	2,500	2,500	0.5	1,250
162.237, 162.437, 162.527, 162.562.	Provide information for acceptable insurance.	Tribal .....	2,000	2,000	0.5	1,000
		Individuals .....	10,000	10,000	0.25	2,500
		Businesses .....	2,500	2,500	0.25	625
162.241 .....	Administrative fees .....	Tribal .....	2,000	2,000	0.25	500
		Individuals .....	10,000	10,000	2	20,000
		Businesses .....	2,500	2,500	2	5,000
162.247, 162.325, 329, 162.425, 429, 162.523, 551.	Pay rent .....	Tribal .....	2,000	2,000	2	4,000
		Individuals .....	10,000	10,000	0.25	2,500
		Businesses .....	2,500	2,500	0.25	625
162.248, 162.368, 162.468, 162.593.	Pay penalties for late payment.	Tribal .....	2,000	2,000	0.25	500
		Individuals .....	3,000	3,000	0.25	750
		Businesses .....	600	600	0.25	150
162.009, 162.212 .....	Bidding on advertised lease.	Tribal .....	25	25	0.25	6
		Individuals .....	10,000	10,000	1	10,000
		Businesses .....	2,500	2,500	1	2,500
162.005(b)(2) .....	Use of a minor's land .....	Tribal .....	2,000	2,000	1	2,000
		All .....	7,250	7,250	3	21,750
		Individuals .....	100	100	0.5	50
162.251, 162.366, 162.466, 162.591.	Provide notice of curing violation.	Businesses .....	45	45	0.5	23
		Individuals .....	100	100	0.5	50
		Businesses .....	45	45	0.5	23
162.256, 162.371, 162.471, 162.596.	Respond to notice of trespass.	Individuals .....	100	100	0.5	50
		Businesses .....	45	45	0.5	23
		Individuals .....	400	400	2	800
162.025, 162.113 .....	Appealing decisions .....	Businesses .....	225	225	2	450
		Individuals .....	400	400	2	800
		Tribal .....	100	100	2	200

CFR cite	Description	Respondent type	Number respondents	Annual responses	Burden hours per response	Total annual burden hours
.....	<b>Total</b> .....	.....	127,110	127,110	.....	108,975

*J. National Environmental Policy Act*

This rule does not constitute a major Federal action significantly affecting the quality of the human environment because these are “regulations \* \* \* whose environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will later be subject to the NEPA process, either collectively or case-by-case.” 43 CFR 46.210(j). No extraordinary circumstances exist that would require greater NEPA review.

*K. Effects on the Energy Supply (E.O. 13211)*

This rule is not a significant energy action under the definition in Executive Order 13211. A Statement of Energy Effects is not required.

**List of Subjects in 25 CFR Part 162**

Indians—lands.

For the reasons stated in the preamble, the Department of the Interior, Bureau of Indian Affairs, amends part 162 in Title 25 of the Code of Federal Regulations as follows:

**PART 162—LEASES AND PERMITS**

■ 1. Revise the authority citation for part 162 to read as follows:

**Authority:** 5 U.S.C. 301, R.S. 463 and 465; 25 U.S.C. 2 and 9. Interpret or apply sec. 3, 26 Stat. 795, sec. 1, 28 Stat. 305, secs. 1, 2, 31 Stat. 229, 246, secs. 7, 12, 34 Stat. 545, 34 Stat. 1015, 1034, 35 Stat. 70, 95, 97, sec. 4, 36 Stat. 856, sec. 1, 39 Stat. 128, 41 Stat. 415, as amended, 751, 1232, sec. 17, 43 Stat. 636, 641, 44 Stat. 658, as amended, 894, 1365, as amended, 47 Stat. 1417, sec. 17, 48 Stat. 984, 988, 49 Stat. 115, 1135, sec. 55, 49 Stat. 781, sec. 3, 49 Stat. 1967, 54 Stat. 745, 1057, 60 Stat. 308, secs. 1, 2, 60 Stat. 962, sec. 5, 64 Stat. 46, secs. 1, 2, 4, 5, 6, 64 Stat. 470, 69 Stat. 539, 540, 72 Stat. 968, 107 Stat. 2011, 108 Stat. 4572, March 20, 1996, 110 Stat. 4016; 25 U.S.C. 380, 393, 393a, 394, 395, 397, 402, 402a, 403, 403a, 403b, 403c, 409a, 413, 415, 415a, 415b, 415c, 415d, 416, 477, 635, 2201 *et seq.*, 3701, 3702, 3703, 3712, 3713, 3714, 3715, 3731, 3733, 4211; 44 U.S.C. 3101 *et seq.*

§ 162.100 [Removed]

■ 2. Remove § 162.100.

§§ 162.101 through 162.113 [Transferred to Subpart B]

■ 3. Transfer §§ 162.101 through 162.113 from subpart A to subpart B.

■ 4. Revise subpart A to read as follows:

**Subpart A—General Provisions**

**Purpose, Definitions, and Scope**

Sec.

- 162.001 What is the purpose of this part?
- 162.002 How is this part subdivided?
- 162.003 What key terms do I need to know?
- 162.004 To what land does this part apply?

**When To Get a Lease**

- 162.005 When do I need a lease to authorize possession of Indian land?
- 162.006 To what types of land use agreements does this part apply?
- 162.007 To what permits does this part apply?
- 162.008 Does this part apply to lease documents I submitted for approval before January 4, 2013?
- 162.009 Do I need BIA approval of a subleasehold mortgage?

**How To Get a Lease**

- 162.010 How do I obtain a lease?
- 162.011 How does a prospective lessee identify and contact individual Indian landowners to negotiate a lease?
- 162.012 What are the consent requirements for a lease?
- 162.013 Who is authorized to consent to a lease?

**Lease Administration**

- 162.014 What laws apply to leases approved under this part?
- 162.015 May a lease contain a preference consistent with tribal law for employment of tribal members?
- 162.016 Will BIA comply with tribal laws in making lease decisions?
- 162.017 What taxes apply to leases approved under this part?
- 162.018 May tribes administer this part on BIA’s behalf?
- 162.019 May a lease address access to the leased premises by roads or other infrastructure?
- 162.020 May a lease combine tracts with different Indian landowners?
- 162.021 What are BIA’s responsibilities in approving leases?
- 162.022 What are BIA’s responsibilities in administering and enforcing leases?
- 162.023 What if an individual or entity takes possession of or uses Indian land without an approved lease or other proper authorization?
- 162.024 May BIA take emergency action if Indian land is threatened?
- 162.025 May decisions under this part be appealed?
- 162.026 Who can answer questions about leasing?
- 162.027 What documentation may BIA require in approving, administering, and enforcing leases?
- 162.028 How may an Indian tribe obtain information about leases on its land?
- 162.029 How does BIA provide notice to the parties to a lease?

**Subpart A—General Provisions**

**Purpose, Definitions, and Scope**

**§ 162.001 What is the purpose of this part?**

(a) The purpose of this part is to promote leasing on Indian land for housing, economic development, and other purposes.

(b) This part specifies:

(1) Conditions and authorities under which we will approve leases of Indian land and may issue permits on Government land;

(2) How to obtain leases;

(3) Terms and conditions required in leases;

(4) How we administer and enforce leases; and

(5) Special requirements for leases made under special acts of Congress that apply only to certain Indian reservations.

(c) If any section, paragraph, or provision of this part is stayed or held invalid, the remaining sections, paragraphs, or provisions of this part remain in full force and effect.

**§ 162.002 How is this part subdivided?**

(a) This part includes multiple subparts relating to:

- (1) General Provisions (Subpart A);
- (2) Agricultural Leases (Subpart B);
- (3) Residential Leases (Subpart C);
- (4) Business Leases (Subpart D);
- (5) Wind Energy Evaluation, Wind Resource, and Solar Resource Leases (Subpart E);

(6) Special Requirements for Certain Reservations (Subpart F); and

- (7) Records (Subpart G).

(b) Leases covered by subpart B are not subject to the provisions in subpart A. Leases covered by subpart B are subject to the provisions in subpart G, except that if a provision in subpart B conflicts with a provision of subpart G, then the provision in subpart B will govern.

(c) Subpart F applies only to leases made under special acts of Congress covering particular Indian reservations. Leases covered by subpart F are also subject to the provisions in subparts A through G, except to the extent that subparts A through G are inconsistent with the provisions in subpart F or any act of Congress under which the lease is made, in which case the provisions in subpart F or any act of Congress under which the lease is made will govern.

**§ 162.003 What key terms do I need to know?**

*Adult* means a person who is 18 years of age or older.

*Appeal bond* means a bond posted upon filing of an appeal.

*Approval* means written authorization by the Secretary or a delegated official or, where applicable, the “deemed approved” authorization of an amendment or sublease.

*Assignment* means an agreement between a lessee and an assignee, whereby the assignee acquires all or some of the lessee’s rights, and assumes all or some of the lessee’s obligations, under a lease.

*BIA* means the Secretary of the Interior or the Bureau of Indian Affairs within the Department of the Interior and any tribe acting on behalf of the Secretary or Bureau of Indian Affairs under § 162.018.

*Business day* means Monday through Friday, excluding federally recognized holidays and other days that the applicable office of the Federal Government is closed to the public.

*Cancellation* means BIA action to end a lease.

*Consent or consenting* means written authorization by an Indian landowner to a specified action.

*Constructive notice* means notice:

- (1) Posted at the tribal government office, tribal community building, and/or the United States Post Office; and
- (2) Published in the local newspaper(s) nearest to the affected land and/or announced on a local radio station(s).

*Court of competent jurisdiction* means a Federal, tribal, or State court with jurisdiction.

*Day* means a calendar day, unless otherwise specified.

*Emancipated minor* means a person less than 18 years of age who is married or who is determined by a court of competent jurisdiction to be legally able to care for himself or herself.

*Equipment installation plan* means a plan that describes the type and location of any improvements to be installed by the lessee to evaluate the wind resources and a schedule showing the tentative commencement and completion dates for installation of those improvements.

*Fair market rental* means the amount of rental income that a leased tract of Indian land would most probably command in an open and competitive market, or as determined by competitive bidding.

*Fee interest* means an interest in land that is owned in unrestricted fee status, and is thus freely alienable by the fee owner.

*Fractionated tract* means a tract of Indian land owned in common by Indian landowners and/or fee owners holding undivided interests therein.

*Government land* means any tract, or interest therein, in which the surface estate is owned and administered by the United States, not including Indian land.

*Holdover* means circumstances in which a lessee remains in possession of the leased premises after the lease term expires.

*Housing for public purposes* means multi-family developments, single-family residential developments, and single-family residences:

- (1) Administered by a tribe or tribally designated housing entity (TDHE); or
- (2) Substantially financed using a tribal, Federal, or State housing assistance program or TDHE.

*Immediate family* means, in the absence of a definition under applicable tribal law, a spouse, brother, sister, aunt, uncle, niece, nephew, first cousin, lineal ancestor, lineal descendant, or member of the household.

*Indian* means:

- (1) Any person who is a member of any Indian tribe, is eligible to become a member of any Indian tribe, or is an owner as of October 27, 2004, of a trust or restricted interest in land;
- (2) Any person meeting the definition of Indian under the Indian Reorganization Act (25 U.S.C. 479) and the regulations promulgated thereunder; and
- (3) With respect to the inheritance and ownership of trust or restricted land in the State of California under 25 U.S.C. 2206, any person described in paragraph (1) or (2) of this definition or any person who owns a trust or restricted interest in a parcel of such land in that State.

*Indian land* means any tract in which any interest in the surface estate is owned by a tribe or individual Indian in trust or restricted status and includes both individually owned Indian land and tribal land.

*Indian landowner* means a tribe or individual Indian who owns an interest in Indian land.

*Individually owned Indian land* means any tract, or interest therein, in which the surface estate is owned by an individual Indian in trust or restricted status.

*Indian tribe* means an Indian tribe under section 102 of the Federally Recognized Indian Tribe List Act of 1994 (25 U.S.C. 479a).

*Interest*, when used with respect to Indian land, means an ownership right to the surface estate of Indian land.

*Lease* means a written contract between Indian landowners and a

lessee, whereby the lessee is granted a right to possess Indian land, for a specified purpose and duration. The lessee’s right to possess will limit the Indian landowners’ right to possess the leased premises only to the extent provided in the lease.

*Lease document* means a lease, amendment, assignment, sublease, or leasehold mortgage.

*Leasehold mortgage* means a mortgage, deed of trust, or other instrument that pledges a lessee’s leasehold interest as security for a debt or other obligation owed by the lessee to a lender or other mortgagee.

*Lessee* means person or entity who has acquired a legal right to possess Indian land by a lease under this part.

*Life estate* means an interest in property held only for the duration of a designated person(s)’ life. A life estate may be created by a conveyance document or by operation of law.

*LTRO* means the Land Titles and Records Office of the BIA.

*Mail* means to send something by U.S. Postal Service or commercial delivery service.

*Minor* means an individual who is less than 18 years of age.

*Mortgagee* means the holder of a leasehold mortgage.

*NEPA* means the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*

*Nominal rental or nominal compensation* means a rental amount that is so insignificant that it bears no relationship to the value of the property that is being leased.

*Non compos mentis* means that the person to whom the term is applied has been legally determined by a court of competent jurisdiction to be of unsound mind or incapable of managing his or her own affairs.

*Notice of violation* means a letter notifying the lessee of a violation of the lease and providing the lessee with a specified period of time to show cause why the lease should not be cancelled for the violation. A 10-day show cause letter is one type of notice of violation.

*Orphaned minor* means a minor whose parents are deceased.

*Performance bond* means security for the performance of certain lease obligations, as furnished by the lessee, or a guaranty of such performance as furnished by a third-party surety.

*Permanent improvements* means buildings, other structures, and associated infrastructure attached to the leased premises.

*Permit* means a written, non-assignable agreement between Indian landowners or BIA and the permittee, whereby the permittee is granted a

temporary, revocable privilege to use Indian land or Government land, for a specified purpose.

*Permittee* means a person or entity who has acquired a privilege to use Indian land or Government land by a permit.

*Power of attorney* means an authority by which one person enables another to act for him or her as attorney-in-fact.

*Remainder interest* means an interest in Indian land that is created at the same time as a life estate, for the use and enjoyment of its owner after the life estate terminates.

*Restoration and reclamation plan* means a plan that defines the reclamation, revegetation, restoration, and soil stabilization requirements for the project area, and requires the expeditious reclamation of construction areas and revegetation of disturbed areas to reduce invasive plant infestation and erosion.

*Secretary* means the Secretary of the Interior.

*Single-family residence* means a building with one to four dwelling units on a tract of land under a single residential lease, or as defined by applicable tribal law or other tribal authorization.

*Single-family residential development* means two or more single-family residences owned, managed, or developed by a single entity.

*Sublease* means a written agreement by which the lessee grants to an individual or entity a right to possession no greater than that held by the lessee under the lease.

*Surety* means one who guarantees the performance of another.

*TDHE* means a tribally designated housing entity under 25 U.S.C. 4103(22), a tribally-sponsored or tribally sanctioned not-for-profit entity, or any limited partnership or other entity organized for the purpose of developing or improving low-income housing utilizing tax credits.

*Termination* means action by Indian landowners to end a lease.

*Trespass* means any unauthorized occupancy, use of, or action on any Indian land or Government land.

*Tribal authorization* means a duly adopted tribal resolution, tribal ordinance, or other appropriate tribal document authorizing the specified action.

*Tribal land* means any tract, or interest therein, in which the surface estate is owned by one or more tribes in trust or restricted status, and includes such lands reserved for BIA administrative purposes. The term also includes the surface estate of lands held by the United States in trust for an

Indian corporation chartered under section 17 of the Act of June 18, 1934 (48 Stat. 988; 25 U.S.C. 477).

*Tribal land assignment* means a contract or agreement that conveys to tribal members or wholly owned tribal corporations any rights for the use of tribal lands, assigned by an Indian tribe in accordance with tribal laws or customs.

*Tribal law* means the body of non-Federal law that governs lands and activities under the jurisdiction of a tribe, including ordinances or other enactments by the tribe, and tribal court rulings.

*Trust or restricted land* means any tract, or interest therein, held in trust or restricted status.

*Trust or restricted status* means:

(1) That the United States holds title to the tract or interest in trust for the benefit of one or more tribes or individual Indians; or

(2) That one or more tribes or individual Indians holds title to the tract or interest, but can alienate or encumber it only with the approval of the United States because of limitations in the conveyance instrument under Federal law or limitations in Federal law.

*Undivided interest* means a fractional share in the surface estate of Indian land, where the surface estate is owned in common with other Indian landowners or fee owners.

*USPAP* means the Uniform Standards of Professional Appraisal Practice promulgated by the Appraisal Standards Board of the Appraisal Foundation to establish requirements and procedures for professional real property appraisal practice.

*Us/we/our* means the BIA.

*Violation* means a failure to take an action, including payment of compensation, when required by the lease, or to otherwise not comply with a term of the lease. This definition applies for purposes of our enforcement of a lease under this part no matter how "violation" or "default" is defined in the lease.

#### **§ 162.004 To what land does this part apply?**

(a) This part applies to Indian land and Government land, including any tract in which an individual Indian or Indian tribe owns an interest in trust or restricted status.

(1) We will not take any action on a lease of fee interests or collect rent on behalf of fee interest owners. We will not condition our approval of a lease of the trust and restricted interests on your having obtained a lease from the owners of any fee interests. The lessee will be

responsible for accounting to the owners of any fee interests that may exist in the property being leased.

(2) We will not include the fee interests in a tract in calculating the applicable percentage of interests required for consent to a lease document.

(b) This paragraph (b) applies if there is a life estate on the land to be leased.

(1) When all of the trust or restricted interests in a tract are subject to a single life estate, the life tenant may lease the land without the consent of the owners of the remainder interests or our approval, for the duration of the life estate.

(i) The lease will terminate upon the death of the life tenant.

(ii) The life tenant must record the lease in the LTRO.

(iii) The lessee must pay rent directly to the life tenant under the terms of the lease unless the whereabouts of the life tenant are unknown, in which case we may collect rents on behalf of the life tenant.

(iv) We may monitor the use of the land on behalf of the owners of the remainder interests, as appropriate, but will not be responsible for enforcing the lease on behalf of the life tenant.

(v) We will not lease the remainder interests or join in a lease by the life tenant on behalf of the owners of the remainder interests except as needed to preserve the value of the land.

(vi) We will be responsible for enforcing the terms of the lease on behalf of the owners of the remainder interests.

(2) When less than all of the trust or restricted interests in a tract are subject to a single life estate, the life tenant may lease his or her interest without the consent of the owners of the remainder interests, but must obtain the consent of the co-owners and our approval.

(i) We will not lease on the life tenant's behalf.

(ii) The lease must provide that the lessee pays the life tenant directly, unless the life tenant's whereabouts are unknown in which case we may collect rents on behalf of the life tenant.

(iii) The lease must be recorded in the LTRO, even where our approval is not required.

(iv) We will be responsible for enforcing the terms of the lease on behalf of the owners of the remainder interests.

(3) Where the remaindermen and the life tenant have not entered into a lease or other written agreement approved by the Secretary providing for the distribution of rent monies under the lease, the life tenant will receive payment in accordance with the

distribution and calculation scheme set forth in Part 179 of this chapter.

(4) The life tenant may not cause or allow permanent injury to the land.

(5) The life tenant must provide a copy of the executed lease to all owners of the remainder interests.

**When to Get a Lease**

**§ 162.005 When do I need a lease to authorize possession of Indian land?**

(a) You need a lease under this part to possess Indian land if you meet one of the criteria in the following table,

unless you are authorized to possess or use the Indian land by a land use agreement not subject to this part under § 162.006(b) or by a permit.

If you are . . .	then you must obtain a lease under this part . . .
(1) A person or legal entity (including an independent legal entity owned and operated by a tribe) who is not an owner of the Indian land.	from the owners of the land before taking possession of the land or any portion thereof.
(2) An Indian landowner of a fractional interest in the land .....	from the owners of other trust and restricted interests in the land, unless all of the owners have given you permission to take or continue in possession without a lease.

(b) You do not need a lease to possess Indian land if:

(1) You are an Indian landowner who owns 100 percent of the trust or restricted interests in a tract; or

(2) You meet any of the criteria in the following table.

You do not need a lease if you are . . .	but the following conditions apply . . .
(i) A parent or guardian of a minor child who owns 100 percent of the trust or restricted interests in the land.	We may require you to provide evidence of a direct benefit to the minor child and when the child is no longer a minor, you must obtain a lease to authorize continued possession.
(ii) A 25 U.S.C. 477 corporate entity that manages or has the power to manage the tribal land directly under its Federal charter or under a tribal authorization (not under a lease from the Indian tribe).	You must record documents in accordance with § 162.343, § 162.443, and § 162.568.

**§ 162.006 To what types of land use agreements does this part apply?**

(a) This part applies to leases of Indian land entered into under 25

U.S.C. 380, 25 U.S.C. 415(a), and 25 U.S.C. 4211, and other tribe-specific statutes authorizing surface leases of Indian land with our approval.

(b) This part does not apply to:  
(1) Land use agreements entered into under other statutory authority, such as the following:

This part does not apply to . . .	which are covered by . . .
(i) Contracts or agreements that encumber tribal land under 25 U.S.C. 81.	25 CFR part 84.
(ii) Traders' licenses .....	25 CFR part 140.
(iii) Timber contracts .....	25 CFR part 163.
(iv) Grazing permits .....	25 CFR part 166.
(v) Rights-of-way .....	25 CFR part 169.
(vi) Mineral leases, prospecting permits, or mineral development agreements.	25 CFR parts 211, 212, 213, 225, 226, 227.
(vii) Tribal land assignments and similar instruments authorizing uses of tribal land.	tribal laws.

(2) Leases of water rights associated with Indian land, except to the extent the use of water rights is incorporated in a lease of the land itself.

(3) The following leases, which do not require our approval, except that you must record these leases in accordance with §§ 162.343, 162.443, and 162.568:

(i) A lease of tribal land by a 25 U.S.C. 477 corporate entity under its charter to a third party for a period not to exceed 25 years; and

(ii) A lease of Indian land under a special act of Congress authorizing leasing without our approval.

**§ 162.007 To what permits does this part apply?**

(a) Permits for the use of Indian land do not require our approval; however, you must fulfill the following requirements:

(1) Ensure that permitted activities comply with all applicable

environmental and cultural resource laws; and

(2) Submit all permits to the appropriate BIA office to allow us to maintain a copy of the permit in our records. If we determine within 10 days of submission that the document does not meet the definition of "permit" and grants a legal interest in Indian land, we will notify you that a lease is required.

(b) The following table provides examples of some common characteristics of permits versus leases.

Permit	Lease
Does not grant a legal interest in Indian land .....	Grants a legal interest in Indian land.
Shorter term .....	Longer term.
Limited use .....	Broader use with associated infrastructure.

Permit	Lease
Permittee has non-possessory right of access .....	Lessee has right of possession, ability to limit or prohibit access by others.
Indian landowner may terminate at any time .....	Indian landowner may terminate under limited circumstances.

(c) We will not administer or enforce permits on Indian land.

(d) We may grant permits for the use of Government land. The leasing regulations in this part will apply to such permits, as appropriate.

**§ 162.008 Does this part apply to lease documents I submitted for approval before January 4, 2013?**

This part applies to all lease documents, except as provided in § 162.006. If you submitted your lease document to us for approval before January 4, 2013, the qualifications in paragraphs (a) and (b) of this section also apply.

(a) If we approved your lease document before January 4, 2013, this part applies to that lease document; however, if the provisions of the lease document conflict with this part, the provisions of the lease govern.

(b) If you submitted a lease document but we did not approve it before January 4, 2013, then:

(1) We will review the lease document under the regulations in effect at the time of your submission; and

(2) Once we approve the lease document, this part applies to that lease document; however, if the provisions of the lease document conflict with this part, the provisions of the lease document govern.

**§ 162.009 Do I need BIA approval of a subleasehold mortgage?**

Unless the lease provides otherwise, sublease, or by request of the parties,

you do not need our approval of a subleasehold mortgage. If the lease or sublease requires, or parties request, our approval, we will use the procedures governing our review of leasehold mortgages.

**How to Get a Lease**

**§ 162.010 How do I obtain a lease?**

(a) This section establishes the basic steps to obtain a lease.

(1) Prospective lessees must:  
 (i) Directly negotiate with Indian landowners for a lease; and  
 (ii) For fractionated tracts, notify all Indian landowners and obtain the consent of the Indian landowners of the applicable percentage of interests, under § 162.012; and

(2) Prospective lessees and Indian landowners must:

(i) Prepare the required information and analyses, including information to facilitate our analysis under applicable environmental and cultural resource requirements; and

(ii) Ensure the lease complies with the requirements in subpart C for residential leases, subpart D for business leases, or subpart E for wind energy evaluation, wind resource, or solar resource leases; and

(3) Prospective lessees or Indian landowners must submit the lease, and required information and analyses, to the BIA office with jurisdiction over the lands covered by the lease, for our review and approval.

(b) Generally, residential, business, wind energy evaluation, wind resource, and solar resource leases will not be advertised for competitive bid.

**§ 162.011 How does a prospective lessee identify and contact individual Indian landowners to negotiate a lease?**

(a) Prospective lessees may submit a written request to us to obtain the following information. The request must specify that it is for the purpose of negotiating a lease:

(1) Names and addresses of the individual Indian landowners or their representatives;

(2) Information on the location of the parcel; and

(3) The percentage of undivided interest owned by each individual Indian landowner.

(b) We may assist prospective lessees in contacting the individual Indian landowners or their representatives for the purpose of negotiating a lease, upon request.

(c) We will assist individual Indian landowners in lease negotiations, upon their request.

**§ 162.012 What are the consent requirements for a lease?**

(a) For fractionated tracts:

(1) Except in Alaska, the owners of the following percentage of undivided trust or restricted interests in a fractionated tract of Indian land must consent to a lease of that tract:

If the number of owners of the undivided trust or restricted interest in the tract is . . .	Then the required percentage of the undivided trust or restricted interest is . . .
(i) One to five, .....	90 percent;
(ii) Six to 10, .....	80 percent;
(iii) 11 to 19, .....	60 percent;
(iv) 20 or more, .....	Over 50 percent.

(2) Leases in Alaska require consent of all of the Indian landowners in the tract.

(3) If the prospective lessee is also an Indian landowner, his or her consent will be included in the percentages in paragraphs (a)(1) and (2) of this section.

(4) Where owners of the applicable percentages in paragraph (a)(1) of this section consent to a lease document:

(i) That lease document binds all non-consenting owners to the same extent as if those owners also consented to the lease document; and

(ii) That lease document will not bind a non-consenting Indian tribe, except with respect to the tribally owned fractional interest, and the non-consenting Indian tribe will not be treated as a party to the lease. Nothing in this paragraph affects the sovereignty or sovereign immunity of the Indian tribe.

(5) We will determine the number of owners of, and undivided interests in, a fractionated tract of Indian land, for the purposes of calculating the percentages

in paragraph (a)(1) of this section based on our records on the date on which the lease is submitted to us for approval.

(b) Tribal land subject to a tribal land assignment may only be leased with the consent of the tribe.

**§ 162.013 Who is authorized to consent to a lease?**

(a) Indian tribes, adult Indian landowners, and emancipated minors, may consent to a lease of their land,



including undivided interests in fractionated tracts.

(b) The following individuals or entities may consent on behalf of an individual Indian landowner:

(1) An adult with legal custody acting on behalf of his or her minor children;

(2) A guardian, conservator, or other fiduciary appointed by a court of competent jurisdiction to act on behalf of an individual Indian landowner;

(3) Any person who is authorized to practice before the Department of the Interior under 43 CFR 1.3(b) and has been retained by the Indian landowner for this purpose;

(4) BIA, under the circumstances in paragraph (c) of this section; or

(5) An adult or legal entity who has been given a written power of attorney that:

(i) Meets all of the formal requirements of any applicable law under § 162.014;

(ii) Identifies the attorney-in-fact; and

(iii) Describes the scope of the powers granted, to include leasing land, and any limits on those powers.

(c) BIA may give written consent to a lease, and that consent must be counted in the percentage ownership described in § 162.012, on behalf of:

(1) The individual owner if the owner is deceased and the heirs to, or devisees of, the interest of the deceased owner have not been determined;

(2) An individual whose whereabouts are unknown to us, after we make a reasonable attempt to locate the individual;

(3) An individual who is found to be non compos mentis or determined to be an adult in need of assistance who does not have a guardian duly appointed by a court of competent jurisdiction, or an individual under legal disability as defined in part 115 of this chapter;

(4) An orphaned minor who does not have a guardian duly appointed by a court of competent jurisdiction;

(5) An individual who has given us a written power of attorney to lease their land; and

(6) The individual Indian landowners of a fractionated tract where:

(i) We have given the Indian landowners written notice of our intent to consent to a lease on their behalf;

(ii) The Indian landowners are unable to agree upon a lease during a 3 month negotiation period following the notice; and

(iii) The land is not being used by an Indian landowner under § 162.005(b)(1).

## Lease Administration

### § 162.014 What laws will apply to leases approved under this part?

(a) In addition to the regulations in this part, leases approved under this part:

(1) Are subject to applicable Federal laws and any specific Federal statutory requirements that are not incorporated in this part;

(2) Are subject to tribal law, subject to paragraph (b) of this section; and

(3) Are not subject to State law or the law of a political subdivision thereof except that:

(i) State law or the law of a political subdivision thereof may apply in the specific areas and circumstances in Indian country where the Indian tribe with jurisdiction has made it expressly applicable;

(ii) State law may apply in the specific areas and circumstances in Indian country where Congress has made it expressly applicable; and

(iii) State law may apply where a Federal court has expressly applied State law to a specific area or circumstance in Indian country in the absence of Federal or tribal law.

(b) Tribal laws generally apply to land under the jurisdiction of the tribe enacting the laws, except to the extent that those tribal laws are inconsistent with these regulations or other applicable Federal law. However, these regulations may be superseded or modified by tribal laws, as long as:

(1) The tribe has notified us of the superseding or modifying effect of the tribal laws;

(2) The superseding or modifying of the regulation would not violate a Federal statute or judicial decision, or conflict with our general trust responsibility under Federal law; and

(3) The superseding or modifying of the regulation applies only to tribal land.

(c) Unless prohibited by Federal law, the parties to a lease may subject that lease to State or local law in the absence of Federal or tribal law, if:

(1) The lease includes a provision to this effect; and

(2) The Indian landowners expressly agree to the application of State or local law.

(d) An agreement under paragraph (c) of this section does not waive a tribe's sovereign immunity unless the tribe expressly states its intention to waive sovereign immunity in the lease of tribal land.

### § 162.015 May a lease contain a preference consistent with tribal law for employment of tribal members?

A lease of Indian land may include a provision, consistent with tribal law, requiring the lessee to give a preference to qualified tribal members, based on their political affiliation with the tribe.

### § 162.016 Will BIA comply with tribal laws in making lease decisions?

Unless contrary to Federal law, BIA will comply with tribal laws in making decisions regarding leases, including tribal laws regulating activities on leased land under tribal jurisdiction, including, but not limited to, tribal laws relating to land use, environmental protection, and historic or cultural preservation.

### § 162.017 What taxes apply to leases approved under this part?

(a) Subject only to applicable Federal law, permanent improvements on the leased land, without regard to ownership of those improvements, are not subject to any fee, tax, assessment, levy, or other charge imposed by any State or political subdivision of a State. Improvements may be subject to taxation by the Indian tribe with jurisdiction.

(b) Subject only to applicable Federal law, activities under a lease conducted on the leased premises are not subject to any fee, tax, assessment, levy, or other charge (e.g., business use, privilege, public utility, excise, gross revenue taxes) imposed by any State or political subdivision of a State. Activities may be subject to taxation by the Indian tribe with jurisdiction.

(c) Subject only to applicable Federal law, the leasehold or possessory interest is not subject to any fee, tax, assessment, levy, or other charge imposed by any State or political subdivision of a State. Leasehold or possessory interests may be subject to taxation by the Indian tribe with jurisdiction.

### § 162.018 May tribes administer this part on BIA's behalf?

A tribe or tribal organization may contract or compact under the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450f *et seq.*) to administer any portion of this part that is not an approval or disapproval of a lease document, waiver of a requirement for lease approval (including but not limited to waivers of fair market rental and valuation, bonding, and insurance), cancellation of a lease, or an appeal.

**§ 162.019 May a lease address access to the leased premises by roads or other infrastructure?**

A lease may address access to the leased premises by roads or other infrastructure, as long as the access complies with applicable statutory and regulatory requirements, including 25 CFR part 169. Roads or other infrastructure within the leased premises do not require compliance with 25 CFR part 169 during the term of the lease, unless otherwise stated in the lease.

**§ 162.020 May a lease combine tracts with different Indian landowners?**

(a) We may approve a lease that combines multiple tracts of Indian land into a unit, if we determine that unitization is:

(1) In the Indian landowners' best interest; and

(2) Consistent with the efficient administration of the land.

(b) For a lease that covers multiple tracts, the minimum consent requirements apply to each tract separately.

(c) Unless the lease provides otherwise, the rent or other compensation will be prorated in proportion to the acreage each tract contributes to the entire lease. Once prorated per tract, the rent will be distributed to the owners of each tract based upon their respective percentage interest in that particular tract.

**§ 162.021 What are BIA's responsibilities in approving leases?**

(a) We will work to provide assistance to Indian landowners in leasing their land, either through negotiations or advertisement.

(b) We will promote tribal control and self-determination over tribal land and other land under the tribe's jurisdiction, including through contracts and self-governance compacts entered into under the Indian Self-Determination and Education Assistance Act, as amended, 25 U.S.C. 450f *et. seq.*

(c) We will promptly respond to requests for BIA approval of leases, as specified in §§ 162.340, 162.440, 162.530, and 162.565.

(d) We will work to ensure that the use of the land is consistent with the Indian landowners' wishes and applicable tribal law.

**§ 162.022 What are BIA's responsibilities in administering and enforcing leases?**

(a) Upon written notification from an Indian landowner that the lessee has failed to comply with the terms and conditions of the lease, we will promptly take appropriate action, as specified in §§ 162.364, 162.464, and

162.589. Nothing in this part prevents an Indian landowner from exercising remedies available to the Indian landowners under the lease or applicable law.

(b) We will promptly respond to requests for BIA approval of amendments, assignments, leasehold mortgages, and subleases, as specified in subparts C, D, and E.

(c) We will respond to Indian landowners' concerns regarding the management of their land.

(d) We will take emergency action as needed to preserve the value of the land under § 162.024.

**§ 162.023 What if an individual or entity takes possession of or uses Indian land without an approved lease or other proper authorization?**

If an individual or entity takes possession of, or uses, Indian land without a lease and a lease is required, the unauthorized possession or use is a trespass. We may take action to recover possession, including eviction, on behalf of the Indian landowners and pursue any additional remedies available under applicable law. The Indian landowners may pursue any available remedies under applicable law.

**§ 162.024 May BIA take emergency action if Indian land is threatened?**

(a) We may take appropriate emergency action if there is a natural disaster or if an individual or entity causes or threatens to cause immediate and significant harm to Indian land. Emergency action may include judicial action seeking immediate cessation of the activity resulting in or threatening the harm.

(b) We will make reasonable efforts to notify the individual Indian landowners before and after taking emergency action. In all cases, we will notify the Indian landowners after taking emergency action by actual or constructive notice. We will provide written notification of our action to the Indian tribe exercising jurisdiction over the Indian land before and after taking emergency action.

**§ 162.025 May decisions under this part be appealed?**

Appeals from BIA decisions under this part may be taken under part 2 of this chapter, except for deemed approvals and as otherwise provided in this part. For purposes of appeals from BIA decisions under this part, "interested party" is defined as any person whose own direct economic interest is adversely affected by an action or decision. Our decision to disapprove a lease may be appealed

only by an Indian landowner. Our decision to disapprove any other lease document may be appealed only by the Indian landowners or the lessee.

**§ 162.026 Who can answer questions about leasing?**

An Indian landowner or prospective lessee may contact the local BIA realty office (or of any tribe acting on behalf of BIA under § 162.018) with jurisdiction over the land for answers to questions about the leasing process.

**§ 162.027 What documentation may BIA require in approving, administering, and enforcing leases?**

(a) We may require that the parties provide any pertinent environmental and technical records, reports, and other information (e.g., records of lease payments), related to approval of lease documents and enforcement of leases.

(b) We will adopt environmental assessments and environmental impact statements prepared by another Federal agency, Indian tribe, entity, or person under 43 CFR 46.320 and 42 CFR 1506.3, including those prepared under 25 U.S.C. 4115 and 25 CFR part 1000, but may require a supplement. We will use any reasonable evidence that another Federal agency has accepted the environmental report, including but not limited to, letters of approval or acceptance.

(c) Upon our request, the parties must make appropriate records, reports, or information available for our inspection and duplication. We will keep confidential any information that is marked confidential or proprietary and will exempt it from public release to the extent allowed by law and in accordance with 43 CFR part 2. We may, at our discretion, treat a lessee's failure to cooperate with such request, provide data, or grant access to information or records as a lease violation.

**§ 162.028 How may an Indian tribe obtain information about leases on its land?**

Upon request of the Indian tribe with jurisdiction, BIA will promptly provide information on the status of leases on tribal land, without requiring a Freedom of Information Act request.

**§ 162.029 How does BIA provide notice to the parties to a lease?**

(a) When this part requires us to notify the parties of the status of our review of a lease document (including but not limited to, providing notice to the parties of the date of receipt of a lease document, informing the parties of the need for additional review time, and informing the parties that a lease proposal package is not complete):

(1) For leases of tribal land, we will notify the lessee and the tribe by mail; and

(2) For leases of individually owned Indian land, we will notify the lessee by mail and, where feasible, the individual Indian landowners either by constructive notice or by mail.

(b) When this part requires us to notify the parties of our determination to approve or disapprove a lease document, and to provide any right of appeal:

(1) For leases of tribal land, we will notify the lessee and the tribe by mail; and

(2) For leases of individually owned Indian land, we will notify the lessee by mail and the individual Indian landowners either by constructive notice or by mail.

**Subpart B—Agricultural Leases**

■ 5. In newly transferred § 162.101, revise the section heading and the introductory text to read as follows:

**§ 162.101 What key terms do I need to know for this subpart?**

For the purposes of this subpart:

\* \* \* \* \*

**§§ 162.102 through 162.104 [Removed]**

■ 6. Remove newly transferred §§ 162.102 through 162.104.

**§ 162.105 [Amended]**

■ 7a. In newly transferred § 162.105, remove the word “leasing” from the section heading and add in its place the words “agricultural leasing” and remove the word “lease” and add in its place the words “agricultural lease” wherever it appears.

**§ 162.106 [Amended]**

■ 7b. In newly transferred § 162.106, remove the word “lease” and add in its place the words “agricultural lease” wherever it appears.

■ 8. In newly transferred § 162.107, revise the section heading and add introductory text to read as follows:

**§ 162.107 What are BIA’s objectives in granting and approving agricultural leases?**

We will assist Indian landowners in leasing their land for agricultural purposes. For the purposes of §§ 162.102 through 162.256:

\* \* \* \* \*

**§ 162.108 [Amended]**

■ 9a. In newly transferred § 162.108, remove the word “leases” from the section heading and paragraph (b) and add in its place the words “agricultural leases” in its place and remove the word

“lease” in paragraph (b) and add in its place the words “agricultural lease”.

**§ 162.109 [Amended]**

■ 9b. In newly transferred § 162.109, remove the word “leases” from the section heading and paragraph (a) and add in its place the words “agricultural leases” in its place and remove the three occurrences of the word “lease” in paragraph (c) and add in their place the words “agricultural lease”.

**§ 162.110 [Amended]**

■ 9c. In newly transferred § 162.110, remove the word “leases” wherever it appears and add in its place the words “agricultural leases”.

■ 10. In newly transferred § 162.111, revise the section heading, paragraph (a) introductory text, and paragraph (b) to read as follows:

**§ 162.111 Who owns the records associated with this subpart?**

(a) Records associated with this subpart are the property of the United States if they:

\* \* \* \* \*

(b) Records associated with this subpart not covered by paragraph (a) of this section that are made or received by a tribe or tribal organization in the conduct of business with the Department of the Interior under this subpart are the property of the tribe.

■ 11. Revise the heading for § 162.112 to read as follows:

**§ 162.112 How must records associated with this part be preserved?**

\* \* \* \* \*

**§ 162.113 [Amended]**

■ 12. In newly transferred § 162.113 remove the word “part” wherever it appears and add in its place the word “subpart”.

■ 13. Add new subparts C through D to read as follows:

**Subpart C—Residential Leases**

**Residential Leasing General Provisions**

Sec.

162.301 What types of leases does this subpart cover?

162.302 Is there a model residential lease form?

162.303 Who needs a lease for housing for public purposes?

**Lease Requirements**

162.311 How long may the term of a residential lease run?

162.312 What must the lease include if it contains an option to renew?

162.313 Are there mandatory provisions that a residential lease must contain?

162.314 May permanent improvements be made under a residential lease?

162.315 How must a residential lease address ownership of permanent improvements?

162.316 How will BIA enforce removal requirements in a residential lease?

162.317 How must a residential lease describe the land?

**Rental Requirements**

162.320 How much rent must be paid under a residential lease of tribal land?

162.321 How much rent must be paid under a residential lease of individually owned Indian land?

162.322 How will BIA determine fair market rental for a residential lease?

162.323 When are rental payments due under a residential lease?

162.324 Must a residential lease specify who receives rental payments?

162.325 What form of payment is acceptable under a residential lease?

162.326 May a residential lease provide for non-monetary or varying types of compensation?

162.327 Will BIA notify a lessee when a payment is due under a residential lease?

162.328 Must a residential lease provide for rental reviews or adjustments?

162.329 What other types of payments are required under a residential lease?

**Bonding and Insurance**

162.334 Is a performance bond required for a residential lease document?

162.335 Is insurance required for a residential lease document?

162.336 [Reserved]

162.337 [Reserved]

**Approval**

162.338 What documents are required for BIA approval of a residential lease?

162.339 Will BIA review a proposed residential lease before or during preparation of the NEPA review documentation?

162.340 What is the approval process for a residential lease?

162.341 How will BIA decide whether to approve a residential lease?

162.342 When will a residential lease be effective?

162.343 Must a residential lease document be recorded?

162.344 Will BIA require an appeal bond for an appeal of a decision on a residential lease document?

**Amendments**

162.345 May the parties amend a residential lease?

162.346 What are the consent requirements for an amendment of a residential lease?

162.347 What is the approval process for an amendment of a residential lease?

162.348 How will BIA decide whether to approve an amendment of a residential lease?

**Assignments**

162.349 May a lessee assign a residential lease?

162.350 What are the consent requirements for an assignment of a residential lease?

162.351 What is the approval process for an assignment of a residential lease?

162.352 How will BIA decide whether to approve an assignment of a residential lease?

#### Subleases

162.353 May a lessee sublease a residential lease?  
 162.354 What are the consent requirements for a sublease of a residential lease?  
 162.355 What is the approval process for a sublease of a residential lease?  
 162.356 How will BIA decide whether to approve a sublease of a residential lease?

#### Leasehold Mortgages

162.357 May a lessee mortgage a residential lease?  
 162.358 What are the consent requirements for a leasehold mortgage of a residential lease?  
 162.359 What is the approval process for a leasehold mortgage of a residential lease?  
 162.360 How will BIA decide whether to approve a leasehold mortgage of a residential lease?

#### Effectiveness, Compliance, and Enforcement

162.361 When will an amendment, assignment, sublease, or leasehold mortgage of a residential lease be effective?  
 162.362 What happens if BIA disapproves an amendment, assignment, sublease, or leasehold mortgage?  
 162.363 What happens if BIA does not meet a deadline for issuing a decision on a lease document?  
 162.364 May BIA investigate compliance with a residential lease?  
 162.365 May a residential lease provide for negotiated remedies if there is a violation?  
 162.366 What will BIA do about a violation of a residential lease?  
 162.367 What will BIA do if the lessee does not cure a violation of a residential lease on time?  
 162.368 Will late payment charges or special fees apply to delinquent payments due under a residential lease?  
 162.369 How will payment rights relating to a residential lease be allocated?  
 162.370 When will a cancellation of a residential lease be effective?  
 162.371 What will BIA do if a lessee remains in possession after a residential lease expires or is terminated or cancelled?  
 162.372 Will BIA appeal bond regulations apply to cancellation decisions involving residential leases?  
 162.373 When will BIA issue a decision on an appeal from a residential leasing decision?  
 162.374 What happens if the lessee abandons the leased premises?

#### Subpart D—Business Leases

##### Business Leasing General Provisions

Sec.  
 162.401 What types of leases does this subpart cover?  
 162.402 Is there a model business lease form?

#### Lease Requirements

162.411 How long may the term of a business lease run?  
 162.412 What must the lease include if it contains an option to renew?  
 162.413 Are there mandatory provisions that a business lease must contain?  
 162.414 May permanent improvements be made under a business lease?  
 162.415 How must a business lease address ownership of permanent improvements?  
 162.416 How will BIA enforce removal requirements in a business lease?  
 162.417 What requirements for due diligence must a business lease include?  
 162.418 How must a business lease describe the land?  
 162.419 May a business lease allow compatible uses?

#### Monetary Compensation Requirements

162.420 How much monetary compensation must be paid under a business lease of tribal land?  
 162.421 How much monetary compensation must be paid under a business lease of individually owned Indian land?  
 162.422 How will BIA determine fair market rental for a business lease?  
 162.423 When are monetary compensation payments due under a business lease?  
 162.424 Must a business lease specify who receives monetary compensation payments?  
 162.425 What form of monetary compensation payment is acceptable under a business lease?  
 162.426 May the business lease provide for non-monetary or varying types of compensation?  
 162.427 Will BIA notify a lessee when a payment is due under a business lease?  
 162.428 Must a business lease provide for compensation reviews or adjustments?  
 162.429 What other types of payments are required under a business lease?

#### Bonding and Insurance

162.434 Must a lessee provide a performance bond for a business lease?  
 162.435 What forms of security are acceptable under a business lease?  
 162.436 What is the release process for a performance bond or alternative form of security under a business lease?  
 162.437 Must a lessee provide insurance for a business lease?

#### Approval

162.438 What documents are required for BIA approval of a business lease?  
 162.439 Will BIA review a proposed business lease before or during preparation of the NEPA review documentation?  
 162.440 What is the approval process for a business lease?  
 162.441 How will BIA decide whether to approve a business lease?  
 162.442 When will a business lease be effective?  
 162.443 Must a business lease document be recorded?  
 162.444 Will BIA require an appeal bond for an appeal of a decision on a business lease document?

#### Amendments

162.445 May the parties amend a business lease?  
 162.446 What are the consent requirements for an amendment to a business lease?  
 162.447 What is the approval process for an amendment to a business lease?  
 162.448 How will BIA decide whether to approve an amendment to a business lease?

#### Assignments

162.449 May a lessee assign a business lease?  
 162.450 What are the consent requirements for an assignment of a business lease?  
 162.451 What is the approval process for an assignment of a business lease?  
 162.452 How will BIA decide whether to approve an assignment of a business lease?

#### Subleases

162.453 May a lessee sublease a business lease?  
 162.454 What are the consent requirements for a sublease of a business lease?  
 162.455 What is the approval process for a sublease of a business lease?  
 162.456 How will BIA decide whether to approve a sublease of a business lease?

#### Leasehold Mortgages

162.457 May a lessee mortgage a business lease?  
 162.458 What are the consent requirements for a leasehold mortgage of a business lease?  
 162.459 What is the approval process for a leasehold mortgage of a business lease?  
 162.460 How will BIA decide whether to approve a leasehold mortgage of a business lease?

#### Effectiveness, Compliance, and Enforcement

162.461 When will an amendment, assignment, sublease, or leasehold mortgage of a business lease be effective?  
 162.462 What happens if BIA disapproves an amendment, assignment, sublease, or leasehold mortgage of a business lease?  
 162.463 What happens if BIA does not meet a deadline for issuing a decision on a lease document?  
 162.464 May BIA investigate compliance with a business lease?  
 162.465 May a business lease provide for negotiated remedies if there is a violation?  
 162.466 What will BIA do about a violation of a business lease?  
 162.467 What will BIA do if the lessee does not cure a violation of a business lease on time?  
 162.468 Will late payment charges or special fees apply to delinquent payments due under a business lease?  
 162.469 How will payment rights relating to a business lease be allocated?  
 162.470 When will a cancellation of a business lease be effective?  
 162.471 What will BIA do if a lessee remains in possession after a business lease expires or is terminated or cancelled?

- 162.472 Will BIA appeal bond regulations apply to cancellation decisions involving business leases?
- 162.473 When will BIA issue a decision on an appeal from a business leasing decision?
- 162.474 What happens if the lessee abandons the leased premises?

### Subpart C—Residential Leases

#### Residential Leasing General Provisions

##### § 162.301 What types of leases does this subpart cover?

(a) This subpart covers both ground leases (undeveloped land) and leases of developed land (together with the permanent improvements thereon) on Indian land, for housing purposes. Leases covered by this subpart would authorize the construction or use of:

- (1) A single-family residence; and
- (2) Housing for public purposes, which may include office space necessary to administer programs for housing for public purposes.

(b) Leases for other residential development (for example, single-family residential developments and multi-family developments that are not housing for public purposes) are covered under subpart D of this part.

##### § 162.302 Is there a model residential lease form?

(a) We will make available one or more model lease forms that satisfy the formal requirements of this part, including, as appropriate, the model tribal lease form jointly developed by BIA, the Department of Housing and Urban Development, the Department of Veterans' Affairs, and the Department of Agriculture. Use of a model lease form is not mandatory, provided all requirements of this part are met.

(b) If a model lease form prepared by us is not used by the parties to a residential lease, we will assist the Indian landowners, upon their request, in drafting lease provisions or in using tribal lease forms that conform to the requirements of this part.

##### § 162.303 Who needs a lease for housing for public purposes?

A TDHE or tribal housing authority must obtain an approved residential lease under this subpart from the Indian landowners if, under the terms of its charter, it is a legal entity independent from the tribe, regardless of whether it is owned and operated by the tribe. A TDHE or tribal housing authority does not need an approved residential lease under this subpart if the tribe has authorized the TDHE's or tribal housing authority's possession through a tribal land assignment.

#### Lease Requirements

##### § 162.311 How long may the term of a residential lease run?

(a) A residential lease must provide for a definite lease term, state if there is an option to renew, and if so, provide for a definite term for the renewal period.

(1) The maximum term of a lease approved under 25 U.S.C. 4211 may not exceed 50 years or may be month-to-month. The lease may provide for an initial term of less than 50 years with a provision for one or more renewals, so long as the maximum term, including all renewals, does not exceed 50 years.

(2) The maximum term of a lease approved under 25 U.S.C. 415(a) may not exceed 50 years (consisting of an initial term not to exceed 25 years and one renewal not to exceed 25 years), unless a Federal statute provides for a longer maximum term (e.g., 25 U.S.C. 415(a) allows for a maximum term of 99 years for certain tribes), a different initial term, renewal term, or number of renewals.

(b) For tribal land, we will defer to the tribe's determination that the lease term, including any renewal, is reasonable. For individually owned Indian land, we will review the lease term, including any renewal, to ensure it is reasonable, given the:

- (1) Purpose of the lease;
- (2) Type of financing; and
- (3) Level of investment.

(c) Unless the lease provides otherwise, a residential lease may not be extended by holdover.

##### § 162.312 What must the lease include if it contains an option to renew?

(a) If the lease provides for an option to renew, the lease must specify:

(1) The time and manner in which the option must be exercised or is automatically effective;

(2) That confirmation of the renewal will be submitted to us, unless the lease provides for automatic renewal;

(3) Whether Indian landowner consent to the renewal is required;

(4) That the lessee must provide notice of the renewal to the Indian landowners and any mortgagees;

(5) The additional consideration, if any, that will be due upon the exercise of the option to renew or the start of the renewal term; and

(6) Any other conditions for renewal (e.g., that the lessee not be in violation of the lease at the time of renewal).

(b) We will record any renewal of a lease in the LTRO.

##### § 162.313 Are there mandatory provisions that a residential lease must contain?

(a) All residential leases must identify:

(1) The tract or parcel of land being leased;

(2) The purpose of the lease and authorized uses of the leased premises;

(3) The parties to the lease;

(4) The term of the lease;

(5) The ownership of permanent improvements and the responsibility for constructing, operating, maintaining, and managing permanent improvements under § 162.315; and

(6) Payment requirements and late payment charges, including interest.

(b) Where a representative executes a lease on behalf of an Indian landowner or lessee, the lease must identify the landowner or lessee being represented and the authority under which the action is taken.

(c) All residential leases must include the following provisions:

(1) The obligations of the lessee to the Indian landowners are also enforceable by the United States, so long as the land remains in trust or restricted status;

(2) There must not be any unlawful conduct, creation of a nuisance, illegal activity, or negligent use or waste of the leased premises;

(3) The lessee must comply with all applicable laws, ordinances, rules, regulations, and other legal requirements under § 162.014;

(4) If historic properties, archeological resources, human remains, or other cultural items not previously reported are encountered during the course of any activity associated with this lease, all activity in the immediate vicinity of the properties, resources, remains, or items will cease and the lessee will contact BIA and the tribe with jurisdiction to determine how to proceed and appropriate disposition;

(5) BIA has the right, at any reasonable time during the term of the lease and upon reasonable notice in accordance with § 162.364, to enter the leased premises for inspection and to ensure compliance; and

(6) BIA may, at its discretion, treat as a lease violation any failure by the lessee to cooperate with a BIA request to make appropriate records, reports, or information available for BIA inspection and duplication.

(d) Unless the lessee would be prohibited by law from doing so, the lease must also contain the following provisions:

(1) The lessee holds the United States and the Indian landowners harmless from any loss, liability, or damages resulting from the lessee's use or occupation of the leased premises; and

(2) The lessee indemnifies the United States and the Indian landowners against all liabilities or costs relating to use, handling, treatment, removal, storage, transportation, or disposal of hazardous materials, or release or discharge of any hazardous material from the leased premises that occurs during the lease term, regardless of fault, with the exception that the lessee is not required to indemnify the Indian landowners for liability or cost arising from the Indian landowners' negligence or willful misconduct.

(e) We may treat any provision of a lease document that violates Federal law as a violation of the lease.

**§ 162.314 May permanent improvements be made under a residential lease?**

(a) The lessee may construct permanent improvements under a residential lease if the residential lease authorizes the construction and generally describes the type and location of the permanent improvements to be constructed during the lease term.

(b) The lessee must provide reasonable notice to the Indian landowners of the construction of any permanent improvements not generally described in the lease.

**§ 162.315 How must a residential lease address ownership of permanent improvements?**

(a) A residential lease must specify who will own any permanent improvements the lessee constructs during the lease term. In addition, the lease must indicate whether each specific permanent improvement the lessee constructs will:

(1) Remain on the leased premises upon expiration, termination, or cancellation of the lease, in a condition satisfactory to the Indian landowners and become the property of the Indian landowners;

(2) Be removed within a time period specified in the lease, at the lessee's expense, with the leased premises to be restored as closely as possible to their condition before construction of the permanent improvements; or

(3) Be disposed of by other specified means.

(b) A lease that requires the lessee to remove the permanent improvements must also provide the Indian landowners with an option to take possession of and title to the permanent improvements if the improvements are not removed within the specified time period.

**§ 162.316 How will BIA enforce removal requirements in a residential lease?**

We may take appropriate enforcement action to ensure removal of the permanent improvements and restoration of the premises at the lessee's expense:

(a) In consultation with the tribe for tribal land or, where feasible, with Indian landowners for individually owned Indian land; and

(b) Before or after expiration, termination, or cancellation of the lease.

**§ 162.317 How must a residential lease describe the land?**

(a) A residential lease must describe the leased premises by reference to a public or private survey, if possible. If the land cannot be so described, the lease must include one or more of the following:

(1) A legal description;

(2) A survey-grade global positioning system description; or

(3) Another description prepared by a registered land surveyor that is sufficient to identify the leased premises.

(b) If the tract is fractionated, we will identify the undivided trust or restricted interests in the leased premises.

**Rental Requirements**

**§ 162.320 How much rent must be paid under a residential lease of tribal land?**

(a) A residential lease of tribal land may allow for any payment amount negotiated by the tribe, and we will defer to the tribe and not require a valuation, if:

(1) The lease is for housing for public purposes; or

(2) The tribe submits a signed certification or tribal authorization stating that it has determined the negotiated amount to be in its best interest.

(b) The tribe may request, in writing, that we determine fair market rental, in which case we will use a valuation in accordance with § 162.322. After providing the tribe with the fair market rental, we will defer to a tribe's decision to allow for any payment amount negotiated by the tribe.

(c) If the conditions in paragraph (a) or (b) of this section are not met, we will require that the lease provide for fair market rental based on a valuation in accordance with § 162.322.

**§ 162.321 How much rent must be paid under a residential lease of individually owned Indian land?**

(a) A residential lease of individually owned Indian land must require payment of not less than fair market rental except that we may approve a

lease of individually owned Indian land that provides for the payment of nominal rent, or less than a fair market rental, if:

(1) One hundred percent of the Indian landowners execute a written waiver of the right to receive fair market rental; or

(2) We waive the requirement under paragraph (c) of this section.

(b) We will require a valuation in accordance with § 162.322, unless:

(1) One hundred percent of the Indian landowners submit to us a written request to waive the valuation requirement; or

(2) We waive the requirement under paragraph (c) of this section.

(c) If the owners of the applicable percentage of interests under § 162.012 consent to a residential lease on behalf of all the Indian landowners of a fractionated tract, the lease must provide that the non-consenting Indian landowners (and those on whose behalf we have consented) receive fair market rental, as determined by a valuation, unless we waive the requirement because:

(1) The lessee is a co-owner who, as of January 4, 2013, has been residing on the tract for at least 7 years, and no other co-owner raises an objection to BIA by July 3, 2013 to the lessee's continued possession of the tract; or

(2) The tribe or lessee will construct infrastructure improvements on, or serving, the leased premises, and we determine it is in the best interest of all the landowners.

**§ 162.322 How will BIA determine fair market rental for a residential lease?**

(a) We will use a market analysis, appraisal, or other appropriate valuation method to determine the fair market rental for residential leases of individually owned Indian land. We will also do this, at the request of the tribe, for tribal land.

(b) We will either:

(1) Prepare, or have prepared, a market analysis, appraisal, or other appropriate valuation method; or

(2) Use an approved market analysis, appraisal, or other appropriate valuation method from the Indian landowners or lessee.

(c) We will use or approve a market analysis, appraisal, or other appropriate valuation method for use only if it:

(1) Has been prepared in accordance with USPAP or a valuation method developed by the Secretary under 25 U.S.C. 2214; and

(2) Complies with Department policies regarding appraisals, including third-party appraisals.

**§ 162.323 When are rental payments due under a residential lease?**

(a) A residential lease must specify the dates on which payments are due.

(b) Unless the lease provides otherwise, payments may not be made or accepted more than one year in advance of the due date.

(c) Payments are due at the time specified in the lease, regardless of whether the lessee receives an advance billing or other notice that a payment is due.

**§ 162.324 Must a residential lease specify who receives rental payments?**

(a) A residential lease must specify whether the lessee will make payments directly to the Indian landowners (direct pay) or to us on their behalf.

(b) The lessee may make payments directly to the Indian landowners if:

- (1) The Indian landowners' trust accounts are unencumbered;
- (2) There are 10 or fewer beneficial owners; and

(3) One hundred percent of the beneficial owners (including those on whose behalf we have consented) agree to receive payment directly from the lessee at the start of the lease.

(c) If the lease provides that the lessee will directly pay the Indian landowners, then:

- (1) The lease must include provisions for proof of payment upon our request.
- (2) When we consent on behalf of an Indian landowner, the lessee must make payment to us on behalf of that landowner.

(3) The lessee must send direct payments to the parties and addresses specified in the lease, unless the lessee receives notice of a change of ownership or address.

(4) Unless the lease provides otherwise, payments may not be made payable directly to anyone other than the Indian landowners.

(5) Direct payments must continue through the duration of the lease, except that:

(i) The lessee must make all Indian landowners' payments to us if 100 percent of the Indian landowners agree to suspend direct pay and provide us with documentation of their agreement; and

(ii) The lessee must make an individual Indian landowner's payment to us if that individual Indian landowner who dies, is declared non compos mentis, owes a debt resulting in a trust account encumbrance, or his or her whereabouts become unknown.

**§ 162.325 What form of payment is acceptable under a residential lease?**

(a) When payments are made directly to Indian landowners, the form of

payment must be acceptable to the Indian landowners.

(b) When payments are made to us, our preferred method of payment is electronic funds transfer payments. We will also accept:

- (1) Money orders;
- (2) Personal checks;
- (3) Certified checks; or
- (4) Cashier's checks.

(c) We will not accept cash or foreign currency.

(d) We will accept third-party checks only from financial institutions or Federal agencies.

**§ 162.326 May a residential lease provide for non-monetary or varying types of compensation?**

(a) A lease may provide for the following, subject to the conditions in paragraphs (b) and (c) of this section:

- (1) Alternative forms of rental, including, but not limited to in-kind consideration; or
- (2) Varying types of compensation at specific stages during the life of the lease.

(b) For tribal land, we will defer to the tribe's determination that the compensation under paragraph (a) of this section is in its best interest, if either:

- (1) The lease is for housing for public purposes; or
- (2) The tribe submits a signed certification or tribal authorization stating that it has determined the compensation under paragraph (a) of this section to be in its best interest.

(c) For individually owned Indian land, we may approve a lease that provides for compensation under paragraph (a) of this section if we determine that it is in the best interest of the Indian landowners.

**§ 162.327 Will BIA notify a lessee when a payment is due under a residential lease?**

Upon request of the Indian landowners, we may issue invoices to a lessee in advance of the dates on which payments are due under a residential lease. The lessee's obligation to make these payments in a timely manner will not be excused if invoices are not issued, delivered, or received.

**§ 162.328 Must a residential lease provide for rental reviews or adjustments?**

(a) For a residential lease of tribal land, unless the lease provides otherwise, no periodic review of the adequacy of rent or rental adjustment is required if:

- (1) The tribe states in a tribal certification or authorization that it has determined that not having rental reviews and/or adjustments is in its best interest; or

(2) The lease is for housing for public purposes.

(b) For a residential lease of individually Indian owned land, unless the lease provides otherwise, no periodic review of the adequacy of rent or rental adjustment is required if:

(1) The lease is for housing for public purposes;

(2) The term of the lease is 5 years or less;

(3) The lease provides for automatic rental adjustments; or

(4) We determine it is in the best interest of the Indian landowners not to require a review or automatic adjustment based on circumstances including, but not limited to, the following:

(i) The lease provides for payment of less than fair market rental; or

(ii) The lease provides for most or all rent to be paid during the first 5 years of the lease term or before the date the review would be conducted.

(c) If the conditions in paragraph (a) or (b) of this section are not met, a review of the adequacy of rent must occur at least every fifth year, in the manner specified in the lease. The lease must specify:

- (1) When adjustments take effect;
- (2) Who can make adjustments;
- (3) What the adjustments are based on; and
- (4) How to resolve disputes arising from the adjustments.

(d) When a review results in the need for adjustment of rent, the Indian landowners must consent to the adjustment in accordance with § 162.012, unless the lease provides otherwise.

**§ 162.329 What other types of payments are required under a residential lease?**

(a) The lessee may be required to pay additional fees, taxes, and assessments associated with the use of the land, as determined by entities having jurisdiction, except as provided in § 162.017. The lessee must pay these amounts to the appropriate office.

(b) If the leased premises are within an Indian irrigation project or drainage district, except as otherwise provided in part 171 of this chapter, the lessee must pay all operation and maintenance charges that accrue during the lease term. The lessee must pay these amounts to the appropriate office in charge of the irrigation project or drainage district. We will treat failure to make these payments as a violation of the lease.

**Bonding and Insurance****§ 162.334 Is a performance bond required for a residential lease document?**

We will not require a lessee or assignee to provide a performance bond or alternative form of security for a residential lease document.

**§ 162.335 Is insurance required for a residential lease document?**

We will not require a lessee or assignee to provide insurance for a residential lease document.

**§ 162.336 [Reserved]****§ 162.337 [Reserved]****Approval****§ 162.338 What documents are required for BIA approval of a residential lease?**

A lessee or the Indian landowners must submit the following documents to us to obtain BIA approval of a residential lease:

(a) A lease executed by the Indian landowners and the lessee that meets the requirements of this part;

(b) For tribal land, a tribal authorization for the lease and, if applicable, meeting the requirements of §§ 162.320(a), 162.326(b), and 162.328(a), or a separate signed certification meeting the requirements of §§ 162.320(a), 162.326(b), and 162.328(a);

(c) A valuation, if required under § 162.320 or § 162.321;

(d) A statement from the appropriate tribal authority that the proposed use is in conformance with applicable tribal law, if required by the tribe;

(e) Reports, surveys, and site assessments as needed to facilitate compliance with applicable Federal and tribal environmental and land use requirements, including any documentation prepared under § 162.027(b);

(f) A preliminary site plan identifying the proposed location of residential development, roads, and utilities, if applicable, unless the lease is for housing for public purposes;

(g) A legal description of the land under § 162.317;

(h) If the lease is being approved under 25 U.S.C. 415, information to assist us in our evaluation of the factors in 25 U.S.C. 415(a); and

(i) If the lessee is a corporation, limited liability company, partnership, joint venture, or other legal entity, except a tribal entity, information such as organizational documents, certificates, filing records, and resolutions, that demonstrates that:

(1) The representative has authority to execute a lease;

(2) The lease will be enforceable against the lessee; and

(3) The legal entity is in good standing and authorized to conduct business in the jurisdiction where the land is located.

**§ 162.339 Will BIA review a proposed residential lease before or during preparation of the NEPA review documentation?**

Upon request of the Indian landowners, we will review the proposed residential lease after negotiation by the parties, before or during preparation of the NEPA review documentation and any valuation. Within 10 days of receiving the proposed lease, we will provide an acknowledgement of the terms of the lease and identify any provisions that, based on this acknowledgment review, would justify disapproval of the lease, pending results of the NEPA review and any valuation.

**§ 162.340 What is the approval process for a residential lease?**

(a) Before we approve a residential lease, we must determine that the lease is in the best interest of the Indian landowners. In making that determination, we will:

(1) Review the lease and supporting documents;

(2) Ensure compliance with applicable laws and ordinances;

(3) If the lease is being approved under 25 U.S.C. 415, assure ourselves that adequate consideration has been given to the factors in 25 U.S.C. 415(a); and

(4) Require any lease modifications or mitigation measures necessary to satisfy any requirements including any other Federal or tribal land use requirements.

(b) Upon receiving a residential lease package, we will promptly notify the parties whether the package is or is not complete. A complete package includes all the information and supporting documents required under this subpart, including but not limited to, NEPA review documentation and valuation documentation, where applicable.

(1) If the residential lease package is not complete, our letter will identify the missing information or documents required for a complete package. If we do not respond to the submission of a residential lease package, the parties may take action under § 162.363.

(2) If the residential lease package is complete, we will notify the parties of the date of receipt. Within 30 days of the receipt date, we will approve or disapprove the lease or return the package for revision.

(c) If we do not meet the deadlines in this section, then the parties may take action under § 162.363.

(d) We will provide any lease approval or disapproval and the basis for the determination, along with notification of any appeal rights under part 2 of this chapter, in writing to the parties to the lease.

(e) Any residential lease issued under the authority of the Native American Housing Assistance and Self-Determination Act, 25 U.S.C 4211(a), whether on tribal land or on individually owned Indian land, must be approved by us and by the affected tribe.

(f) We will provide approved residential leases on tribal land to the lessee and provide a copy to the tribe. We will provide approved residential leases on individually owned Indian land to the lessee, and make copies available to the Indian landowners upon written request.

**§ 162.341 How will BIA decide whether to approve a residential lease?**

(a) We will approve a residential lease unless:

(1) The required consents have not been obtained from the parties to the lease;

(2) The requirements of this subpart have not been met; or

(3) We find a compelling reason to withhold our approval in order to protect the best interests of the Indian landowners.

(b) We will defer, to the maximum extent possible, to the Indian landowners' determination that the residential lease is in their best interest.

(c) We may not unreasonably withhold approval of a lease.

**§ 162.342 When will a residential lease be effective?**

(a) A residential lease will be effective on the date that we approve the lease, even if an appeal is filed under part 2 of this chapter.

(b) The lease may specify a date on which the obligations between the parties to a residential lease are triggered. Such date may be before or after the approval date under paragraph (a) of this section.

**§ 162.343 Must a residential lease document be recorded?**

(a) Any residential lease, amendment, assignment, or leasehold mortgage must be recorded in the LTRO with jurisdiction over the leased land. A residential sublease need not be recorded.

(1) We will record the lease or other document immediately following our approval.



(2) When our approval of an assignment is not required, the parties must record the assignment in the LTRO with jurisdiction over the leased land.

(b) The tribe must record lease documents for the following types of leases in the LTRO with jurisdiction over the leased lands, even though BIA approval is not required:

(1) Leases of tribal land that a corporate entity leases to a third party under 25 U.S.C. 477; and

(2) Leases of tribal land under a special act of Congress authorizing leases without our approval under certain conditions.

**§ 162.344 Will BIA require an appeal bond for an appeal of a decision on a residential lease document?**

BIA will not require an appeal bond for an appeal of a decision on a residential lease document.

**Amendments**

**§ 162.345 May the parties amend a residential lease?**

The parties may amend a residential lease by obtaining:

(a) The lessee's signature;

(b) The Indian landowners' consent under the requirements in § 162.346; and

(c) BIA approval of the amendment under §§ 162.347 and 162.348.

**§ 162.346 What are the consent requirements for an amendment of a residential lease?**

(a) Unless the lease provides otherwise, the lessee must notify all Indian landowners of the proposed amendment.

(b) The Indian landowners, or their representatives under § 162.013, must consent to an amendment of a residential lease in the same percentages and manner as a new residential lease under § 162.012, unless the lease:

(1) Provides that individual Indian landowners are deemed to have consented if they do not object in writing to the amendment within a specified period of time following Indian landowners' receipt of the amendment and the lease meets the requirements of paragraph (c) of this section;

(2) Authorizes one or more representatives to consent to an amendment on behalf of all Indian landowners; or

(3) Designates us as the Indian landowners' representative for the purposes of consent to an amendment.

(c) If the lease provides for deemed consent under paragraph (b)(1) of this section, it must require the parties to submit to us:

(1) A copy of the executed amendment or other documentation of any Indian landowners' actual consent;

(2) Proof of mailing of the amendment to any Indian landowners who are deemed to have consented; and

(3) Any other pertinent information for review.

(d) Unless specifically authorized in the lease, a written power of attorney, or a court document, Indian landowners may not be deemed to have consented to, and an Indian landowner's designated representative may not negotiate or consent to, an amendment that would:

(1) Reduce the payment obligations to the Indian landowners;

(2) Increase or decrease the lease area; or

(3) Terminate or change the term of the lease.

**§ 162.347 What is the approval process for an amendment of a residential lease?**

(a) When we receive an amendment that meets the requirements of this subpart, we will notify the parties of the date we receive it. We have 30 days from receipt of the executed amendment, proof of required consents, and required documentation to approve or disapprove the amendment. Our determination whether to approve the amendment will be in writing and will state the basis for our approval or disapproval.

(b) If we do not send a determination within 30 days from receipt of the required documents, the amendment is deemed approved to the extent consistent with Federal law. Unless the lease provides otherwise, provisions of the amendment that are inconsistent with Federal law will be severed and unenforceable; all other provisions of the amendment will remain in force.

**§ 162.348 How will BIA decide whether to approve an amendment of a residential lease?**

(a) We may disapprove a residential lease amendment only if at least one of the following is true:

(1) The Indian landowners have not consented and their consent is required;

(2) The lessee's mortgagees have not consented;

(3) The lessee is in violation of the lease;

(4) The requirements of this subpart have not been met; or

(5) We find a compelling reason to withhold our approval in order to protect the best interests of the Indian landowners.

(b) We will defer, to the maximum extent possible, to the Indian landowners' determination that the amendment is in their best interest.

(c) We may not unreasonably withhold approval of an amendment.

**Assignments**

**§ 162.349 May a lessee assign a residential lease?**

(a) A lessee may assign a residential lease by meeting the consent requirements in § 162.350 and obtaining our approval of the assignment under §§ 162.351 and 162.352 or by meeting the conditions in paragraph (b) of this section.

(b) The lessee may assign the lease without our approval or meeting consent requirements if:

(1) The lease is for housing for public purposes, or the assignee is a leasehold mortgagee or its designee, acquiring the lease either through foreclosure or by conveyance;

(2) The assignee agrees in writing to assume all of the obligations and conditions of the lease; and

(3) The assignee agrees in writing that any transfer of the lease will be in accordance with applicable law under § 162.014.

**§ 162.350 What are the consent requirements for an assignment of a residential lease?**

(a) Unless the lease provides otherwise, the lessee must notify all Indian landowners of the proposed assignment.

(b) The Indian landowners, or their representatives under § 162.013, must consent to an assignment of a residential lease in the same percentages and manner as a new residential lease under § 162.012, unless the lease:

(1) Provides for assignments without further consent of the Indian landowners or with consent in specified percentages and manner;

(2) Provides that individual Indian landowners are deemed to have consented where they do not object in writing to the assignment within a specified period of time following the landowners' receipt of the assignment and the lease meets the requirements of paragraph (c) of this section;

(3) Authorizes one or more of the Indian landowners to consent on behalf of all Indian landowners; or

(4) Designates us as the Indian landowners' representative for the purposes of consenting to an assignment.

(c) If the lease provides for deemed consent under paragraph (b)(2) of this section, it must require the parties to submit to us:

(1) A copy of the executed assignment or other documentation of any Indian landowners' actual consent;

(2) Proof of mailing of the assignment to any Indian landowners who are deemed to have consented; and

(3) Any other pertinent information for us to review.

(d) The lessee must obtain the consent of the holders of any mortgages.

**§ 162.351 What is the approval process for an assignment of a residential lease?**

(a) When we receive an assignment that meets the requirements of this subpart, we will notify the parties of the date we receive it. If our approval is required, we have 30 days from receipt of the executed assignment, proof of required consents, and required documentation to approve or disapprove the assignment. Our determination whether to approve the assignment will be in writing and will state the basis for our approval or disapproval.

(b) If we do not meet the deadline in this section, the lessee or Indian landowners may take appropriate action under § 162.363.

**§ 162.352 How will BIA decide whether to approve an assignment of a residential lease?**

(a) We may disapprove an assignment of a residential lease only if at least one of the following is true:

(1) The Indian landowners have not consented, and their consent is required;

(2) The lessee's mortgagees have not consented;

(3) The lessee is in violation of the lease;

(4) The assignee does not agree to be bound by the terms of the lease;

(5) The requirements of this subpart have not been met; or

(6) We find a compelling reason to withhold our approval in order to protect the best interests of the Indian landowners.

(b) In making the finding required by paragraph (a)(6) of this section, we may consider whether the value of any part of the leased premises not covered by the assignment would be adversely affected.

(c) We will defer, to the maximum extent possible, to the Indian landowners' determination that the assignment is in their best interest.

(d) We may not unreasonably withhold approval of an assignment.

**Subleases**

**§ 162.353 May a lessee sublease a residential lease?**

(a) A lessee may sublease a residential lease by meeting the consent requirements in § 162.354 and obtaining our approval of the sublease under

§§ 162.355 and 162.356, or by meeting the conditions in paragraph (b) of this section.

(b) The lessee may sublease without meeting consent requirements or obtaining BIA approval of the sublease, if:

(1) The lease provides for subleasing without meeting consent requirements or obtaining BIA approval; and

(2) The sublease does not relieve the lessee/sublessor of any liability.

**§ 162.354 What are the consent requirements for a sublease of a residential lease?**

(a) Unless the lease provides otherwise, the lessee must notify all Indian landowners of the proposed sublease.

(b) The Indian landowners must consent to a sublease of a residential lease in the same percentages and manner as a new residential lease under § 162.012, unless the lease:

(1) Provides that individual Indian landowners are deemed to have consented where they do not object in writing to the sublease within a specified period of time following the landowners' receipt of the sublease and the lease meets the requirements of paragraph (c) of this section;

(2) Authorizes one or more of the Indian landowners to consent on behalf of all Indian landowners; or

(3) Designates us as the Indian landowners' representative for the purposes of consenting to a sublease.

(c) If the lease provides for deemed consent under paragraph (b)(1) of this section, it must require the parties to submit to us:

(1) A copy of the executed sublease or other documentation of any landowner's actual consent;

(2) Proof of mailing of the sublease to any Indian landowners who are deemed to have consented; and

(3) Any other pertinent information for us to review.

(d) The lessee must obtain the consent of any mortgagees.

**§ 162.355 What is the approval process for a sublease of a residential lease?**

(a) When we receive a sublease that meets the requirements of this subpart, we will notify the parties of the date we receive it. If our approval is required, we have 30 days from receipt of the executed sublease, proof of required consents, and required documentation to approve or disapprove the sublease.

(b) If we do not send a determination within 30 days from receipt of required documents, the sublease is deemed approved to the extent consistent with Federal law. Unless the lease provides

otherwise, provisions of the sublease that are inconsistent with Federal law will be severed and unenforceable; all other provisions of the sublease will remain in force.

**§ 162.356 How will BIA decide whether to approve a sublease of a residential lease?**

(a) We may disapprove a sublease of a residential lease only if at least one of the following is true:

(1) The Indian landowners have not consented, and their consent is required;

(2) The lessee's mortgagees have not consented;

(3) The lessee is in violation of the lease;

(4) The lessee will not remain liable under the lease;

(5) The requirements of this subpart have not been met; or

(6) We find a compelling reason to withhold our approval in order to protect the best interests of the Indian landowners.

(b) In making the finding required by paragraph (a)(6) of this section, we may consider whether the value of any part of the leased premises not covered by the sublease would be adversely affected.

(c) We will defer, to the maximum extent possible, to the Indian landowners' determination that the sublease is in their best interest.

(d) We may not unreasonably withhold approval of a sublease.

**Leasehold Mortgages**

**§ 162.357 May a lessee mortgage a residential lease?**

(a) A lessee may mortgage a residential lease by meeting the consent requirements in § 162.358 and obtaining BIA approval of the leasehold mortgage under in §§ 162.359 and 162.360.

(b) Refer to § 162.349(b) for information on what happens if a sale or foreclosure under an approved mortgage of the leasehold interest occurs.

**§ 162.358 What are the consent requirements for a leasehold mortgage of a residential lease?**

(a) Unless the lease provides otherwise, the lessee must notify all Indian landowners of the proposed leasehold mortgage.

(b) The Indian landowners, or their representatives under § 162.013, must consent to a leasehold mortgage of a residential lease in the same percentages and manner as a new residential lease under § 162.012, unless the lease:

(1) States that landowner consent is not required for a leasehold mortgage and identifies what law would apply in case of foreclosure;

(2) Provides that individual Indian landowners are deemed to have consented where they do not object in writing to the leasehold mortgage within a specified period of time following the landowners' receipt of the leasehold mortgage and the lease meets the requirements of paragraph (c) of this section;

(3) Authorizes one or more representatives to consent to a leasehold mortgage on behalf of all Indian landowners; or

(4) Designates us as the Indian landowners' representative for the purposes of consenting to a leasehold mortgage.

(c) If the lease provides for deemed consent under paragraph (b)(2) of this section, it must require the parties to submit to us:

(1) A copy of the executed leasehold mortgage or other documentation of any Indian landowners' actual consent;

(2) Proof of mailing of the leasehold mortgage to any Indian landowners who are deemed to have consented; and

(3) Any other pertinent information for us to review.

**§ 162.359 What is the approval process for a leasehold mortgage of a residential lease?**

(a) When we receive leasehold mortgage that meets the requirements of this subpart, we will notify the parties of the date we receive it. We have 20 days from receipt of the executed leasehold mortgage, proof of required consents, and required documentation to approve or disapprove the leasehold mortgage. Our determination whether to approve the leasehold mortgage will be in writing and will state the basis for our approval or disapproval.

(b) If we do not meet the deadline in this section, the lessee may take appropriate action under § 162.363.

**§ 162.360 How will BIA decide whether to approve a leasehold mortgage of a residential lease?**

(a) We may disapprove a leasehold mortgage of a residential lease only if at least one of the following is true:

(1) The Indian landowners have not consented, and their consent is required;

(2) The requirements of this subpart have not been met; or

(3) We find a compelling reason to withhold our approval in order to protect the best interests of the Indian landowners.

(b) In making the finding required by paragraph (a)(3) of this section, we may consider whether:

(1) The leasehold mortgage proceeds would be used for purposes unrelated to the leased premises; and

(2) The leasehold mortgage is limited to the leasehold.

(c) We will defer, to the maximum extent possible, to the Indian landowners' determination that the leasehold mortgage is in their best interest.

(d) We may not unreasonably withhold approval of a leasehold mortgage.

**Effectiveness, Compliance, and Enforcement**

**§ 162.361 When will an amendment, assignment, sublease, or leasehold mortgage of a residential lease be effective?**

(a) An amendment, assignment, sublease, or leasehold mortgage of a residential lease will be effective when approved, even if an appeal is filed under part 2 of this chapter, except:

(1) If the amendment or sublease was deemed approved under § 162.347(b) or § 162.355(b), the amendment or sublease becomes effective 45 days from the date the parties mailed or delivered the document to us for our review; and

(2) An assignment that does not require our approval under § 162.349(b) or a sublease that does not require our approval under § 162.353(b) becomes effective on the effective date specified in the assignment or sublease. If the assignment or sublease does not specify the effective date, it becomes effective upon execution by the parties.

(b) We will provide copies of approved documents to the party requesting approval, to the tribe for tribal land, and upon request, to other parties to the lease document.

**§ 162.362 What happens if BIA disapproves an amendment, assignment, sublease, or leasehold mortgage?**

If we disapprove an amendment, assignment, sublease, or leasehold mortgage of a residential lease, we will notify the parties immediately and advise the landowners of their right to appeal the decision under part 2 of this chapter.

**§ 162.363 What happens if BIA does not meet a deadline for issuing a decision on a lease document?**

(a) If a Superintendent does not meet a deadline for issuing a decision on a lease, assignment, or leasehold mortgage, the parties may file a written notice to compel action with the appropriate Regional Director.

(b) The Regional Director has 15 days from receiving the notice to:

(1) Issue a decision; or

(2) Order the Superintendent to issue a decision within the time set out in the order.

(c) The parties may file a written notice to compel action with the BIA Director if:

(1) The Regional Director does not meet the deadline in paragraph (b) of this section;

(2) The Superintendent does not issue a decision within the time set by the Regional Director under paragraph (b)(2) of this section; or

(3) The initial decision on the lease, assignment, or leasehold mortgage is with the Regional Director, and he or she does not meet the deadline for such decision.

(d) The BIA Director has 15 days from receiving the notice to:

(1) Issue a decision; or

(2) Order the Regional Director or Superintendent to issue a decision within the time set out in the order.

(e) If the Regional Director or Superintendent does not issue a decision within the time set out in the order under paragraph (d)(2) of this section, then the BIA Director must issue a decision within 15 days from the expiration of the time set out in the order.

(f) The parties may file an appeal from our inaction to the Interior Board of Indian Appeals if the Director does not meet the deadline in paragraph (d) or (e) of this section.

(g) The provisions of 25 CFR 2.8 do not apply to the inaction of BIA officials with respect to a decision on a lease, amendment, assignment, sublease, or leasehold mortgage under this subpart.

**§ 162.364 May BIA investigate compliance with a residential lease?**

(a) We may enter the leased premises at any reasonable time, upon reasonable notice, and consistent with any notice requirements under applicable tribal law and applicable lease documents, to protect the interests of the Indian landowners and ensure that the lessee is in compliance with the requirements of the lease.

(b) If an Indian landowner notifies us that a specific lease violation has occurred, we will promptly initiate an appropriate investigation.

**§ 162.365 May a residential lease provide for negotiated remedies if there is a violation?**

(a) A residential lease of tribal land may provide either or both parties with negotiated remedies in the event of a lease violation, including, but not limited to, the power to terminate the lease. If the lease provides one or both parties with the power to terminate the lease:

(1) BIA approval of the termination is not required;

(2) The termination is effective without BIA cancellation; and

(3) The Indian landowners must notify us of the termination so that we may record it in the LTR0.

(b) A residential lease of individually owned Indian land may provide either or both parties with negotiated remedies, so long as the lease also specifies the manner in which those remedies may be exercised by or on behalf of the Indian landowners of the applicable percentage of interests under § 162.012 of this part. If the lease provides one or both parties with the power to terminate the lease:

(1) BIA concurrence with the termination is required to ensure that the Indian landowners of the applicable percentage of interests have consented; and

(2) BIA will record the termination in the LTR0.

(c) The parties must notify any mortgagee of any violation that may result in termination and the termination of a residential lease.

(d) Negotiated remedies may apply in addition to, or instead of, the cancellation remedy available to us, as specified in the lease. The landowners may request our assistance in enforcing negotiated remedies.

(e) A residential lease may provide that lease violations will be addressed by the tribe, and that lease disputes will be resolved by a tribal court, any other court of competent jurisdiction, or by a tribal governing body in the absence of a tribal court, or through an alternative dispute resolution method. We may not be bound by decisions made in such forums, but we will defer to ongoing actions or proceedings, as appropriate, in deciding whether to exercise any of the remedies available to us.

**162.366 What will BIA do about a violation of a residential lease?**

(a) In the absence of actions or proceedings described in § 162.365(e), or if it is not appropriate for us to defer to the actions or proceedings, we will follow the procedures in paragraphs (b), (c), and (d) of this section and, as applicable, ensure consistency with 25 U.S.C. 4137.

(b) If we determine there has been a violation of the conditions of a residential lease other than a violation of payment provisions covered by paragraph (c) of this section, we will promptly send the lessee and any mortgagee a notice of violation by certified mail, return receipt requested.

(1) We will send a copy of the notice of violation to the tribe for tribal land, or provide constructive notice to Indian

landowners for individually owned Indian land.

(2) The notice of violation will advise the lessee that, within 10 business days of the receipt of a notice of violation, the lessee must:

(i) Cure the violation and notify us, and the tribe for tribal land, in writing that the violation has been cured;

(ii) Dispute our determination that a violation has occurred; or

(iii) Request additional time to cure the violation.

(3) The notice of violation may order the lessee to cease operations under the lease.

(c) A lessee's failure to pay rent in the time and manner required by a residential lease is a violation of the lease, and we will issue a notice of violation in accordance with this paragraph.

(1) We will send the lessee and any mortgagee a notice of violation by certified mail, return receipt requested:

(i) Promptly following the date on which the payment was due, if the lease requires that rental payments be made to us; or

(ii) Promptly following the date on which we receive actual notice of non-payment from the Indian landowners, if the lease provides for payment directly to the Indian landowners.

(2) We will send a copy of the notice of violation to the tribe for tribal land, or provide constructive notice to Indian landowners for individually owned Indian land.

(3) The notice of violation will require the lessee to provide adequate proof of payment.

(d) The lessee will continue to be responsible for the obligations in the lease until the lease expires or is terminated or cancelled.

**§ 162.367 What will BIA do if the lessee does not cure a violation of a residential lease on time?**

(a) If the lessee does not cure a violation of a residential lease within the required time period, or provide adequate proof of payment as required in the notice of violation, we will consult with the tribe for tribal land or, where feasible, with Indian landowners for individually owned Indian land, and determine whether:

(1) We should cancel the lease;

(2) The Indian landowners wish to invoke any remedies available to them under the lease;

(3) We should invoke other remedies available under the lease or applicable law, including collection on any available performance bond or, for failure to pay rent, referral of the debt

to the Department of the Treasury for collection; or

(4) The lessee should be granted additional time in which to cure the violation.

(b) Following consultation with the tribe for tribal land or, where feasible, with Indian landowners for individually owned Indian land, we may take action to recover unpaid rent and any associated late payment charges.

(1) We do not have to cancel the lease or give any further notice to the lessee before taking action to recover unpaid rent.

(2) We may still take action to recover any unpaid rent if we cancel the lease.

(c) If we decide to cancel the lease, we will send the lessee and any mortgagee a cancellation letter by certified mail, return receipt requested within 5 business days of our decision. We will send a copy of the cancellation letter to the tribe for tribal land, and will provide Indian landowners for individually owned Indian land with actual or constructive notice of the cancellation. The cancellation letter will:

(1) Explain the grounds for cancellation;

(2) If applicable, notify the lessee of the amount of any unpaid rent or late payment charges due under the lease;

(3) Notify the lessee of the lessee's right to appeal under part 2 of this chapter;

(4) Order the lessee to vacate the property within 31 days of the date of receipt of the cancellation letter, if an appeal is not filed by that time; and

(5) Order the lessee to take any other action BIA deems necessary to protect the Indian landowners.

(d) We may invoke any other remedies available to us under the lease, including collecting on any available performance bond, and the Indian landowners may pursue any available remedies under tribal law.

(e) We will ensure that any action we take is consistent with 25 U.S.C. 4137, as applicable.

**§ 162.368 Will late payment charges or special fees apply to delinquent payments due under a residential lease?**

(a) Late payment charges will apply as specified in the lease. The failure to pay these amounts will be treated as a lease violation.

(b) We may assess the following special fees to cover administrative costs incurred by the United States in the collection of the debt, if rent is not paid in the time and manner required, in addition to late payment charges that must be paid to the Indian landowners under the lease:

The lessee will pay . . .	For . . .
(1) \$50.00 .....	Any dishonored check.
(2) \$15.00 .....	Processing of each notice or demand letter.
(3) 18 percent of balance due .....	Treasury processing following referral for collection of delinquent debt.

**§ 162.369 How will payment rights relating to a residential lease be allocated?**

The residential lease may allocate rights to payment for insurance proceeds, trespass damages, condemnation awards, settlement funds, and other payments between the Indian landowners and the lessee. If not specified in the lease, insurance policy, order, award, judgment, or other document, the Indian landowners will be entitled to receive these payments.

**§ 162.370 When will a cancellation of a residential lease be effective?**

(a) A cancellation involving a residential lease will not be effective until 31 days after the lessee receives a cancellation letter from us, or 41 days from the date we mailed the letter, whichever is earlier.

(b) The cancellation decision will not be effective if an appeal is filed unless the cancellation is made immediately effective under part 2 of this chapter. While a cancellation decision is ineffective, the lessee must continue to pay rent and comply with the other terms of the lease.

**§ 162.371 What will BIA do if a lessee remains in possession after a residential lease expires or is terminated or cancelled?**

If a lessee remains in possession after the expiration, termination, or cancellation of a residential lease, we may treat the unauthorized possession as a trespass under applicable law in consultation with the Indian landowners. Unless the Indian landowners of the applicable percentage of interests under § 162.012 have notified us in writing that they are engaged in good faith negotiations with the holdover lessee to obtain a new lease, we may take action to recover possession on behalf of the Indian landowners, and pursue any additional remedies available under applicable law, such as a forcible entry and detainer action.

**§ 162.372 Will BIA appeal bond regulations apply to cancellation decisions involving residential leases?**

(a) Except as provided in paragraph (b) of this section, the appeal bond provisions in part 2 of this chapter will apply to appeals from lease cancellation decisions.

(b) The lessee may not appeal the appeal bond decision. The lessee may, however, request that the official to

whom the appeal is made reconsider the appeal bond decision, based on extraordinary circumstances. Any reconsideration decision is final for the Department.

**§ 162.373 When will BIA issue a decision on an appeal from a residential leasing decision?**

BIA will issue a decision on an appeal from a leasing decision within 30 days of receipt of all pleadings.

**§ 162.374 What happens if the lessee abandons the leased premises?**

If a lessee abandons the leased premises, we will treat the abandonment as a violation of the lease. The lease may specify a period of non-use after which the lease premises will be considered abandoned.

**Subpart D—Business Leases**

**Business Leasing General Provisions**

**§ 162.401 What types of leases does this subpart cover?**

(a) This subpart covers both ground leases (undeveloped land) and leases of developed land (together with the permanent improvements thereon) on Indian land that are not covered in another subpart of this part, including:

- (1) Leases for residential purposes that are not covered in subpart C;
- (2) Leases for business purposes that are not covered in subpart E;
- (3) Leases for religious, educational, recreational, cultural, or other public purposes; and
- (4) Commercial or industrial leases for retail, office, manufacturing, storage, biomass, waste-to-energy, or other business purposes.

(b) Leases covered by this subpart may authorize the construction of single-purpose or mixed-use projects designed for use by any number of lessees or occupants.

**§ 162.402 Is there a model business lease form?**

There is no model business lease form because of the need for flexibility in negotiating and writing business leases; however, we may:

- (a) Provide other guidance, such as checklists and sample lease provisions, to assist in the lease negotiation process; and
- (b) Assist the Indian landowners, upon their request, in developing appropriate lease provisions or in using

tribal lease forms that conform to the requirements of this part.

**Lease Requirements**

**§ 162.411 How long may the term of a business lease run?**

(a) A business lease must provide for a definite term, state if there is an option to renew, and if so, provide for a definite term for the renewal period. The maximum term of a lease approved under 25 U.S.C. 415(a) may not exceed 50 years (consisting of an initial term not to exceed 25 years and one renewal not to exceed 25 years), unless a Federal statute provides for a longer maximum term (e.g., 25 U.S.C. 415(a) allows for a maximum term of 99 years for certain tribes), a different initial term, renewal term, or number of renewals.

(b) For tribal land, we will defer to the tribe's determination that the lease term, including any renewal, is reasonable. For individually owned Indian land, we will review the lease term, including any renewal, to ensure it is reasonable, given the:

- (1) Purpose of the lease;
  - (2) Type of financing; and
  - (3) Level of investment.
- (c) The lease may not be extended by holdover.

**§ 162.412 What must the lease include if it contains an option to renew?**

(a) If the lease provides for an option to renew, the lease must specify:

- (1) The time and manner in which the option must be exercised or is automatically effective;

(2) That confirmation of the renewal will be submitted to us, unless the lease provides for automatic renewal;

(3) Whether Indian landowner consent to the renewal is required;

(4) That the lessee must provide notice of the renewal to the Indian landowners and any sureties and mortgagees;

(5) The additional consideration, if any, that will be due upon the exercise of the option to renew or the start of the renewal term; and

(6) Any other conditions for renewal (e.g., that the lessee not be in violation of the lease at the time of renewal).

(b) We will record any renewal of a lease in the LTRO.

**§ 162.413 Are there mandatory provisions that a business lease must contain?**

(a) All business leases must identify:

(1) The tract or parcel of land being leased;

(2) The purpose of the lease and authorized uses of the leased premises;

(3) The parties to the lease;

(4) The term of the lease;

(5) The ownership of permanent improvements and the responsibility for constructing, operating, maintaining, and managing permanent improvements under § 162.415;

(6) Payment requirements and late payment charges, including interest;

(7) Due diligence requirements under § 162.417 (unless the lease is for religious, educational, recreational, cultural, or other public purposes);

(8) Insurance requirements under § 162.437; and

(9) Bonding requirements under § 162.434. If a performance bond is required, the lease must state that the lessee must obtain the consent of the surety for any legal instrument that directly affects their obligations and liabilities.

(b) Where a representative executes a lease on behalf of an Indian landowner or lessee, the lease must identify the landowner or lessee being represented and the authority under which the action is taken.

(c) All business leases must include the following provisions:

(1) The obligations of the lessee and its sureties to the Indian landowners are also enforceable by the United States, so long as the land remains in trust or restricted status;

(2) There must not be any unlawful conduct, creation of a nuisance, illegal activity, or negligent use or waste of the leased premises;

(3) The lessee must comply with all applicable laws, ordinances, rules, regulations, and other legal requirements under § 162.014;

(4) If historic properties, archeological resources, human remains, or other cultural items not previously reported are encountered during the course of any activity associated with this lease, all activity in the immediate vicinity of the properties, resources, remains, or items will cease and the lessee will contact BIA and the tribe with jurisdiction over the land to determine how to proceed and appropriate disposition;

(5) BIA has the right, at any reasonable time during the term of the lease and upon reasonable notice, in accordance with § 162.464, to enter the leased premises for inspection and to ensure compliance; and

(6) BIA may, at its discretion, treat as a lease violation any failure by the lessee to cooperate with a BIA request to make appropriate records, reports, or

information available for BIA inspection and duplication.

(d) Unless the lessee would be prohibited by law from doing so, the lease must also contain the following provisions:

(1) The lessee holds the United States and the Indian landowners harmless from any loss, liability, or damages resulting from the lessee's use or occupation of the leased premises; and

(2) The lessee indemnifies the United States and the Indian landowners against all liabilities or costs relating to the use, handling, treatment, removal, storage, transportation, or disposal of hazardous materials, or the release or discharge of any hazardous material from the leased premises that occurs during the lease term, regardless of fault, with the exception that the lessee is not required to indemnify the Indian landowners for liability or cost arising from the Indian landowners' negligence or willful misconduct.

(e) We may treat any provision of a lease document that violates Federal law as a violation of the lease.

**§ 162.414 May permanent improvements be made under a business lease?**

The lessee may construct permanent improvements under a business lease if the business lease specifies, or provides for the development of:

(a) A plan that describes the type and location of any permanent improvements to be constructed by the lessee; and

(b) A general schedule for construction of the permanent improvements, including dates for commencement and completion of construction.

**§ 162.415 How must a business lease address ownership of permanent improvements?**

(a) A business lease must specify who will own any permanent improvements the lessee constructs during the lease term and may specify under what conditions, if any, permanent improvements the lessee constructs may be conveyed to the Indian landowners during the lease term. In addition, the lease must indicate whether each specific permanent improvement the lessee constructs will:

(1) Remain on the leased premises, upon the expiration, cancellation, or termination of the lease, in a condition satisfactory to the Indian landowners, and become the property of the Indian landowners;

(2) Be removed within a time period specified in the lease, at the lessee's expense, with the leased premises to be restored as closely as possible to their

condition before construction of the permanent improvements; or

(3) Be disposed of by other specified means.

(b) A lease that requires the lessee to remove the permanent improvements must also provide the Indian landowners with an option to take possession of and title to the permanent improvements if the improvements are not removed within the specified time period.

**§ 162.416 How will BIA enforce removal requirements in a business lease?**

(a) We may take appropriate enforcement action to ensure removal of the permanent improvements and restoration of the premises at the lessee's expense:

(1) In consultation with the tribe, for tribal land or, where feasible, with Indian landowners for individually owned Indian land; and

(2) Before or after expiration, termination, or cancellation of the lease.

(b) We may collect and hold the performance bond or alternative form of security until removal and restoration are completed.

**§ 162.417 What requirements for due diligence must a business lease include?**

(a) If permanent improvements are to be constructed, the business lease must include due diligence requirements that require the lessee to complete construction of any permanent improvements within the schedule specified in the lease or general schedule of construction, and a process for changing the schedule by mutual consent of the parties. If construction does not occur, or is not expected to be completed, within the time period specified in the lease, the lessee must provide the Indian landowners and BIA with an explanation of good cause as to the nature of any delay, the anticipated date of construction of facilities, and evidence of progress toward commencement of construction.

(b) Failure of the lessee to comply with the due diligence requirements of the lease is a violation of the lease and may lead to cancellation of the lease under § 162.467.

(c) BIA may waive the requirements in this section if such waiver is in the best interest of the Indian landowners.

(d) The requirements of this section do not apply to leases for religious, educational, recreational, cultural, or other public purposes.

**§ 162.418 How must a business lease describe the land?**

(a) A business lease must describe the leased premises by reference to an official or certified survey, if possible. If

the land cannot be so described, the lease must include one or more of the following:

- (1) A legal description;
- (2) A survey-grade global positioning system description; or
- (3) Another description prepared by a registered land surveyor that is sufficient to identify the leased premises.

(b) If the tract is fractionated we will identify the undivided trust or restricted interests in the leased premises.

**§ 162.419 May a business lease allow compatible uses?**

A business lease may provide for the Indian landowners to use, or authorize others to use, the leased premises for other uses compatible with the purpose of the business lease and consistent with the terms of the business lease. Any such use or authorization by the Indian landowners will not reduce or offset the monetary compensation for the business lease.

**Monetary Compensation Requirements**

**§ 162.420 How much monetary compensation must be paid under a business lease of tribal land?**

(a) A business lease of tribal land may allow for any payment amount negotiated by the tribe, and we will defer to the tribe and not require a valuation if the tribe submits a tribal authorization expressly stating that it:

- (1) Has negotiated compensation satisfactory to the tribe;
- (2) Waives valuation; and
- (3) Has determined that accepting such negotiated compensation and waiving valuation is in its best interest.

(b) The tribe may request, in writing, that we determine fair market rental, in which case we will use a valuation in accordance with § 162.422. After providing the tribe with the fair market rental, we will defer to a tribe's decision to allow for any payment amount negotiated by the tribe.

(c) If the conditions in paragraph (a) or (b) of this section are not met, we will require that the lease provide for fair market rental based on a valuation in accordance with § 162.422.

**§ 162.421 How much monetary compensation must be paid under a business lease of individually owned Indian land?**

(a) A business lease of individually owned Indian land must require payment of not less than fair market rental before any adjustments, based on a fixed amount, a percentage of the projected income, or some other method, unless paragraphs (b) or (c) of this section permit a lesser amount. The

lease must establish how the fixed amount, percentage, or combination will be calculated and the frequency at which the payments will be made.

(b) We may approve a lease of individually owned Indian land that provides for the payment of nominal compensation, or less than a fair market rental, if:

(1) The Indian landowners execute a written waiver of the right to receive fair market rental; and

(2) We determine it is in the Indian landowners' best interest, based on factors including, but not limited to:

(i) The lessee is a member of the immediate family, as defined in § 162.003, of an individual Indian landowner;

(ii) The lessee is a co-owner in the leased tract;

(iii) A special relationship or circumstances exist that we believe warrant approval of the lease;

(iv) The lease is for religious, educational, recreational, cultural, or other public purposes;

(v) We have waived the requirement for a valuation under paragraph (e) of this section.

(c) We may approve a lease that provides for payment of less than a fair market rental during the pre-development or construction periods, if we determine it is in the Indian landowners' best interest. The lease must specify the amount of the compensation and the applicable periods.

(d) We will require a valuation in accordance with § 162.422, unless:

(1) 100 percent of the Indian landowners submit to us a written request to waive the valuation requirement; or

(2) We waive the requirement under paragraph (e) of this section.

(e) If the owners of the applicable percentage of interests under § 162.012 of this part execute a business lease on behalf of all of the Indian landowners of a fractionated tract, the lease must provide that the non-consenting Indian landowners, and those on whose behalf we have consented, receive a fair market rental, as determined by a valuation, unless we waive the requirement because the tribe or lessee will construct infrastructure improvements on, or serving, the leased premises, and we determine it is in the best interest of all the landowners.

**§ 162.422 How will BIA determine fair market rental for a business lease?**

(a) We will use a market analysis, appraisal, or other appropriate valuation method to determine the fair market rental before we approve a business

lease of individually owned Indian land or, at the request of the tribe, for tribal land.

(b) We will either:

(1) Prepare, or have prepared, a market analysis, appraisal, or other appropriate valuation method; or

(2) Use an approved market analysis, appraisal, or other appropriate valuation method from the Indian landowners or lessee.

(c) We will use or approve use of a market analysis, appraisal, or other appropriate valuation method only if it:

(1) Has been prepared in accordance with USPAP or a valuation method developed by the Secretary under 25 U.S.C. 2214; and

(2) Complies with Departmental policies regarding appraisals, including third-party appraisals.

(d) Indian landowners may use competitive bidding as a valuation method.

**§ 162.423 When are monetary compensation payments due under a business lease?**

(a) A business lease must specify the dates on which all payments are due.

(b) Unless the lease provides otherwise, payments may not be made or accepted more than one year in advance of the due date.

(c) Payments are due at the time specified in the lease, regardless of whether the lessee receives an advance billing or other notice that a payment is due.

**§ 162.424 Must a business lease specify who receives monetary compensation payments?**

(a) A business lease must specify whether the lessee will make payments directly to the Indian landowners (direct pay) or to us on their behalf.

(b) The lessee may make payments directly to the Indian landowners if:

- (1) The Indian landowners' trust accounts are unencumbered;
- (2) There are 10 or fewer beneficial owners; and

(3) One hundred percent of the beneficial owners (including those on whose behalf we have consented) agree to receive payment directly from the lessee at the start of the lease.

(c) If the lease provides that the lessee will directly pay the Indian landowners, then:

(1) The lease must include provisions for proof of payment upon our request.

(2) When we consent on behalf of an Indian landowner, the lessee must make payment to us on behalf of that landowner.

(3) The lessee must send direct payments to the parties and addresses

specified in the lease, unless the lessee receives notice of a change of ownership or address.

(4) Unless the lease provides otherwise, compensation payments may not be made payable directly to anyone other than the Indian landowners.

(5) Direct payments must continue through the duration of the lease, except that:

(i) The lessee must make all Indian landowners' payments to us if 100 percent of the Indian landowners agree to suspend direct pay and provide us with documentation of their agreement; and

(ii) The lessee must make that individual Indian landowner's payment to us if any individual Indian landowner who dies, is declared non compos mentis, owes a debt resulting in a trust account encumbrance, or his or her whereabouts become unknown.

**§ 162.425 What form of monetary compensation payment is acceptable under a business lease?**

(a) When payments are made directly to Indian landowners, the form of payment must be acceptable to the Indian landowners.

(b) When payments are made to us, our preferred method of payment is electronic funds transfer payments. We will also accept:

- (1) Money orders;
- (2) Personal checks;
- (3) Certified checks; or
- (4) Cashier's checks.

(c) We will not accept cash or foreign currency.

(d) We will accept third-party checks only from financial institutions or Federal agencies.

**§ 162.426 May the business lease provide for non-monetary or varying types of compensation?**

(a) A lease may provide for the following, subject to the conditions in paragraphs (b) and (c) of this section:

(1) Alternative forms of compensation, including but not limited to, in-kind consideration and payments based on percentage of income; or

(2) Varying types of compensation at specific stages during the life of the lease, including but not limited to fixed annual payments during construction, payments based on income during an operational period, and bonuses.

(b) For tribal land, we will defer to the tribe's determination that the compensation under paragraph (a) of this section is in its best interest, if the tribe submits a signed certification or tribal authorization stating that it has determined the compensation under paragraph (a) of this section to be in its best interest.

(c) For individually owned land, we may approve a lease that provides for compensation under paragraph (a) of this section if we determine that it is in the best interest of the Indian landowners.

**§ 162.427 Will BIA notify a lessee when a payment is due under a business lease?**

Upon request of the Indian landowners, we may issue invoices to a lessee in advance of the dates on which payments are due under a business lease. The lessee's obligation to make these payments in a timely manner will not be excused if invoices are not issued, delivered, or received.

**§ 162.428 Must a business lease provide for compensation reviews or adjustments?**

(a) For a business lease of tribal land, unless the lease provides otherwise, no periodic review of the adequacy of compensation or adjustment is required if the tribe states in its tribal certification or authorization that it has determined that not having compensation reviews and/or adjustments is in its best interest.

(b) For a business lease of individually owned Indian land, unless the lease provides otherwise, no periodic review of the adequacy of compensation or adjustment is required if:

- (1) If the term of the lease is 5 years or less;
- (2) The lease provides for automatic adjustments; or

(3) We determine it is in the best interest of the Indian landowners not to require a review or automatic adjustment based on circumstances including, but not limited to, the following:

(i) The lease provides for payment of less than fair market rental;

(ii) The lease is for religious, educational, recreational, cultural, or other public purposes;

(iii) The lease provides for most or all of the compensation to be paid during the first 5 years of the lease term or before the date the review would be conducted; or

(iv) The lease provides for graduated rent or non-monetary or various types of compensation.

(c) If the conditions in paragraph (a) or (b) of this section are not met, a review of the adequacy of compensation must occur at least every fifth year, in the manner specified in the lease. The lease must specify:

- (1) When adjustments take effect;
- (2) Who can make adjustments;
- (3) What the adjustments are based on; and
- (4) How to resolve disputes arising from the adjustments.

(d) When a review results in the need for adjustment of compensation, the Indian landowners must consent to the adjustment in accordance with § 162.012, unless the lease provides otherwise.

**§ 162.429 What other types of payments are required under a business lease?**

(a) The lessee may be required to pay additional fees, taxes, and assessments associated with the use of the land, as determined by entities having jurisdiction, except as provided in § 162.017. The lessee must pay these amounts to the appropriate office.

(b) If the leased premises are within an Indian irrigation project or drainage district, except as otherwise provided in part 171 of this chapter, the lessee must pay all operation and maintenance charges that accrue during the lease term. The lessee must pay these amounts to the appropriate office in charge of the irrigation project or drainage district. We will treat failure to make these payments as a violation of the lease.

(c) Where the property is subject to at least one other lease for another compatible use, the lessees may agree among themselves how to allocate payment of the Indian irrigation operation and maintenance charges.

**Bonding and Insurance**

**§ 162.434 Must a lessee provide a performance bond for a business lease?**

The lessee must provide a performance bond or alternative form of security, except as provided in paragraph (f) of this section.

(a) The performance bond or alternative form of security must be in an amount sufficient to secure the contractual obligations including:

(1) No less than:

(i) The highest annual rental specified in the lease, if compensation is paid annually; or

(ii) If the compensation is not paid annually, another amount established by BIA in consultation with the tribe for tribal land or, where feasible, with Indian landowners for individually owned Indian land;

(2) The construction of any required permanent improvements;

(3) The operation and maintenance charges for any land located within an irrigation project; and

(4) The restoration and reclamation of the leased premises, to their condition at the start of the lease term or some other specified condition.

(b) The performance bond or other security:

(1) Must be deposited with us and made payable only to us, and may not



be modified without our approval, except as provided in paragraph (b)(2) of this section; and

(2) For tribal land, if the lease so provides, may be deposited with the tribe and made payable to the tribe, and may not be modified without the approval of the tribe.

(c) The lease must specify the conditions under which we may adjust security or performance bond requirements to reflect changing conditions, including consultation with the tribal landowner for tribal land before the adjustment.

(d) We may require that the surety provide any supporting documents needed to show that the performance bond or alternative forms of security will be enforceable, and that the surety will be able to perform the guaranteed obligations.

(e) The performance bond or other security instrument must require the surety to provide notice to us at least 60 days before canceling a performance bond or other security. This will allow us to notify the lessee of its obligation to provide a substitute performance bond or other security and require collection of the bond or security before the cancellation date. Failure to provide a substitute performance bond or security is a violation of the lease.

(f) We may waive the requirement for a performance bond or alternative form of security if either:

(1) The lease is for religious, educational, recreational, cultural, or other public purposes; or

(2) The Indian landowners request it and we determine a waiver is in the Indian landowners' best interest.

(g) For tribal land, we will defer, to the maximum extent possible, to the tribe's determination that a waiver of a performance bond or alternative form of security is in its best interest.

**§ 162.435 What forms of security are acceptable under a business lease?**

(a) We will accept a performance bond only in one of the following forms:

(1) Certificates of deposit issued by a federally insured financial institution authorized to do business in the United States;

(2) Irrevocable letters of credit issued by a federally insured financial institution authorized to do business in the United States;

(3) Negotiable Treasury securities; or

(4) Surety bonds issued by a company approved by the U.S. Department of the Treasury.

(b) We may accept an alternative form of security approved by us that provides adequate protection for the Indian landowners and us, including but not

limited to an escrow agreement and assigned savings account.

(c) All forms of performance bonds or alternative security must, if applicable:

(1) Indicate on their face that BIA approval is required for redemption;

(2) Be accompanied by a statement granting full authority to BIA to make an immediate claim upon or sell them if the lessee violates the lease;

(3) Be irrevocable during the term of the performance bond or alternative security; and

(4) Be automatically renewable during the term of the lease.

(d) We will not accept cash bonds.

**§ 162.436 What is the release process for a performance bond or alternative form of security under a business lease?**

(a) Upon expiration, termination, or cancellation of the lease, the lessee may ask BIA in writing to release the performance bond or alternative form of security.

(b) Upon receiving a request under paragraph (a) of this section, BIA will:

(1) Confirm with the tribe, for tribal land or, where feasible, with the Indian landowners for individually owned Indian land, that the lessee has complied with all lease obligations; and

(2) Release the performance bond or alternative form of security to the lessee, unless we determine that the bond or security must be redeemed to fulfill the contractual obligations.

**§ 162.437 Must a lessee provide insurance for a business lease?**

Except as provided in paragraph (c) of this section, a lessee must provide insurance necessary to protect the interests of the Indian landowners and in the amount sufficient to protect all insurable permanent improvements on the premises.

(a) The insurance may include property, crop, liability, and casualty insurance, depending on the Indian landowners' interests to be protected.

(b) Both the Indian landowners and the United States must be identified as additional insured parties.

(c) We may waive the requirement for insurance upon the request of the Indian landowner, if a waiver is in the best interest of the Indian landowner, including if the lease is for less than fair market rental or nominal compensation. For tribal land, we will defer, to the maximum extent possible, to the tribe's determination that a waiver is in its best interest.

**Approval**

**§ 162.438 What documents are required for BIA approval of a business lease?**

A lessee or the Indian landowners must submit the following documents to

us to obtain BIA approval of a business lease:

(a) A lease executed by the Indian landowners and the lessee that meets the requirements of this part;

(b) For tribal land, a tribal authorization for the lease and, if applicable, meeting the requirements of §§ 162.420(a), 162.426(b), and 162.428(a), or a separate signed certification meeting the requirements of §§ 162.426(b) and 162.428(a);

(c) A valuation, if required under § 162.420 or § 162.421;

(d) Proof of insurance, if required under § 162.437;

(e) A performance bond or other security, if required under § 162.434;

(f) Statement from the appropriate tribal authority that the proposed use is in conformance with applicable tribal law, if required by the tribe;

(g) Environmental and archeological reports, surveys, and site assessments as needed to facilitate compliance with applicable Federal and tribal environmental and land use requirements, including any documentation prepared under § 162.027(b);

(h) A restoration and reclamation plan (and any subsequent modifications to the plan), if appropriate;

(i) Where the lessee is not an entity owned and operated by the tribe, documents that demonstrate the technical capability of the lessee or lessee's agent to construct, operate, maintain, and terminate the proposed project and the lessee's ability to successfully design, construct, or obtain the funding for a project similar to the proposed project, if appropriate;

(j) A preliminary plan of development that describes the type and location of any permanent improvements the lessee plans to construct and a schedule showing the tentative commencement and completion dates for those improvements, if appropriate;

(k) A legal description of the land under § 162.418;

(l) If the lease is being approved under 25 U.S.C. 415, information to assist us in our evaluation of the factors in 25 U.S.C. 415(a); and

(m) If the lessee is a corporation, limited liability company, partnership, joint venture, or other legal entity, except a tribal entity, information such as organizational documents, certificates, filing records, and resolutions, that demonstrates that:

(1) The representative has authority to execute a lease;

(2) The lease will be enforceable against the lessee; and

(3) The legal entity is in good standing and authorized to conduct business in

the jurisdiction where the land is located.

**§ 162.439 Will BIA review a proposed business lease before or during preparation of the NEPA review documentation?**

Upon request of the Indian landowners, we will review the proposed business lease after negotiation by the parties, before or during preparation of the NEPA review documentation and any valuation. Within 60 days of receiving the proposed lease, we will provide an acknowledgement of the terms of the lease and identify any provisions that, based on this acknowledgment review, would justify disapproval of the lease, pending results of the NEPA review and any valuation.

**§ 162.440 What is the approval process for a business lease?**

(a) Before we approve a business lease, we must determine that the lease is in the best interest of the Indian landowners. In making that determination, we will:

- (1) Review the lease and supporting documents;
- (2) Identify potential environmental impacts and ensure compliance with all applicable environmental laws, land use laws, and ordinances;
- (3) If the lease is being approved under 25 U.S.C. 415, assure ourselves that adequate consideration has been given to the factors in 25 U.S.C. 415(a); and
- (4) Require any lease modifications or mitigation measures necessary to satisfy any requirements including any other Federal or tribal land use requirements.

(b) Upon receiving a business lease package, we will promptly notify the parties whether the package is or is not complete. A complete package includes all the information and supporting documents required under this subpart, including but not limited to, NEPA review documentation and valuation documentation, where applicable.

(1) If the business lease package is not complete, our letter will identify the missing information or documents required for a complete package. If we do not respond to the submission of a business lease package, the parties may take action under § 162.463.

(2) If the business lease package is complete, we will notify the parties of the date of our receipt. Within 60 days of the receipt date, we will approve or disapprove the lease, return the package for revision, or inform the parties in writing that we need additional review time. If we inform the parties in writing that we need additional time, then:

(i) Our letter informing the parties that we need additional review time

must identify our initial concerns and invite the parties to respond within 15 days of the date of the letter; and

(ii) We have 30 days from sending the letter informing the parties that we need additional time to approve or disapprove the lease.

(c) If we do not meet the deadlines in this section, then the parties may take appropriate action under § 162.463.

(d) We will provide any lease approval or disapproval and the basis for the determination, along with notification of any appeal rights under part 2 of this chapter, in writing to the parties to the lease.

(e) We will provide approved business leases on tribal land to the lessee and provide a copy to the tribe. We will provide approved business leases on individually owned Indian land to the lessee, and make copies available to the Indian landowners upon written request.

**§ 162.441 How will BIA decide whether to approve a business lease?**

(a) We will approve a business lease unless:

- (1) The required consents have not been obtained from the parties to the lease;
- (2) The requirements of this subpart have not been met; or
- (3) We find a compelling reason to withhold our approval in order to protect the best interests of the Indian landowners.

(b) We will defer, to the maximum extent possible, to the Indian landowners' determination that the lease is in their best interest.

(c) We may not unreasonably withhold approval of a lease.

**§ 162.442 When will a business lease be effective?**

(a) A business lease will be effective on the date that we approve the lease, even if an appeal is filed under part 2 of this chapter.

(b) The lease may specify a date on which the obligations between the parties to the business lease are triggered. Such date may be before or after the approval date under paragraph (a) of this section.

**§ 162.443 Must a business lease document be recorded?**

(a) Any business lease document must be recorded in our LTRO with jurisdiction over the leased land.

(1) We will record the lease document immediately following our approval.

(2) If our approval of an assignment or sublease is not required, the parties must record the assignment or sublease in the LTRO with jurisdiction over the leased land.

(b) The tribe must record lease documents for the following types of leases in the LTRO with jurisdiction over the leased lands, even though BIA approval is not required:

(1) Leases of tribal land a corporate entity leases to a third party under 25 U.S.C. 477; and

(2) Leases of tribal land under a special act of Congress authorizing leases without our approval under certain conditions.

**§ 162.444 Will BIA require an appeal bond for an appeal of a decision on a business lease document?**

(a) If a party appeals our decision on a lease, assignment, amendment, or sublease, then the official to whom the appeal is made may require the appellant to post an appeal bond in accordance with part 2 of this chapter. We will not require an appeal bond:

- (1) For an appeal of a decision on a leasehold mortgage; or
- (2) If the tribe is a party to the appeal and requests a waiver of the appeal bond.

(b) The appellant may not appeal the appeal bond decision. The appellant may, however, request that the official to whom the appeal is made reconsider the bond decision, based on extraordinary circumstances. Any reconsideration decision is final for the Department.

**Amendments**

**§ 162.445 May the parties amend a business lease?**

The parties may amend a business lease by obtaining:

- (a) The lessee's signature;
- (b) The Indian landowners' consent under the requirements in § 162.446; and
- (c) BIA approval of the amendment under §§ 162.447 and 162.448.

**§ 162.446 What are the consent requirements for an amendment to a business lease?**

(a) Unless the lease provides otherwise, the lessee must notify all Indian landowners of the proposed amendment.

(b) The Indian landowners, or their representatives under § 162.013, must consent to an amendment of a business lease in the same percentages and manner as a new business lease under § 162.012, unless the lease:

- (1) Provides that individual Indian landowners are deemed to have consented where they do not object in writing to the amendment within a specified period of time following the landowners' receipt of the amendment and the lease meets the requirements of paragraph (c) of this section;

(2) Authorizes one or more representatives to consent to an amendment on behalf of all Indian landowners; or

(3) Designates us as the Indian landowners' representative for the purposes of consenting to an amendment.

(c) If the lease provides for deemed consent under paragraph (b)(1) of this section, it must require the parties to submit to us:

(1) A copy of the executed amendment or other documentation of any Indian landowners' actual consent;

(2) Proof of mailing of the amendment to any Indian landowners who are deemed to have consented; and

(3) Any other pertinent information for us to review.

(d) Unless specifically authorized in the lease, a written power of attorney, or a court document, Indian landowners may not be deemed to have consented to, and an Indian landowner's designated representative may not negotiate or consent to, an amendment that would:

(1) Reduce the payment obligations to the Indian landowners;

(2) Increase or decrease the lease area;

(3) Terminate or change the term of the lease; or

(4) Modify the dispute resolution procedures.

**§ 162.447 What is the approval process for an amendment to a business lease?**

(a) When we receive an amendment that meets the requirements of this subpart, we will notify the parties of the date we receive it. We have 30 days from receipt of the executed amendment, proof of required consents, and required documentation to approve or disapprove the amendment or inform the parties in writing that we need additional review time. Our determination whether to approve the amendment will be in writing and will state the basis for our approval or disapproval.

(b) Our letter informing the parties that we need additional review time must identify our initial concerns and invite the parties to respond within 15 days of the date of the letter. We have 30 days from sending the letter informing the parties that we need additional time to approve or disapprove the amendment.

(c) If we do not meet the deadline in paragraph (a) or this section, or paragraph (b) of this section if applicable, the amendment is deemed approved to the extent consistent with Federal law. Unless the lease provides otherwise, provisions of the amendment that are inconsistent with Federal law

will be severed and unenforceable; all other provisions of the amendment will remain in force.

**§ 162.448 How will BIA decide whether to approve an amendment to a business lease?**

(a) We may disapprove a business lease amendment only if at least one of the following is true:

(1) The Indian landowners have not consented and their consent is required;

(2) The lessee's mortgagees or sureties have not consented;

(3) The lessee is in violation of the lease;

(4) The requirements of this subpart have not been met; or

(5) We find a compelling reason to withhold our approval in order to protect the best interests of the Indian landowners.

(b) We will defer, to the maximum extent possible to the Indian landowners' determination that the amendment is in their best interest.

(c) We may not unreasonably withhold approval of an amendment.

**Assignments**

**§ 162.449 May a lessee assign a business lease?**

(a) A lessee may assign a business lease by meeting the consent requirements in § 162.450 and obtaining our approval of the assignment under §§ 162.451 and 162.452, or by meeting the conditions in paragraphs (b) or (c) of this section.

(b) Where provided in the lease, the lessee may assign the lease to the following without meeting consent requirements or obtaining BIA approval of the assignment, as long as the lessee notifies BIA of the assignment within 30 days after it is executed:

(1) Not more than three distinct legal entities specified in the lease; or

(2) The lessee's wholly owned subsidiaries.

(c) The lessee may assign the lease without our approval or meeting consent requirements if:

(1) The assignee is a leasehold mortgagee or its designee, acquiring the lease either through foreclosure or by conveyance;

(2) The assignee agrees in writing to assume all of the obligations and conditions of the lease; and

(3) The assignee agrees in writing that any transfer of the lease will be in accordance with applicable law under § 162.014.

**§ 162.450 What are the consent requirements for an assignment of a business lease?**

(a) Unless the lease provides otherwise, the lessee must notify all

Indian landowners of the proposed assignment.

(b) The Indian landowners, or their representatives under § 162.013, must consent to an amendment of a business lease in the same percentages and manner as a new business lease under § 162.012, unless the lease:

(1) Provides that individual Indian landowners are deemed to have consented where they do not object in writing to the amendment within a specified period of time following the landowners' receipt of the amendment and the lease meets the requirements of paragraph (c) of this section;

(2) Authorizes one or more representatives to consent to an amendment on behalf of all Indian landowners; or

(3) Designates us as the Indian landowners' representative for the purposes of consenting to an amendment.

(c) If the lease provides for deemed consent under paragraph (b)(1) of this section, it must require the parties to submit to us:

(1) A copy of the executed amendment or other documentation of any Indian landowners' actual consent;

(2) Proof of mailing of the amendment to any Indian landowners who are deemed to have consented; and

(3) Any other pertinent information for us to review.

(d) The lessee must obtain the consent of the holders of any bonds or mortgages.

**§ 162.451 What is the approval process for an assignment of a business lease?**

(a) When we receive an assignment that meets the requirements of this subpart, we will notify the parties of the date we receive it. If our approval is required, we have 30 days from receipt of the executed assignment, proof of required consents, and required documentation to approve or disapprove the assignment. Our determination whether to approve the assignment will be in writing and will state the basis for our approval or disapproval.

(b) If we do not meet the deadline in this section, the lessee or Indian landowners may take appropriate action under § 162.463.

**§ 162.452 How will BIA decide whether to approve an assignment of a business lease?**

(a) We may disapprove an assignment of a business lease only if at least one of the following is true:

(1) The Indian landowners have not consented and their consent is required;

(2) The lessee's mortgagees or sureties have not consented;

(3) The lessee is in violation of the lease;

(4) The assignee does not agree to be bound by the terms of the lease;

(5) The requirements of this subpart have not been met; or

(6) We find a compelling reason to withhold our approval in order to protect the best interests of the Indian landowners.

(b) In making the finding required by paragraph (a)(6) of this section, we may consider whether:

(1) The value of any part of the leased premises not covered by the assignment would be adversely affected; and

(2) If a performance bond is required, the assignee has posted the bond or security and provided supporting documents that demonstrate that:

(i) The lease will be enforceable against the assignee; and

(ii) The assignee will be able to perform its obligations under the lease or assignment.

(c) We will defer, to the maximum extent possible, to the Indian landowners' determination that the assignment is in their best interest.

(d) We may not unreasonably withhold approval of an assignment.

#### Subleases

##### § 162.453 May a lessee sublease a business lease?

(a) A lessee may sublease a business lease by meeting the consent requirements in § 162.454 and obtaining our approval of the sublease under §§ 162.455 and 162.456, or by meeting the conditions in paragraph (b) of this section.

(b) Where the sublease is part of a commercial development or residential development, the lessee may sublease without meeting consent requirements or obtaining BIA approval of the sublease, if:

(1) The lease provides for subleasing without meeting consent requirements or obtaining BIA approval;

(2) The sublease does not relieve the lessee/sublessor of any liability; and

(3) The parties provide BIA with a copy of the sublease within 30 days after it is executed.

##### § 162.454 What are the consent requirements for a sublease of a business lease?

(a) Unless the lease provides otherwise, the lessee must notify all Indian landowners of the proposed sublease.

(b) The Indian landowners must consent to a sublease of a business lease in the same percentages and manner as a new business lease under § 162.012, unless the lease:

(1) Provides that individual Indian landowners are deemed to have consented where they do not object in writing to the sublease within a specified period of time following the landowners' receipt of the sublease and the lease meets the requirements of paragraph (c) of this section;

(2) Authorizes one or more representatives to consent to a sublease on behalf of all Indian landowners; or

(3) Designates us as the Indian landowners' representative for the purposes of consenting to a sublease.

(c) If the lease provides for deemed consent under paragraph (b)(1) of this section, it must require the parties to submit to us:

(1) A copy of the executed sublease or other documentation of any Indian landowners' actual consent;

(2) Proof of mailing of the sublease to any Indian landowners who are deemed to have consented; and

(3) Any other pertinent information for us to review.

##### § 162.455 What is the approval process for a sublease of a business lease?

(a) When we receive a sublease that meets the requirements of this subpart, we will notify the parties of the date we receive it. If our approval is required, we have 30 days from receipt of the executed sublease, proof of required consents, and required documentation to approve or disapprove the sublease or inform the parties in writing that we need additional review time. Our determination whether to approve the sublease will be in writing and will state the basis for our approval or disapproval.

(b) Our letter informing the parties that we need additional review time must identify our initial concerns and invite the parties to respond within 15 days of the date of the letter. We have 30 days from sending the letter informing the parties that we need additional time to approve or disapprove the sublease.

(c) If we do not meet the deadline in paragraph (a) of this section, or paragraph (b) of this section if applicable, the sublease is deemed approved to the extent consistent with Federal law. Unless the lease provides otherwise, provisions of the sublease that are inconsistent with Federal law will be severed and unenforceable; all other provisions of the sublease will remain in force.

##### § 162.456 How will BIA decide whether to approve a sublease of a business lease?

(a) We may disapprove a sublease of a business lease only if at least one of the following is true:

(1) The Indian landowners have not consented and their consent is required;

(2) The lessee's mortgagees or sureties have not consented;

(3) The lessee is in violation of the lease;

(4) The lessee will not remain liable under the lease;

(5) The requirements of this subpart have not been met; or

(6) We find a compelling reason to withhold our approval in order to protect the best interests of the Indian landowners.

(b) In making the finding required by paragraph (a)(6) of this section, we may consider whether the value of any part of the leased premises not covered by the sublease would be adversely affected.

(c) We will defer, to the maximum extent possible, to the Indian landowners' determination that the sublease is in their best interest.

(d) We may not unreasonably withhold approval of a sublease.

#### Leasehold Mortgages

##### § 162.457 May a lessee mortgage a business lease?

(a) A lessee may mortgage a business lease by meeting the consent requirements in § 162.458 and obtaining our approval of the leasehold mortgage under §§ 162.459 and 162.460.

(b) Refer to § 162.449(c) for information on what happens if a sale or foreclosure under an approved mortgage of the leasehold interest occurs.

##### § 162.458 What are the consent requirements for a leasehold mortgage of a business lease?

(a) Unless the lease provides otherwise, the lessee must notify all Indian landowners of the proposed leasehold mortgage.

(b) The Indian landowners, or their representatives under § 162.013, must consent to a leasehold mortgage of a business lease in the same percentages and manner as a new business lease under § 162.012, unless the lease:

(1) States that landowner consent is not required for a leasehold mortgage and identifies what law would apply in case of foreclosure;

(2) Provides that individual Indian landowners are deemed to have consented where they do not object in writing to the leasehold mortgage within a specified period of time following the landowners' receipt of the leasehold mortgage and the lease meets the requirements of paragraph (c) of this section;

(3) Authorizes one or more representatives to consent to a leasehold

mortgage on behalf of all Indian landowners; or

(4) Designates us as the Indian landowners' representative for the purposes of consenting to a leasehold mortgage.

(c) If the lease provides for deemed consent under paragraph (b)(2) of this section, it must require the parties to submit to us:

(1) A copy of the executed leasehold mortgage or other documentation of any Indian landowners' actual consent;

(2) Proof of mailing of the leasehold mortgage to any Indian landowners who are deemed to have consented; and

(3) Any other pertinent information for us to review.

**§ 162.459 What is the approval process for a leasehold mortgage of a business lease?**

(a) When we receive a leasehold mortgage that meets the requirements of this subpart, we will notify the parties of the date we receive it. We have 20 days from receipt of the executed leasehold mortgage, proof of required consents, and required documentation to approve or disapprove the leasehold mortgage. Our determination whether to approve the leasehold mortgage will be in writing and will state the basis for our approval or disapproval.

(b) If we do not meet the deadline in this section, the lessee may take appropriate action under § 162.463.

**§ 162.460 How will BIA decide whether to approve a leasehold mortgage of a business lease?**

(a) We may disapprove a leasehold mortgage of a business lease only if at least one of the following is true:

(1) The Indian landowners have not consented and their consent is required;

(2) The lessee's mortgagees or sureties have not consented;

(3) The requirements of this subpart have not been met; or

(4) We find a compelling reason to withhold our approval in order to protect the best interests of the Indian landowners.

(b) In making the finding required by paragraph (a)(4) of this section, we may consider whether:

(1) The leasehold mortgage proceeds would be used for purposes unrelated to the leased premises; and

(2) The leasehold mortgage is limited to the leasehold.

(c) We will defer, to the maximum extent possible, to the Indian landowners' determination that the leasehold mortgage is in their best interest.

(d) We may not unreasonably withhold approval of a leasehold mortgage.

**Effectiveness, Compliance, and Enforcement**

**§ 162.461 When will an amendment, assignment, sublease, or leasehold mortgage of a business lease be effective?**

(a) An amendment, assignment, sublease, or leasehold mortgage of a business lease will be effective when approved, even if an appeal is filed under part 2 of this chapter, except:

(1) If the amendment or sublease was deemed approved under § 162.447(c) or § 162.455(c), the amendment or sublease becomes effective 45 days from the date the parties mailed or delivered the document to us for our review or, if we sent a letter informing the parties that we need additional time to approve or disapprove the lease, the amendment or sublease becomes effective 45 days from the date of the letter informing the parties that we need additional time to approve or disapprove the lease; and

(2) An assignment that does not require our approval under § 162.449(b) or § 162.449(c) or a sublease that does not require our approval under § 152.453(b) becomes effective on the effective date specified in the assignment or sublease. If the assignment or sublease does not specify the effective date, it becomes effective upon execution by the parties.

(b) We will provide copies of approved documents to the party requesting approval, to the tribe for tribal land, and upon request, to other parties to the lease document.

**§ 162.462 What happens if BIA disapproves an amendment, assignment, sublease, or leasehold mortgage of a business lease?**

If we disapprove an amendment, assignment, sublease, or leasehold mortgage of a business lease, we will notify the parties immediately and advise the landowners of their right to appeal the decision under part 2 of this chapter.

**§ 162.463 What happens if BIA does not meet a deadline for issuing a decision on a lease document?**

(a) If a Superintendent does not meet a deadline for issuing a decision on a lease, assignment, or leasehold mortgage, the parties may file a written notice to compel action with the appropriate Regional Director.

(b) The Regional Director has 15 days from receiving the notice to:

(1) Issue a decision; or

(2) Order the Superintendent to issue a decision within the time set out in the order.

(c) The parties may file a written notice to compel action with the BIA Director if:

(1) The Regional Director does not meet the deadline in paragraph (b) of this section;

(2) The Superintendent does not issue a decision within the time set by the Regional Director under paragraph (b)(2) of this section; or

(3) The initial decision on the lease, assignment, or leasehold mortgage is with the Regional Director, and he or she does not meet the deadline for such decision.

(d) The BIA Director has 15 days from receiving the notice to:

(1) Issue a decision; or

(2) Order the Regional Director or Superintendent to issue a decision within the time set out in the order.

(e) If the Regional Director or Superintendent does not issue a decision within the time set out in the order under paragraph (d)(2), then the BIA Director must issue a decision within 15 days from the expiration of the time set out in the order.

(f) The parties may file an appeal from our inaction to the Interior Board of Indian Appeals if the Director does not meet the deadline in paragraph (d) or (e) of this section.

(g) The provisions of 25 CFR 2.8 do not apply to the inaction of BIA officials with respect to a decision on a lease, amendment, assignment, sublease, or leasehold mortgage under this subpart.

**§ 162.464 May BIA investigate compliance with a business lease?**

(a) We may enter the leased premises at any reasonable time, upon reasonable notice, and consistent with any notice requirements under applicable tribal law and applicable lease documents, to protect the interests of the Indian landowners and to determine if the lessee is in compliance with the requirements of the lease.

(b) If an Indian landowner notifies us that a specific lease violation has occurred, we will promptly initiate an appropriate investigation.

**§ 162.465 May a business lease provide for negotiated remedies if there is a violation?**

(a) A business lease of tribal land may provide either or both parties with negotiated remedies in the event of a lease violation, including, but not limited to, the power to terminate the lease. If the lease provides one or both parties with the power to terminate the lease:

(1) BIA approval of the termination is not required;

(2) The termination is effective without BIA cancellation; and

(3) The Indian landowners must notify us of the termination so that we may record it in the LTRO.

(b) A business lease of individually owned Indian land may provide either or both parties with negotiated remedies, so long as the lease also specifies the manner in which those remedies may be exercised by or on behalf of the Indian landowners of the applicable percentage of interests under § 162.012 of this part. If the lease provides one or both parties with the power to terminate the lease:

(1) BIA concurrence with the termination is required to ensure that the Indian landowners of the applicable percentage of interests have consented; and

(2) BIA will record the termination in the LTRO.

(c) The parties must notify any surety or mortgagee of any violation that may result in termination and the termination of a business lease.

(d) Negotiated remedies may apply in addition to, or instead of, the cancellation remedy available to us, as specified in the lease. The landowners may request our assistance in enforcing negotiated remedies.

(e) A business lease may provide that lease violations will be addressed by a tribe, and that lease disputes will be resolved by a tribal court, any other court of competent jurisdiction, or by a tribal governing body in the absence of a tribal court, or through an alternative dispute resolution method. We may not be bound by decisions made in such forums, but we will defer to ongoing actions or proceedings, as appropriate, in deciding whether to exercise any of the remedies available to us.

**§ 162.466 What will BIA do about a violation of a business lease?**

(a) In the absence of actions or proceedings described in § 162.465(e), or if it is not appropriate for us to defer to the actions or proceedings, we will follow the procedures in paragraphs (b) and (c) of this section.

(b) If we determine there has been a violation of the conditions of a business lease, other than a violation of payment provisions covered by paragraph (c) of this section, we will promptly send the lessee and any surety and mortgagee a notice of violation by certified mail, return receipt requested.

(1) We will send a copy of the notice of violation to the tribe for tribal land, or provide constructive notice to Indian landowners for individually owned Indian land.

(2) The notice of violation will advise the lessee that, within 10 business days of the receipt of a notice of violation, the lessee must:

(i) Cure the violation and notify us, and the tribe for tribal land, in writing that the violation has been cured;

(ii) Dispute our determination that a violation has occurred; or

(iii) Request additional time to cure the violation.

(3) The notice of violation may order the lessee to cease operations under the lease.

(c) A lessee's failure to pay compensation in the time and manner required by a business lease is a violation of the lease, and we will issue a notice of violation in accordance with this paragraph.

(1) We will send the lessees and any surety and mortgagee a notice of violation by certified mail, return receipt requested:

(i) Promptly following the date on which the payment was due, if the lease requires that payments be made to us; or

(ii) Promptly following the date on which we receive actual notice of non-payment from the Indian landowners, if the lease provides for payment directly to the Indian landowners.

(2) We will send a copy of the notice of violation to the tribe for tribal land, or provide constructive notice to the Indian landowners for individually owned Indian land.

(3) The notice of violation will require the lessee to provide adequate proof of payment.

(d) The lessee and its sureties will continue to be responsible for the obligations in the lease until the lease expires, or is terminated or cancelled.

**§ 162.467 What will BIA do if the lessee does not cure a violation of a business lease on time?**

(a) If the lessee does not cure a violation of a business lease within the required time period, or provide adequate proof of payment as required in the notice of violation, we will consult with the tribe for tribal land or, where feasible, with Indian landowners for individually owned Indian land, and determine whether:

(1) We should cancel the lease;

(2) The Indian landowners wish to invoke any remedies available to them under the lease;

(3) We should invoke other remedies available under the lease or applicable law, including collection on any available performance bond or, for failure to pay compensation, referral of the debt to the Department of the Treasury for collection; or

(4) The lessee should be granted additional time in which to cure the violation.

(b) Following consultation with the tribe for tribal land or, where feasible, with Indian landowners for individually owned Indian land, we may take action to recover unpaid compensation and any associated late payment charges.

(1) We do not have to cancel the lease or give any further notice to the lessee before taking action to recover unpaid compensation.

(2) We may still take action to recover any unpaid compensation if we cancel the lease.

(c) If we decide to cancel the lease, we will send the lessee and any surety and mortgagee a cancellation letter by certified mail, return receipt requested, within 5 business days of our decision. We will send a copy of the cancellation letter to the tribe for tribal land, and will provide Indian landowners for individually owned Indian land with actual or constructive notice of the cancellation. The cancellation letter will:

(1) Explain the grounds for cancellation;

(2) If applicable, notify the lessee of the amount of any unpaid compensation or late payment charges due under the lease;

(3) Notify the lessee of the lessee's right to appeal under part 2 of this chapter, including the possibility that the official to whom the appeal is made may require the lessee to post an appeal bond;

(4) Order the lessee to vacate the property within 31 days of the date of receipt of the cancellation letter, if an appeal is not filed by that time; and

(5) Order the lessee to take any other action BIA deems necessary to protect the Indian landowners.

(d) We may invoke any other remedies available to us under the lease, including collecting on any available performance bond, and the Indian landowners may pursue any available remedies under tribal law.

**§ 162.468 Will late payment charges or special fees apply to delinquent payments due under a business lease?**

(a) Late payment charges will apply as specified in the lease. The failure to pay these amounts will be treated as a lease violation.

(b) We may assess the following special fees to cover administrative costs incurred by the United States in the collection of the debt, if compensation is not paid in the time and manner required, in addition to the late payment charges that must be paid to the Indian landowners under the lease:

The lessee will pay . . .	For . . .
(1) \$50.00 .....	Any dishonored check.
(2) \$15.00 .....	Processing of each notice or demand letter.
(3) 18 percent of balance due .....	Treasury processing following referral for collection of delinquent debt.

**§ 162.469 How will payment rights relating to a business lease be allocated?**

The business lease may allocate rights to payment for insurance proceeds, trespass damages, condemnation awards, settlement funds, and other payments between the Indian landowners and the lessee. If not specified in the lease, insurance policy, order, award, judgment, or other document, the Indian landowners or lessees will be entitled to receive these payments.

**§ 162.470 When will a cancellation of a business lease be effective?**

(a) A cancellation involving a business lease will not be effective until 31 days after the lessee receives a cancellation letter from us, or 41 days from the date we mailed the letter, whichever is earlier.

(b) The cancellation decision will not be effective if an appeal is filed unless the cancellation is made immediately effective under part 2 of this chapter. While a cancellation decision is ineffective, the lessee must continue to pay compensation and comply with the other terms of the lease.

**§ 162.471 What will BIA do if a lessee remains in possession after a business lease expires or is terminated or cancelled?**

If a lessee remains in possession after the expiration, termination, or cancellation of a business lease, we may treat the unauthorized possession as a trespass under applicable law in consultation with the Indian landowners. Unless the Indian landowners of the applicable percentage of interests under § 162.012 have notified us in writing that they are engaged in good faith negotiations with the holdover lessee to obtain a new lease, we may take action to recover possession on behalf of the Indian landowners, and pursue any additional remedies available under applicable law, such as a forcible entry and detainer action.

**§ 162.472 Will BIA appeal bond regulations apply to cancellation decisions involving business leases?**

(a) Except as provided in paragraph (b) of this section, the appeal bond provisions in part 2 of this chapter will apply to appeals from lease cancellation decisions

(b) The lessee may not appeal the appeal bond decision. The lessee may,

however, request that the official to whom the appeal is made reconsider the appeal bond decision, based on extraordinary circumstances. Any reconsideration decision is final for the Department.

**§ 162.473 When will BIA issue a decision on an appeal from a business leasing decision?**

BIA will issue a decision on an appeal from a business leasing decision within 60 days of receipt of all pleadings.

**§ 162.474 What happens if the lessee abandons the leased premises?**

If a lessee abandons the leased premises, we will treat the abandonment as a violation of the lease. The lease may specify a period of non-use after which the lease premises will be considered abandoned.

**Subpart F—[Removed]**

■ 14a. Remove subpart F, consisting of §§ 162.600 through 162.623.

**Subpart E [Redesignated as Subpart F]**

■ 14b. Redesignate subpart E, consisting of §§ 162.500 through 162.503, as new subpart F under the following heading:

**Subpart F—Special Requirements for Certain Reservations**

■ 15. Add a new subpart E to read as follows:

**Subpart E—Wind and Solar Resource Leases**

**General Provisions Applicable to WEELs and WSR Leases**

Sec.

162.501 What types of leases does this subpart cover?

162.502 Who must obtain a WEEL or WSR lease?

162.503 Is there a model WEEL or WSR lease?

**WEELs**

162.511 What is the purpose of a WEEL?

162.512 How long may the term of a WEEL run?

162.513 Are there mandatory provisions a WEEL must contain?

162.514 May permanent improvements be made under a WEEL?

162.515 How must a WEEL address ownership of permanent improvements?

162.516 How will BIA enforce removal requirements in a WEEL?

162.517 What requirements for due diligence must a WEEL include?

162.518 How must a WEEL describe the land?

162.519 May a WEEL allow for compatible uses by the Indian landowner?

162.520 Who owns the energy resource information obtained under the WEEL?

162.521 May a lessee incorporate its WEEL analyses into its WSR lease analyses?

162.522 May a WEEL contain an option for a lessee to enter into a WSR lease?

**WEEL Monetary Compensation Requirements**

162.523 How much compensation must be paid under a WEEL?

162.524 Will BIA require a valuation for a WEEL?

**WEEL Bonding and Insurance**

162.525 Must a lessee provide a performance bond for a WEEL?

162.526 [Reserved]

162.527 Must a lessee provide insurance for a WEEL?

**WEEL Approval**

162.528 What documents are required for BIA approval of a WEEL?

162.529 Will BIA review a proposed WEEL before or during preparation of the NEPA review documentation?

162.530 What is the approval process for a WEEL?

162.531 How will BIA decide whether to approve a WEEL?

162.532 When will a WEEL be effective?

162.533 Must a WEEL lease document be recorded?

**WEEL Administration**

162.534 May the parties amend, assign, sublease, or mortgage a WEEL?

**WEEL Compliance and Enforcement**

162.535 What effectiveness, compliance, and enforcement provisions apply to WEELs?

162.536 Under what circumstance may a WEEL be terminated?

162.537 [Reserved]

**WSR Leases**

162.538 What is the purpose of a WSR lease?

162.539 Must I obtain a WEEL before obtaining a WSR lease?

162.540 How long may the term of a WSR lease run?

162.541 What must the lease include if it contains an option to renew?

162.542 Are there mandatory provisions a WSR lease must contain?

162.543 May permanent improvements be made under a WSR lease?

162.544 How must a WSR lease address ownership of permanent improvements?

162.545 How will BIA enforce removal requirements in a WSR lease?

162.546 What requirements for due diligence must a WSR lease include?

- 162.547 How must a WSR lease describe the land?  
 162.548 May a WSR lease allow compatible uses?

#### **WSR Lease Monetary Compensation Requirements**

- 162.549 How much monetary compensation must be paid under a WSR lease of tribal land?  
 162.550 How much monetary compensation must be paid under a WSR lease of individually owned Indian land?  
 162.551 How will BIA determine fair market rental for a WSR lease?  
 162.552 When are monetary compensation payments due under a WSR lease?  
 162.553 Must a WSR lease specify who receives monetary compensation payments?  
 162.554 What form of monetary compensation payment is acceptable under a WSR lease?  
 162.555 May a WSR lease provide for non-monetary or varying types of compensation?  
 162.556 Will BIA notify a lessee when a payment is due under a WSR lease?  
 162.557 Must a WSR lease provide for compensation reviews or adjustments?  
 162.558 What other types of payments are required under a WSR lease?

#### **WSR Lease Bonding and Insurance**

- 162.559 Must a lessee provide a performance bond for a WSR lease?  
 162.560 What forms of security are acceptable under a WSR lease?  
 162.561 What is the release process for a performance bond or alternative form of security under a WSR lease?  
 162.562 Must a lessee provide insurance for a WSR lease?

#### **WSR Lease Approval**

- 162.563 What documents are required for BIA approval of a WSR lease?  
 162.564 Will BIA review a proposed WSR lease before or during preparation of the NEPA review documentation?  
 162.565 What is the approval process for a WSR lease?  
 162.566 How will BIA decide whether to approve a WSR lease?  
 162.567 When will a WSR lease be effective?  
 162.568 Must a WSR lease document be recorded?  
 162.569 Will BIA require an appeal bond for an appeal of a decision on a WSR lease document?

#### **WSR Lease Amendments**

- 162.570 May the parties amend a WSR lease?  
 162.571 What are the consent requirements for an amendment to a WSR lease?  
 162.572 What is the approval process for an amendment to a WSR lease?  
 162.573 How will BIA decide whether to approve an amendment to a WSR lease?

#### **WSR Lease Assignments**

- 162.574 May a lessee assign a WSR lease?  
 162.575 What are the consent requirements for an assignment of a WSR lease?

- 162.576 What is the approval process for an assignment of a WSR lease?  
 162.577 How will BIA decide whether to approve an assignment of a WSR lease?

#### **WSR Lease Subleases**

- 162.578 May a lessee sublease a WSR lease?  
 162.579 What are the consent requirements for a sublease of a WSR lease?  
 162.580 What is the approval process for a sublease of a WSR lease?  
 162.581 How will BIA decide whether to approve a sublease of a WSR lease?

#### **WSR Lease Leasehold Mortgages**

- 162.582 May a lessee mortgage a WSR lease?  
 162.583 What are the consent requirements for a leasehold mortgage of a WSR lease?  
 162.584 What is the approval process for a leasehold mortgage of a WSR lease?  
 162.585 How will BIA decide whether to approve a leasehold mortgage of a WSR lease?

#### **WSR Lease—Effectiveness, Compliance, and Enforcement**

- 162.586 When will an amendment, assignment, sublease, or leasehold mortgage of a WSR lease be effective?  
 162.587 What happens if BIA disapproves an amendment, assignment, sublease, or leasehold mortgage of a WSR lease?  
 162.588 What happens if BIA does not meet a deadline for issuing a decision on a lease document?  
 162.589 May BIA investigate compliance with a WSR lease?  
 162.590 May a WSR lease provide for negotiated remedies if there is a violation?  
 162.591 What will BIA do about a violation of a WSR lease?  
 162.592 What will BIA do if a lessee does not cure a violation of a WSR lease on time?  
 162.593 Will late payment charges or special fees apply to delinquent payments due under a WSR lease?  
 162.594 How will payment rights relating to WSR leases be allocated?  
 162.595 When will a cancellation of a WSR lease be effective?  
 162.596 What will BIA do if a lessee remains in possession after a WSR lease expires or is terminated or cancelled?  
 162.597 Will BIA appeal bond regulations apply to cancellation decisions involving WSR leases?  
 162.598 When will BIA issue a decision on an appeal from a WSR leasing decision?  
 162.599 What happens if the lessee abandons the leased premises?

#### **Subpart E—Wind and Solar Resource Leases**

##### **General Provisions Applicable to WEELs and WSR Leases**

##### **§ 162.501 What types of leases does this subpart cover?**

- (a) This subpart covers:  
 (1) Wind energy evaluation leases (WEELs), which are short-term leases that authorize possession of Indian land

for the purpose of installing, operating, and maintaining instrumentation, and associated infrastructure, such as meteorological towers, to evaluate wind resources for electricity generation; and

(2) Wind and solar resource (WSR) leases, which are leases that authorize possession of Indian land for the purpose of installing, operating, and maintaining instrumentation, facilities, and associated infrastructure, such as wind turbines and solar panels, to harness wind and/or solar energy to generate and supply electricity:

- (i) For resale on a for-profit or non-profit basis;  
 (ii) To a utility grid serving the public generally; or  
 (iii) To users within the local community (e.g., on and adjacent to a reservation).

(b) If the generation of electricity is solely to support a use approved under subpart B, Agricultural Leases; subpart C, Residential Leases; or subpart D Business Leases (including religious, educational, recreational, cultural, or other public purposes), for the same parcel of land, then the installation, operation, and maintenance of instrumentation, facilities, and associated infrastructure are governed by subpart B, C, or D, as appropriate.

##### **§ 162.502 Who must obtain a WEEL or WSR lease?**

(a) Anyone seeking to possess Indian land to conduct activities associated with the evaluation of wind resources must obtain a WEEL, except that a WEEL is not required if use or possession of the Indian land to conduct wind energy evaluation activities is authorized:

- (1) Under § 162.005(b);  
 (2) By a permit from the Indian landowners under § 162.007; or  
 (3) By a tribe on its land under 25 U.S.C. 81.

(b) Except as provided in §§ 162.005(b), 162.501, and paragraph (c) of this section, anyone seeking to possess Indian land to conduct activities associated with the development of wind and/or solar resources must obtain a WSR lease.

(c) A tribe that conducts wind and solar resource activities on its tribal land does not need a WEEL or WSR under this subpart.

##### **§ 162.503 Is there a model WEEL or WSR lease?**

There is no model WEEL or WSR lease because of the need for flexibility in negotiating and writing WEELs and WSR leases; however, we may:

- (a) Provide other guidance, such as checklists and sample lease provisions,



to assist in the lease negotiation process; and

(b) Assist the Indian landowners, upon their request, in developing appropriate lease provisions or in using tribal lease forms that conform to the requirements of this part.

#### WEELs

##### § 162.511 What is the purpose of a WEEL?

A WEEL is a short-term lease that allows the lessee to possess trust or restricted lands for the purpose of evaluating wind resources. The lessee may use information collected under the WEEL to assess the potential for wind energy development, and determine future placement and type of wind energy technology to use in developing the energy resource potential of the leased area.

##### § 162.512 How long may the term of a WEEL run?

(a) A WEEL must provide for a definite term, state if there is an option to renew and if so, provide for a definite term for the renewal period. WEELs are for project evaluation purposes, and therefore may have:

- (1) An initial term that is no longer than 3 years; and
- (2) One renewal period not to exceed 3 years.

(b) The exercise of the option to renew must be in writing and the WEEL must specify:

- (1) The time and manner in which the option must be exercised or is automatically effective;
- (2) That confirmation of the renewal will be submitted to us, unless the WEEL provides for automatic renewal; and
- (3) Additional consideration, if any, that will be due upon the exercise of the option to renew or the start of the renewal term.

##### § 162.513 Are there mandatory provisions a WEEL must contain?

- (a) All WEELs must identify:
  - (1) The tract or parcel of land being leased;
  - (2) The purpose of the WEEL and authorized uses of the leased premises;
  - (3) The parties to the WEEL;
  - (4) The term of the WEEL;
  - (5) The ownership of permanent improvements and the responsibility for constructing, operating, maintaining, and managing permanent improvements, under § 162.515;
  - (6) Payment requirements and late payment charges, including interest; and
  - (7) Due diligence requirements, under § 162.517.
- (b) Where a representative executes a lease on behalf of an Indian landowner

or lessee, the lease must identify the landowner or lessee being represented and the authority under which the action is taken.

(c) All WEELs must include the following provisions:

(1) The obligations of the lessee and its sureties to the Indian landowners are also enforceable by the United States, so long as the land remains in trust or restricted status;

(2) There must not be any unlawful conduct, creation of a nuisance, illegal activity, or negligent use or waste of leased premises;

(3) The lessee must comply with all applicable laws, ordinances, rules, regulations, and other legal requirements under § 162.014;

(4) If historic properties, archeological resources, human remains, or other cultural items, not previously reported are encountered during the course of any activity associated with this lease, all activity in the immediate vicinity of the properties, resources, remains, or items will cease, and the lessee will contact BIA and the tribe with jurisdiction to determine how to proceed and appropriate disposition;

(5) BIA has the right, at any reasonable time during the term of the lease, and upon reasonable notice, in accordance with § 162.589, to enter the leased premises for inspection; and

(6) BIA may, at its discretion, treat as a lease violation any failure by the lessee to cooperate with a BIA request to make appropriate records, reports, or information available for BIA inspection and duplication.

(d) Unless the lessee would be prohibited by law from doing so, the lease must also contain the following provisions:

(1) The lessee holds the United States and the Indian landowners harmless from any loss, liability, or damages resulting from the lessee's use or occupation of the leased premises;

(2) The lessee indemnifies the United States and the Indian landowners against all liabilities or costs relating to the use, handling, treatment, removal, storage, transportation, or disposal of hazardous materials, or the release or discharge of any hazardous material from the leased premises that occurs during the lease term, regardless of fault, with the exception that the lessee is not required to indemnify the Indian landowners for liability or cost arising from the Indian landowners' negligence or willful misconduct.

##### § 162.514 May permanent improvements be made under a WEEL?

(a) A WEEL anticipates the installation of facilities and associated

infrastructure of a size and magnitude necessary for evaluation of wind resource capacity and potential effects of development. These facilities and associated infrastructure are considered permanent improvements. An equipment installation plan must be submitted with the lease under § 162.528(g).

(b) If any of the following changes are made to the equipment installation plan, the Indian landowners must approve the revised plan and the lessee must provide a copy of the revised plan to BIA:

- (1) Location of permanent improvements;
- (2) Type of permanent improvements; or
- (3) Delay of 90 days or more in any phase of development.

##### § 162.515 How must a WEEL address ownership of permanent improvements?

(a) A WEEL must specify who will own any permanent improvements the lessee installs during the lease term. In addition, the WEEL must indicate whether any permanent improvements the lessee installs:

(1) Will remain on the premises upon expiration, termination, or cancellation of the lease whether or not the WEEL is followed by a WSR lease, in a condition satisfactory to the Indian landowners;

(2) May be conveyed to the Indian landowners during the WEEL term and under what conditions the permanent improvements may be conveyed;

(3) Will be removed within a time period specified in the WEEL, at the lessee's expense, with the leased premises to be restored as closely as possible to their condition before installation of the permanent improvements; or

(4) Will be disposed of by other specified means.

(b) A WEEL that requires the lessee to remove the permanent improvements must also provide the Indian landowners with an option to take possession and title to the permanent improvements if the improvements are not removed within the specified time period.

##### § 162.516 How will BIA enforce removal requirements in a WEEL?

We may take appropriate enforcement action to ensure removal of the permanent improvements and restoration of the premises at the lessee's expense:

(a) In consultation with the tribe, for tribal land or, where feasible, with Indian landowners for individually owned Indian land; and

(b) After termination, cancellation, or expiration of the WEEL.

**§ 162.517 What requirements for due diligence must a WEEL include?**

(a) A WEEL must include due diligence requirements that require the lessee to:

(1) Install testing and monitoring facilities within 12 months after the effective date of the WEEL or other period designated in the WEEL and consistent with the plan of development; and

(2) If installation does not occur, or is not expected to be completed, within the time period specified in paragraph (a)(1) of this section, provide the Indian landowners and BIA with an explanation of good cause for any delay, the anticipated date of installation of facilities, and evidence of progress toward installing or completing testing and monitoring facilities.

(b) Failure of the lessee to comply with the due diligence requirements of the WEEL is a violation of the WEEL and may lead to:

(1) Cancellation of the WEEL under § 162.592; and

(2) Application of the requirement that the lessee transfer ownership of energy resource information collected under the WEEL to the Indian landowners under § 162.520.

**§ 162.518 How must a WEEL describe the land?**

(a) A WEEL must describe the leased premises by reference to a public or private survey, if possible. If the land cannot be so described, the lease must include one or more of the following:

(1) A legal description;

(2) A survey-grade global positioning system description; or

(3) Another description prepared by a registered land surveyor that is sufficient to identify the leased premises.

(b) If the tract is fractionated, we will identify the undivided trust or restricted interests in the leased premises.

**§ 162.519 May a WEEL allow for compatible uses by the Indian landowner?**

The WEEL may provide for the Indian landowners to use, or authorize others to use, the leased premises for other noncompeting uses compatible with the purpose of the WEEL. This may include the right to lease the premises for other compatible purposes. Any such use by the Indian landowners will not reduce or offset the monetary compensation for the WEEL.

**§ 162.520 Who owns the energy resource information obtained under the WEEL?**

(a) The WEEL must specify the ownership of any energy resource information the lessee obtains during the WEEL term.

(b) Unless otherwise specified in the WEEL, the energy resource information the lessee obtains through the leased activity becomes the property of Indian landowners at the expiration, termination, or cancellation of the WEEL or upon failure by the lessee to diligently install testing and monitoring facilities on the leased premises in accordance with § 162.517.

(c) BIA will keep confidential any information it is provided that is marked confidential or proprietary and that is exempt from public release, to the extent allowed by law.

**§ 162.521 May a lessee incorporate its WEEL analyses into its WSR lease analyses?**

Any analyses a lessee uses to bring a WEEL activity into compliance with applicable laws, ordinances, rules, regulations under § 162.014 and any other legal requirements may be incorporated by reference, as appropriate, into the analyses of a proposed WSR lease.

**§ 162.522 May a WEEL contain an option for the lessee to enter into a WSR lease?**

(a) A WEEL may provide for an option period following the expiration of the WEEL term during which the lessee and the Indian landowners may enter into a WSR lease.

(b) Our approval of a WEEL that contains an option to enter into a WSR lease does not guarantee or imply our approval of any WSR lease.

**WEEL Monetary Compensation Requirements****§ 162.523 How much compensation must be paid under a WEEL?**

(a) The WEEL must state how much compensation will be paid.

(b) A WEEL must specify the date on which compensation will be due.

(c) Failure to make timely payments is a violation of the WEEL and may lead to cancellation of the WEEL.

(d) The lease compensation requirements of §§ 162.552 through 162.558 also apply to WEELs.

**§ 162.524 Will BIA require a valuation for a WEEL?**

We will not require a valuation for a WEEL.

**WEEL Bonding and Insurance****§ 162.525 Must a lessee provide a performance bond for a WEEL?**

We will not require the lessee to provide a performance bond or alternative form of security for a WEEL.

**§ 162.526 [Reserved]****§ 162.527 Must a lessee provide insurance for a WEEL?**

Except as provided in paragraph (d) of this section, a lessee must provide insurance necessary to protect the interests of Indian landowners and in the amount sufficient to protect all insurable permanent improvements on the leased premises.

(a) The insurance may include property, crop, liability, and casualty insurance, depending on the Indian landowners' interests to be protected.

(b) Both the Indian landowners and the United States must be identified as additional insured parties.

(c) Lease insurance may be increased and extended for use as the required WSR lease insurance.

(d) We may waive the requirement for insurance upon the request of the Indian landowner, if a waiver is in the best interest of the Indian landowner, including if the lease is for less than fair market rental or nominal compensation. For tribal land, we will defer, to the maximum extent possible, to the tribe's determination that a waiver is in its best interest.

**WEEL Approval****§ 162.528 What documents are required for BIA approval of a WEEL?**

A lessee or the Indian landowners must submit the following documents to us to obtain BIA approval of a WEEL:

(a) A WEEL executed by the Indian landowners and the lessee that meets the requirements of this part;

(b) For tribal land, a tribal authorization for the WEEL;

(c) Proof of insurance, as required by § 162.527;

(d) Statement from the appropriate tribal authority that the proposed use is in conformance with applicable tribal law, if required by the tribe;

(e) Environmental and archeological reports, surveys, and site assessments as needed to facilitate compliance with applicable Federal and tribal environmental and land use requirements, including any documentation prepared under § 162.027(b);

(f) An equipment installation plan;

(g) A restoration and reclamation plan (and any subsequent modifications to the plan);

(h) Where the lessee is not an entity owned and operated by the tribe, documents that demonstrate the technical capability of the lessee or lessee's agent to construct, operate, maintain, and terminate the proposed project and the lessee's ability to successfully design, construct, or obtain

the funding for a project similar to the proposed project, if appropriate;

(i) A legal description of the land under § 162.518;

(j) If the lease is being approved under 25 U.S.C. 415, information to assist us in our evaluation of the factors in 25 U.S.C. 415(a); and

(k) If the lessee is a corporation, limited liability company, partnership, joint venture, or other legal entity, except a tribal entity, information such as organizational documents, certificates, filing records, and resolutions, that demonstrates that:

(1) The representative has authority to execute a lease;

(2) The lease will be enforceable against the lessee; and

(3) The legal entity is in good standing and authorized to conduct business in the jurisdiction where the land is located.

**§ 162.529 Will BIA review a proposed WEEL before or during preparation of the NEPA review documentation?**

Upon request of the Indian landowners, we will review the proposed WEEL after negotiation by the parties, before or during preparation of the NEPA review documentation. Within 10 days of receiving the proposed WEEL, we will provide an acknowledgement of the terms of the lease and identify any provisions that, based on this acknowledgment review, would justify disapproval of the lease, pending results of the NEPA review.

**§ 162.530 What is the approval process for a WEEL?**

(a) Before we approve a WEEL, we must determine that the WEEL is in the best interest of the Indian landowners. In making that determination, we will:

(1) Review the WEEL and supporting documents;

(2) Identify potential environmental impacts and ensure compliance with all applicable environmental laws, land use laws, and ordinances;

(3) If the lease is being approved under 25 U.S.C. 415, assure ourselves that adequate consideration has been given to the factors in 25 U.S.C. 415(a); and

(4) Require any lease modifications or mitigation measures necessary to satisfy any requirements including any other Federal or tribal land use requirements.

(b) Upon receiving the WEEL package, we will promptly notify the parties whether the package is or is not complete. A complete package includes all the information and supporting documents required for a WEEL, including but not limited to, NEPA review documentation, where applicable.

(1) If the WEEL package is not complete, our letter will identify the missing information or documents required for a complete package. If we do not respond to the submission of a WEEL package, the parties may take action under § 162.588.

(2) If the WEEL package is complete, we will notify the parties of the date we receive the complete package, and, within 20 days of the date of receipt of the package at the appropriate BIA office, approve or disapprove the WEEL or return the package for revision.

(c) If we do not meet the deadline in this section, then the parties may take appropriate action under § 162.588.

(d) We will provide any WEEL approval determination and the basis for the determination, along with notification of appeal rights under part 2 of this chapter, in writing to the parties to the WEEL.

(e) We will provide any WEEL disapproval determination and the basis for the determination, along with notification of rights to an informal conference, in writing to the parties. Within 30 days of receipt of the disapproval determination, the parties may request an informal conference with the official who issued the determination. Within 30 days of receiving this request, the official must hold the informal conference with the parties. Within 10 days of the informal conference, the official must issue a decision and the basis for the decision, along with a notification of appeal rights under part 2 of this chapter, in writing to the parties to the WEEL.

(f) We will provide the approved WEEL on tribal land to the lessee and provide a copy to the tribe. We will provide the approved WEEL on individually owned Indian land to the lessee, and make copies available to the Indian landowners upon written request.

**§ 162.531 How will BIA decide whether to approve a WEEL?**

(a) We will approve a WEEL unless:

(1) The required consents have not been obtained from the parties to the WEEL;

(2) The requirements applicable to WEELs have not been met; or

(3) We find a compelling reason to withhold our approval in order to protect the best interests of the Indian landowners.

(b) We will defer, to the maximum extent possible, to the Indian landowners' determination that the WEEL is in their best interest.

(c) We may not unreasonably withhold approval of a WEEL.

**§ 162.532 When will a WEEL be effective?**

(a) A WEEL will be effective on the date on which we approve the WEEL, even if an appeal is filed under part 2 of this chapter.

(b) The WEEL may specify a date on which the obligations between the parties to a WEEL are triggered. Such date may be before or after the approval date under paragraph (a) of this section.

(c) WEEL lease documents not requiring our approval are effective upon execution by the parties, or on the effective date specified in the lease document. If the WEEL lease document does not specify an effective date, it becomes effective upon execution by the parties.

**§ 162.533 Must a WEEL lease document be recorded?**

(a) Any WEEL lease document must be recorded in our LTRO with jurisdiction over the leased land.

(1) We will record the lease document immediately following our approval.

(2) If our approval of an assignment or sublease is not required, the parties must record the assignment or sublease in the LTRO with jurisdiction over the leased land.

(b) The tribe must record lease documents for the following types of leases in the LTRO with jurisdiction over the tribal lands, even though BIA approval is not required:

(1) Leases of tribal land that a corporate entity leases to a third party under 25 U.S.C. 477; and

(2) Leases of tribal land under a special act of Congress authorizing leases without our approval.

**WEEL Administration**

**§ 162.534 May the parties amend, assign, sublease, or mortgage a WEEL?**

The parties may amend, assign, sublease, or mortgage a WEEL by following the procedures and requirements for amending, assigning, subleasing, or mortgaging a WSR lease.

**WEEL Compliance and Enforcement**

**§ 162.535 What effectiveness, compliance, and enforcement provisions apply to WEELs?**

(a) The provisions at § 162.586 apply to WEEL lease documents.

(b) The provisions at §§ 162.587 through 162.589 and 162.591 through 162.599 apply to WEELs, except that any references to § 162.590 will apply instead to § 162.536.

**§ 162.536 Under what circumstances may a WEEL be terminated?**

A WEEL must state whether, and under what conditions, the Indian landowners may terminate the WEEL.

**§ 162.537 [Reserved]****WSR Leases****§ 162.538 What is the purpose of a WSR lease?**

A WSR lease authorizes a lessee to possess Indian land to conduct activities related to the installation, operation, and maintenance of wind and/or solar energy resource development projects. Activities include installing instrumentation facilities and infrastructure associated with the generation, transmission, and storage of electricity and other related activities. Leases for biomass or waste-to-energy purposes are governed by subpart D of this part.

**§ 162.539 Must I obtain a WEEL before obtaining a WSR lease?**

You may enter into a WSR lease without a WEEL. While you may enter into a lease as a direct result of energy resource information gathered from a WEEL activity, obtaining a WEEL is not a precondition to entering into a WSR lease.

**§ 162.540 How long may the term of a WSR lease run?**

(a) A WSR lease must provide for a definite lease term, state if there is an option to renew, and if so, provide for a definite term for the renewal period. The maximum term of a lease approved under 25 U.S.C. 415(a) may not exceed 50 years (consisting of an initial term not to exceed 25 years and one renewal not to exceed 25 years), unless a Federal statute provides for a longer maximum term (e.g., 25 U.S.C. 415(a) allows for a maximum term of 99 years for certain tribes), a different initial term, renewal term, or number of renewals.

(b) For tribal land, we will defer to the tribe's determination that the lease term, including any renewal, is reasonable. For individually owned Indian land, we will review the lease term, including any renewal, to ensure it is reasonable, given the:

- (1) Purpose of the lease;
- (2) Type of financing; and
- (3) Level of investment.

(c) The lease may not be extended by holdover.

**§ 162.541 What must the lease include if it contains an option to renew?**

(a) If the lease provides for an option to renew, the lease must specify:

- (1) The time and manner in which the option must be exercised or is automatically effective;
- (2) That confirmation of the renewal will be submitted to us, unless the lease provides for automatic renewal;
- (3) Whether Indian landowner consent to the renewal is required;

(4) That the lessee must provide notice of the renewal to the Indian landowners and any sureties and mortgagees;

(5) The additional consideration, if any, that will be due upon the exercise of the option to renew or the start of the renewal term; and

(6) Any other conditions for renewal (e.g., that the lessee not be in violation of the lease at the time of renewal).

(b) We will record any renewal of a lease in the LTRO.

**§ 162.542 Are there mandatory provisions a WSR lease must contain?**

(a) All WSR leases must identify:

- (1) The tract or parcel of land being leased;
- (2) The purpose of the lease and authorized uses of the leased premises;
- (3) The parties to the lease;
- (4) The term of the lease;
- (5) The ownership of permanent improvements and the responsibility for constructing, operating, maintaining, and managing, WSR equipment, roads, transmission lines and related facilities under § 162.543;

(6) Who is responsible for evaluating the leased premises for suitability; purchasing, installing, operating, and maintaining WSR equipment; negotiating power purchase agreements; and transmission;

(7) Payment requirements and late payment charges, including interest;

(8) Due diligence requirements, under § 162.546;

(9) Insurance requirements, under § 162.562; and

(10) Bonding requirements under § 162.559. If a performance bond is required, the lease must state that the lessee must obtain the consent of the surety for any legal instrument that directly affects their obligations and liabilities.

(b) Where a representative executes a lease on behalf of an Indian landowner or lessee, the lease must identify the landowner or lessee being represented and the authority under which such action is taken.

(c) All WSR leases must include the following provisions:

(1) The obligations of the lessee and its sureties to the Indian landowners are also enforceable by the United States, so long as the land remains in trust or restricted status;

(2) There must not be any unlawful conduct, creation of a nuisance, illegal activity, or negligent use or waste of the leased premises;

(3) The lessee must comply with all applicable laws, ordinances, rules, regulations, and other legal requirements under § 162.014;

(4) If historic properties, archeological resources, human remains, or other cultural items not previously reported are encountered during the course of any activity associated with the lease, all activity in the immediate vicinity of the properties, resources, remains, or items will cease and the lessee will contact BIA and the tribe with jurisdiction to determine how to proceed and appropriate disposition;

(5) BIA has the right, at any reasonable time during the term of the lease and upon reasonable notice, in accordance with § 162.589, to enter the leased premises for inspection and to ensure compliance; and

(6) BIA may, at its discretion, treat as a lease violation any failure by the lessee to cooperate with a BIA request to make appropriate records, reports, or information available for BIA inspection and duplication.

(d) Unless the lessee would be prohibited by law from doing so, the lease must also contain the following provisions:

(1) The lessee holds the United States and the Indian landowners harmless from any loss, liability, or damages resulting from the lessee's use or occupation of the leased premises; and

(2) The lessee indemnifies the United States and the Indian landowners against all liabilities or costs relating to the use, handling, treatment, removal, storage, transportation, or disposal of hazardous materials, or the release or discharge of any hazardous material from the leased premises that occurs during the lease term, regardless of fault, with the exception that the lessee is not required to indemnify the Indian landowners for liability or cost arising from the Indian landowners' negligence or willful misconduct.

(e) We may treat any provision of a lease document that violates Federal law as a violation of the lease.

**§ 162.543 May permanent improvements be made under a WSR lease?**

(a) A WSR lease must provide for the installation of a facility and associated infrastructure of a size and magnitude necessary for the generation and delivery of electricity, in accordance with § 162.019. These facilities and associated infrastructure are considered permanent improvements. A resource development plan must be submitted for approval with the lease under § 162.563(h).

(b) If the parties agree to any of the following changes to the resource development plan after lease approval, they must submit the revised plan to BIA for the file:

- (1) Location of permanent improvements;
- (2) Type of permanent improvements; or
- (3) Delay of 90 days or more in any phase of development.

**§ 162.544 How must a WSR lease address ownership of permanent improvements?**

(a) A WSR lease must specify who will own any permanent improvements the lessee installs during the lease term and may specify under what conditions, if any, permanent improvements the lessee constructs may be conveyed to the Indian landowners during the lease term. In addition, the lease must indicate whether each specific permanent improvement the lessee installs will:

- (1) Remain on the leased premises upon the expiration, termination, or cancellation of the lease, in a condition satisfactory to the Indian landowners and become the property of the Indian landowners;
- (2) Be removed within a time period specified in the lease, at the lessee's expense, with the leased premises to be restored as closely as possible to their condition before installation of the permanent improvements; or
- (3) Be disposed of by other specified means.

(b) A lease that requires the lessee to remove the permanent improvements must also provide the Indian landowners with an option to take possession of and title to the permanent improvements if the improvements are not removed within the specified time period.

**§ 162.545 How will BIA enforce removal requirements in a WSR lease?**

(a) We may take appropriate enforcement action to ensure removal of the permanent improvements and restoration of the premises at the lessee's expense:

- (1) In consultation with the tribe, for tribal land or, where feasible, with Indian landowners for individually owned Indian land; and
- (2) Before or after expiration, termination, or cancellation of the lease.

(b) We may collect and hold the performance bond until removal and restoration are completed.

**§ 162.546 What requirements for due diligence must a WSR lease include?**

(a) A WSR lease must include due diligence requirements that require the lessee to:

- (1) Commence installation of energy facilities within 2 years after the effective date of the lease or consistent with a timeframe in the resource development plan;

(2) If installation does not occur, or is not expected to be completed, within the time period specified in paragraph (a)(1) of this section, provide the Indian landowners and BIA with an explanation of good cause as to the nature of any delay, the anticipated date of installation of facilities, and evidence of progress toward commencement of installation;

(3) Maintain all on-site electrical generation equipment and facilities and related infrastructure in accordance with the design standards in the resource development plan; and

(4) Repair, place into service, or remove from the site within a time period specified in the lease any idle, improperly functioning, or abandoned equipment or facilities that have been inoperative for a continuous period specified in the lease (unless the equipment or facilities were idle as a result of planned suspension of operations, for example, for grid operations or during bird migration season).

(b) Failure of the lessee to comply with the due diligence requirements of the lease is a violation of the lease and may lead to cancellation of the lease under § 162.592.

**§ 162.547 How must a WSR lease describe the land?**

(a) A WSR lease must describe the leased premises by reference to a private or public survey, if possible. If the land cannot be so described, the lease must include one or more of the following:

- (1) A legal description;
- (2) A survey-grade global positioning system description; or
- (3) Another description prepared by a registered land surveyor that is sufficient to identify the leased premises.

(b) If the tract is fractionated, we will identify the undivided trust or restricted interests in the leased premises.

**§ 162.548 May a WSR lease allow compatible uses?**

The lease may provide for the Indian landowners to use, or authorize others to use, the leased premises for other uses compatible with the purpose of the WSR lease and consistent with the terms of the WSR lease. This may include the right to lease the premises for other compatible purposes. Any such use or authorization by the Indian landowners will not reduce or offset the monetary compensation for the WSR lease.

**WSR Lease Monetary Compensation Requirements**

**§ 162.549 How much monetary compensation must be paid under a WSR lease of tribal land?**

(a) A WSR lease of tribal land may allow for any payment negotiated by the tribe, and we will defer to the tribe and not require a valuation if the tribe submits a tribal authorization expressly stating that it:

- (1) Has negotiated compensation satisfactory to the tribe;
- (2) Waives valuation; and
- (3) Has determined that accepting such negotiated compensation and waiving valuation is in its best interest.

(b) The tribe may request, in writing, that we determine fair market rental, in which case we will use a valuation in accordance with § 162.551. After providing the tribe with the fair market rental, we will defer to a tribe's decision to allow for any payment amount negotiated by the tribe.

(c) If the conditions in paragraph (a) or (b) of this section are not met, we will require that the lease provide for fair market rental based on a valuation in accordance with § 162.551.

**§ 162.550 How much monetary compensation must be paid under a WSR lease of individually owned Indian land?**

(a) A WSR lease of individually owned Indian land must require payment of not less than fair market rental before any adjustments, based on a fixed amount, a percentage of the projected gross income, megawatt capacity fee, or some other method, unless paragraphs (b) or (c) of this section permit a lesser amount. The lease must establish how the fixed amount, percentage or combination will be calculated and the frequency at which the payments will be made.

(b) We may approve a lease of individually owned Indian land that provides for the payment of nominal compensation, or less than a fair market rental, if:

- (1) The Indian landowners execute a written waiver of the right to receive fair market rental; and

(2) We determine it is in the Indian landowners' best interest, based on factors including, but not limited to:

- (i) The lessee is a member of the immediate family, as defined in § 162.003, of an Indian landowner;
- (ii) The lessee is a co-owner of the leased tract;

(iii) A special relationship or circumstances exist that we believe warrant approval of the lease;

(iv) The lease is for public purposes; or

(v) We have waived the requirement for a valuation under paragraph (e) of this section.

(c) We may approve a lease that provides for the payment of less than a fair market rental during the periods before the generation and transmission of electricity begins, if we determine it is in the Indian landowners' best interest. The lease must specify the amount of the compensation and the applicable periods.

(d) We will require a valuation in accordance with § 162.422, unless:

(1) 100 percent of the landowners submit to us a written request to waive the valuation requirement; or

(2) We waive the requirement under paragraph (e) of this section; or

(3) We determine it is in the best interest of the Indian landowners to accept an economic analysis in lieu of an appraisal and:

(i) The Indian landowners submit an economic analysis that is approved by the Office of Indian Energy & Economic Development (IEED); or

(ii) IEED prepares an economic analysis at the request of the Indian landowners.

(e) If the owners of the applicable percentage of interests under § 162.011 of this part grant a WSR lease on behalf of all of the Indian landowners of a fractionated tract, the lease must provide that the non-consenting Indian landowners, and those on whose behalf we have consented, receive a fair market rental, as determined by a valuation, unless we waive the requirement because the tribe or lessee will construct infrastructure improvements on, or serving, the leased premises, and we determine it is in the best interest of all the landowners.

**§ 162.551 How will BIA determine fair market rental for a WSR lease?**

(a) We will use a market analysis, appraisal, or other appropriate valuation method to determine the fair market rental before we approve a WSR lease of individually owned Indian land or, at the request of the tribe, for tribal land.

(b) We will either:

(1) Prepare, or have prepared, a market analysis, appraisal, or other appropriate valuation method; or

(2) Use an approved market analysis, appraisal, or other appropriate valuation method from the Indian landowners or lessee.

(c) We will use or approve use of a market analysis, appraisal, or other appropriate valuation method only if it:

(1) Has been prepared in accordance with USPAP or a valuation method developed by the Secretary under 25 U.S.C. 2214; and

(2) Complies with Department policies regarding appraisals, including third-party appraisals.

(d) Indian landowners may use competitive bidding as a valuation method.

**§ 162.552 When are monetary compensation payments due under a WSR lease?**

(a) A WSR lease must specify the dates on which all payments are due.

(b) Unless the lease provides otherwise, payments may not be made or accepted more than one year in advance of the due date.

(c) Payments are due at the time specified in the lease, regardless of whether the lessee receives an advance billing or other notice that a payment is due.

**§ 162.553 Must a WSR lease specify who receives monetary compensation payments?**

(a) A WSR lease must specify whether the lessee will make payments directly to the Indian landowners (direct pay) or to us on their behalf.

(b) The lessee may make payments directly to the Indian landowners if:

(1) The Indian landowners' trust accounts are unencumbered;

(2) There are 10 or fewer beneficial owners; and

(3) One hundred percent of the beneficial owners (including those on whose behalf we have consented) agree to receive payment directly from the lessee at the start of the lease.

(c) If the lease provides that the lessee will directly pay the Indian landowners, then:

(1) The lease must include provisions for proof of payment upon our request.

(2) When we consent on behalf of an Indian landowner, the lessee must make payment to us on behalf of that landowner.

(3) The lessee must send direct payments to the parties and addresses specified in the lease, unless the lessee receives notice of a change of ownership or address.

(4) Unless the lease provides otherwise, payments may not be made payable directly to anyone other than the Indian landowners.

(5) Direct payments must continue through the duration of the lease, except that:

(i) The lessee must make all Indian landowners' payments to us if 100 percent of the Indian landowners agree to suspend direct pay and provide us with documentation of their agreement; and

(ii) The lessee must make that individual Indian landowner's payment

to us if any individual Indian landowner who dies, is declared non compos mentis, owes a debt resulting in a trust account encumbrance, or his or her whereabouts become unknown.

**§ 162.554 What form of monetary compensation payment is acceptable under a WSR lease?**

(a) When payments are made directly to Indian landowners, the form of payment must be acceptable to the Indian landowners.

(b) When payments are made to us, our preferred method of payment is electronic funds transfer payments. We will also accept:

(1) Money orders;

(2) Personal checks;

(3) Certified checks; or

(4) Cashier's checks.

(c) We will not accept cash or foreign currency.

(d) We will accept third-party checks only from financial institutions or Federal agencies.

**§ 162.555 May a WSR lease provide for non-monetary or varying types of compensation?**

(a) A WSR lease may provide for the following, subject to the conditions in paragraphs (b) and (c) of this section:

(1) Alternative forms of compensation, including but not limited to, in-kind consideration and payments based on percentage of income; or

(2) Varying types of consideration at specific stages during the life of the lease, including but not limited to fixed annual payments during installation, payments based on income during an operational period, and bonuses.

(b) For tribal land, we will defer to the tribe's determination that the compensation in paragraph (a) of this section is in its best interest, if the tribe submits a signed certification or tribal authorization stating that it has determined the compensation in paragraph (a) of this section to be in its best interest.

(c) For individually owned land, we may approve a lease that provides for compensation under paragraph (a) of this section if we determine that it is in the best interest of the Indian landowners.

**§ 162.556 Will BIA notify a lessee when a payment is due under a WSR lease?**

Upon request of the Indian landowners, we may issue invoices to a lessee in advance of the dates on which payments are due under a WSR lease. The lessee's obligation to make these payments in a timely manner will not be excused if invoices are not delivered or received.

**§ 162.557 Must a WSR lease provide for compensation reviews or adjustments?**

(a) For a WSR lease of tribal land, unless the lease provides otherwise, no periodic review of the adequacy of compensation or adjustment is required if the tribe states in its tribal certification or authorization that it has determined that not having reviews and/or adjustments is in its best interest.

(b) For a WSR lease of individually owned Indian land, unless the lease provides otherwise, no periodic review of the adequacy of compensation or adjustment is required if:

(1) If the term of the lease is 5 years or less;

(2) The lease provides for automatic adjustments; or

(3) We determine it is in the best interest of the Indian landowners not to require a review or automatic adjustment based on circumstances including, but not limited to, the following:

(i) The lease provides for payment of less than fair market rental;

(ii) The lease is for public purposes;

(iii) The lease provides for most or all of the compensation to be paid during the first 5 years of the lease term or before the date the review would be conducted; or

(iv) The lease provides for graduated rent or non-monetary or various types of compensation.

(c) If the conditions in paragraph (a) or (b) of this section are not met, a review of the adequacy of compensation must occur at least every fifth year, in the manner specified in the lease. The lease must specify:

(1) When adjustments take effect;

(2) Who can make adjustments;

(3) What the adjustments are based on; and

(4) How to resolve disputes arising from the adjustments.

(d) When a review results in the need for adjustment of compensation, the Indian landowners must consent to the adjustment in accordance with § 162.012, unless the lease provides otherwise.

**§ 162.558 What other types of payments are required under a WSR lease?**

(a) The lessee may be required to pay additional fees, taxes, and assessments associated with the use of the land, as determined by entities having jurisdiction, except as provided in § 162.017. The lessee must pay these amounts to the appropriate office.

(b) If the leased premises are within an Indian irrigation project or drainage district, except as otherwise provided in part 171 of this chapter, the lessee must pay all operation and maintenance

charges that accrue during the lease term. The lessee must pay these amounts to the appropriate office in charge of the irrigation project or drainage district. We will treat failure to make these payments as a violation of the lease.

(c) Where the property is subject to at least one other lease for another compatible use, such as grazing, the lessees may agree among themselves how to allocate payment of the operation and maintenance charges.

**WSR Lease Bonding and Insurance****§ 162.559 Must a lessee provide a performance bond for a WSR lease?**

The lessee must provide a performance bond or alternative form of security, except as provided in paragraph (f) of this section.

(a) The performance bond or alternative form of security must be in an amount sufficient to secure the contractual obligations including:

(1) No less than:

(i) The highest annual rental specified in the lease, if the compensation is paid annually; or

(ii) If the compensation is not paid annually, another amount established by BIA in consultation with the tribe for tribal land or, where feasible, with Indian landowners for individually owned Indian land;

(2) The installation of any required permanent improvements;

(3) The operation and maintenance charges for any land located within an irrigation project; and

(4) The restoration and reclamation of the leased premises, to their condition at the start of the lease term or some other specified condition.

(b) The performance bond or other security:

(1) Must be deposited with us and made payable only to us, and may not be modified without our approval, except as provided in paragraph (b)(2) of this section; and

(2) For tribal land, if the lease so provides, may be deposited with the tribe and made payable to the tribe, and may not be modified without the approval of the tribe.

(c) The lease must specify the conditions under which we may adjust security or performance bond requirements to reflect changing conditions, including consultation with the tribal landowner for tribal land before adjustment.

(d) We may require that the surety provide any supporting documents needed to show that the performance bond or alternative forms of security will be enforceable, and that the surety

will be able to perform the guaranteed obligations.

(e) The performance bond or other security instrument must require the surety to provide notice to us at least 60 days before canceling a performance bond or other security. This will allow us to notify the lessee of its obligation to provide a substitute performance bond or other security and require collection of the bond or security before the cancellation date. Failure to provide a substitute performance bond or security is a violation of the lease.

(f) We may waive the requirement for a performance bond or alternative forms of security if:

(1) The lease is for public purposes; or

(2) The Indian landowners request it and we determine a waiver is in the Indian landowners' best interest.

(g) For tribal land, we will defer to the tribe's determination that a waiver of the performance bond or alternative form of security is in its best interest, to the maximum extent possible.

**§ 162.560 What forms of security are acceptable under a WSR lease?**

(a) We will accept a performance bond only in one of the following forms:

(1) Certificates of deposit issued by a federally insured financial institution authorized to do business in the United States;

(2) Irrevocable letters of credit issued by a federally insured financial institution authorized to do business in the United States;

(3) Negotiable Treasury securities; or

(4) Surety bonds issued by a company approved by the U.S. Department of the Treasury.

(b) We may accept an alternative form of security approved by us that provides adequate protection for the Indian landowners and us, including but not limited to an escrow agreement and assigned savings account.

(c) All forms of performance bonds or alternative security must, if applicable:

(1) Indicate on their face that BIA approval is required for redemption;

(2) Be accompanied by a statement granting full authority to BIA to make an immediate claim upon or sell them if the lessee violates the terms of the lease;

(3) Be irrevocable during the term of the performance bond or alternative security; and

(4) Be automatically renewable during the term of the lease.

(d) We will not accept cash bonds.

**§ 162.561 What is the release process for a performance bond or alternative form of security under a WSR lease?**

(a) Upon expiration, termination, or cancellation of the lease, the lessee must

ask BIA in writing to release the performance bond or alternative form of security.

(b) Upon receiving the request under paragraph (a) of this section, BIA will:

(1) Confirm with the tribe, for tribal land or, where feasible, with the Indian landowners for individually owned Indian land, that the lessee has complied with all lease obligations; and

(2) Release the performance bond or alternative form of security to the lessee unless we determine that the bond or security must be redeemed to fulfill the contractual obligations.

**§ 162.562 Must a lessee provide insurance for a WSR lease?**

Except as provided in paragraph (c) of this section, a lessee must provide insurance when necessary to protect the interests of Indian landowners and in the amount sufficient to protect all insurable permanent improvements on the leased premises.

(a) The insurance may include property, liability, and casualty insurance, depending on the Indian landowners' interests to be protected.

(b) Both the Indian landowners and the United States must be identified as additional insured parties.

(c) We may waive the requirement for insurance upon the request of the Indian landowner, if a waiver is in the best interest of the Indian landowner, including if the lease is for less than fair market rental or nominal compensation. For tribal land, we will defer, to the maximum extent possible, to the tribe's determination that a waiver is in its best interest.

**WSR Lease Approval**

**§ 162.563 What documents are required for BIA approval of a WSR lease?**

A lessee or the Indian landowners must submit the following documents to us to obtain BIA approval of a WSR lease:

(a) A lease executed by the Indian landowners and the lessee that meets the requirements of this part;

(b) For tribal land, a tribal authorization for the lease and, if applicable, meeting the requirements of §§ 162.549(a), 162.555(b), and 162.557(a), or a separate signed certification meeting the requirements of §§ 162.555(b) and 162.557(a);

(c) A valuation, if required under § 162.549 or § 162.550;

(d) Proof of insurance, if required under § 162.562;

(e) A performance bond or other security, if required under § 162.559;

(f) Statement from the appropriate tribal authority that the proposed use is

in conformance with applicable tribal law, if required by the tribe;

(g) Environmental and archeological reports, surveys, and site assessments as needed to facilitate compliance with applicable Federal and tribal environmental and land use requirements, including any documentation prepared under § 162.027(b);

(h) A resource development plan that describes the type and location of any permanent improvements the lessee plans to install and a schedule showing the tentative commencement and completion dates for those improvements;

(i) A restoration and reclamation plan (and any subsequent modifications to the plan);

(j) Where the lessee is not an entity owned and operated by the tribe, documents that demonstrate the technical capability of the lessee or lessee's agent to construct, operate, maintain, and terminate the proposed project and the lessee's ability to successfully design, construct, or obtain the funding for a project similar to the proposed project, if appropriate;

(k) A legal description of the land under § 162.547;

(l) If the lease is being approved under 25 U.S.C. 415, information to assist us in our evaluation of the factors in 25 U.S.C. 415(a); and

(m) If the lessee is a corporation, limited liability company, partnership, joint venture, or other legal entity, except a tribal entity, information such as organizational documents, certificates, filing records, and resolutions, that demonstrates that:

(1) The representative has authority to execute a lease;

(2) The lease will be enforceable against the lessee; and

(3) The legal entity is in good standing and authorized to conduct business in the jurisdiction where the land is located.

**§ 162.564 Will BIA review a proposed WSR lease before or during preparation of the NEPA review documentation?**

Upon request of the Indian landowners, we will review the proposed WSR lease after negotiation by the parties, before or during preparation of the NEPA review documentation and any valuation. Within 60 days of receiving the proposed lease, we will provide an acknowledgement of the terms of the lease and identify any provisions that, based on this acknowledgment review, would justify disapproval of the lease, pending results of the NEPA review and any valuation.

**§ 162.565 What is the approval process for a WSR lease?**

(a) Before we approve a WSR lease, we must determine that the lease is in the best interest of the Indian landowners. In making that determination, we will:

(1) Review the lease and supporting documents;

(2) Identify potential environmental impacts and ensure compliance with all applicable environmental laws, land use laws, and ordinances;

(3) If the lease is being approved under 25 U.S.C. 415, assure ourselves that adequate consideration has been given to the factors in 25 U.S.C. 415(a); and

(4) Require any lease modifications or mitigation measures necessary to satisfy any requirements including any other Federal or tribal land use requirements.

(b) Upon receiving a WSR lease package, we will promptly notify the parties whether the package is or is not complete. A complete package includes all the information and supporting documents required under this subpart, including but not limited to, NEPA review documentation and valuation documentation, where applicable.

(1) If the WSR lease package is not complete, our letter will identify the missing information or documents required for a complete package. If we do not respond to the submission of a WSR lease package, the parties may take action under § 162.588.

(2) If the WSR lease package is complete, we will notify the parties of the date of receipt. Within 60 days of the receipt date, we will approve or disapprove the lease, return the package for revision, or inform the parties in writing that we need additional review time. If we inform the parties in writing that we need additional time, then:

(i) Our letter informing the parties that we need additional review time must identify our initial concerns and invite the parties to respond within 15 days of the date of the letter; and

(ii) We have 30 days from sending the letter informing the parties that we need additional time to approve or disapprove the lease.

(c) If we do not meet the deadlines in this section, then the parties may take appropriate action under § 162.588.

(d) We will provide any lease approval or disapproval and the basis for the determination, along with notification of any appeal rights under part 2 of this chapter, in writing to the parties to the lease.

(e) We will provide approved WSR leases on tribal land to the lessee and provide a copy to the tribe. We will provide approved WSR leases on



individually owned Indian land to the lessee, and make copies available to the Indian landowners upon written request.

**§ 162.566 How will BIA decide whether to approve a WSR lease?**

(a) We will approve a WSR lease unless:

(1) The required consents have not been obtained from the parties to the lease;

(2) The requirements of this subpart have not been met; or

(3) We find a compelling reason to withhold our approval in order to protect the best interests of the Indian landowners.

(b) We will defer, to the maximum extent possible, to the Indian landowners' determination that the WSR lease is in their best interest.

(c) We may not unreasonably withhold approval of a WSR lease.

**§ 162.567 When will a WSR lease be effective?**

(a) A WSR lease will be effective on the date that we approve the lease, even if an appeal is filed under part 2 of this chapter.

(b) The lease may specify a date on which the obligations between the parties to the lease are triggered. Such date may be before or after the approval date under paragraph (a) of this section.

**§ 162.568 Must a WSR lease document be recorded?**

(a) Any WSR lease document must be recorded in the LTRO with jurisdiction over the leased land.

(1) We will record the lease document immediately following our approval.

(2) If our approval of an assignment or sublease is not required, the parties must record the assignment or sublease in the LTRO with jurisdiction over the leased land.

(b) The tribe must record lease documents for the following types of leases in the LTRO with jurisdiction over the tribal lands, even though BIA approval is not required:

(1) Leases of tribal land that a corporate entity leases to a third party under 25 U.S.C. 477; and

(2) Leases of tribal land under a special act of Congress authorizing leases without our approval.

**§ 162.569 Will BIA require an appeal bond for an appeal of a decision on a WSR lease document?**

(a) If a party appeals our decision on a WSR lease, assignment, amendment, or sublease, then the official to whom the appeal is made may require the appellant to post an appeal bond in accordance with part 2 of this chapter. We will not require an appeal bond:

(1) For an appeal of a decision on a leasehold mortgage; or

(2) If the tribe is a party to the appeal and requests a waiver of the appeal bond.

(b) The appellant may not appeal the appeal bond decision. The appellant may, however, request that the official to whom the appeal is made reconsider the bond decision, based on extraordinary circumstances. Any reconsideration decision is final for the Department.

**WSR Lease Amendments**

**§ 162.570 May the parties amend a WSR lease?**

The parties may amend a WSR lease by obtaining:

(a) The lessee's signature;

(b) The Indian landowners' consent under the requirements in § 162.571; and

(c) BIA approval of the amendment under §§ 162.572 and 162.573.

**§ 162.571 What are the consent requirements for an amendment to a WSR lease?**

(a) Unless the lease provides otherwise, the lessee must notify all Indian landowners of the proposed amendment.

(b) The Indian landowners, or their representatives under § 162.013, must consent to an amendment of a WSR lease in the same percentages and manner as a new WSR lease under § 162.012, unless the lease:

(1) Provides that individual Indian landowners are deemed to have consented if they do not object in writing to the amendment within a specified period of time following the landowners' receipt of the amendment and the lease meets the requirements of paragraph (c) of this section;

(2) Authorizes one or more representatives to consent to an amendment on behalf of all Indian landowners; or

(3) Designates us as the Indian landowners' representative for the purposes of consenting to an amendment.

(c) If the lease provides for deemed consent under paragraph (b)(1) of this section, it must require the parties to submit to us:

(1) A copy of the executed amendment or other documentation of any Indian landowners' actual consent;

(2) Proof of mailing of the amendment to any Indian landowners who are deemed to have consented; and

(3) Any other pertinent information for review.

(d) Unless specifically authorized in the lease, a written power of attorney, or

a court document, Indian landowners may not be deemed to have consented to, and an Indian landowner's designated representative may not negotiate or consent to, an amendment that would:

(1) Reduce the payment obligations to the Indian landowners;

(2) Increase or decrease the lease area;

(3) Terminate or change the term of the lease; or

(4) Modify dispute resolution procedures.

**§ 162.572 What is the approval process for an amendment to a WSR lease?**

(a) When we receive an amendment that meets the requirements of this subpart, we will notify the parties of the date we receive it. We have 30 days from receipt of the executed amendment, proof of required consents, and required documentation to approve or disapprove the amendment or inform the parties in writing that we need additional review time. Our determination whether to approve the amendment will be in writing and will state the basis for our approval or disapproval.

(b) Our letter informing the parties that we need additional review time must identify our initial concerns and invite the parties to respond within 15 days of the date of the letter. We have 30 days from sending the letter informing the parties that we need additional time to approve or disapprove the amendment.

(c) If we do not meet the deadline in paragraph (a) of this section, or paragraph (b) of this section if applicable, the amendment is deemed approved to the extent consistent with Federal law. Unless the lease provides otherwise, provisions of the amendment that are inconsistent with Federal law will be severed and unenforceable; all other provisions of the amendment will remain in force.

**§ 162.573 How will BIA decide whether to approve an amendment to a WSR lease?**

(a) We may disapprove a WSR lease amendment only if at least one of the following is true:

(1) The Indian landowners have not consented and their consent is required;

(2) The lessee's mortgagees or sureties have not consented;

(3) The lessee is in violation of the lease;

(4) The requirements of this subpart have not been met; or

(5) We find a compelling reason to withhold our approval in order to protect the best interests of the Indian landowners.

(b) We will defer, to the maximum extent possible, to the Indian

landowners' determination that the amendment is in their best interest.

(c) We may not unreasonably withhold approval of an amendment.

#### WSR Lease Assignments

##### § 162.574 May a lessee assign a WSR lease?

(a) A lessee may assign a WSR lease by meeting the consent requirements in § 162.575 and obtaining our approval of the assignment under §§ 162.576 and 162.577 or by meeting the conditions in paragraphs (b) or (c) of this section.

(b) Where provided in the lease, the lessee may assign the lease to the following without meeting consent requirements or obtaining BIA approval of the assignment, as long as the lessee notifies BIA of the assignment within 30 days after it is executed:

(1) Not more than three distinct legal entities specified in the lease; or

(2) The lessee's wholly owned subsidiaries.

(c) The lessee may assign the lease without our approval or meeting consent requirements if:

(1) The assignee is a leasehold mortgagee or its designee, acquiring the lease either through foreclosure or by conveyance;

(2) The assignee agrees in writing to assume all of the obligations and conditions of the lease; and

(3) The assignee agrees in writing that any transfer of the lease will be in accordance with applicable law under § 162.014.

##### § 162.575 What are the consent requirements for an assignment of a WSR lease?

(a) Unless the lease provides otherwise, the lessee must notify all Indian landowners of the proposed assignment.

(b) The Indian landowners, or their representatives under § 162.013, must consent to an assignment in the same percentages and manner as a new WSR lease under § 162.012, unless the lease:

(1) Provides that individual Indian landowners are deemed to have consented where they do not object in writing to the assignment within a specified period of time following the landowners' receipt of the assignment and the lease meets the requirements of paragraph (c) of this section;

(2) Authorizes one or more representatives to consent to an assignment on behalf of all Indian landowners; or

(3) Designates us as the Indian landowners' representative for the purposes of consenting to an assignment.

(c) If the lease provides for deemed consent under paragraph (b)(1) of this

section, it must require the parties to submit to us:

(1) A copy of the executed assignment or other documentation of any Indian landowners' actual consent;

(2) Proof of mailing of the assignment to any Indian landowners who are deemed to have consented; and

(3) Any other pertinent information for us to review.

(d) The lessee must obtain the consent of the holders of any bonds or mortgages.

##### § 162.576 What is the approval process for an assignment of a WSR lease?

(a) When we receive an assignment that meets the requirements of this subpart, we will notify the parties of the date we receive it. If our approval is required, we have 30 days from receipt of the executed assignment, proof of required consents, and required documentation to approve or disapprove the assignment. Our determination whether to approve the assignment will be in writing and will state the basis for our approval or disapproval.

(b) If we do not meet any of the deadlines in this section, the lessee or Indian landowners may take appropriate action under § 162.588.

##### § 162.577 How will BIA decide whether to approve an assignment of a WSR lease?

(a) We may disapprove an assignment of a WSR lease only if at least one of the following is true:

(1) The Indian landowners have not consented and their consent is required;

(2) The lessee's mortgagees or sureties have not consented;

(3) The lessee is in violation of the lease;

(4) The assignee does not agree to be bound by the terms of the lease;

(5) The requirements of this subpart have not been met; or

(6) We find a compelling reason to withhold our approval in order to protect the best interests of the Indian landowners.

(b) In making the finding required by paragraph (a)(6) of this section, we may consider whether:

(1) The value of any part of the leased premises not covered by the assignment would be adversely affected; and

(2) If a performance bond is required, the assignee has posted the bond or security and provided supporting documents that demonstrate that:

(i) The lease will be enforceable against the assignee; and

(ii) The assignee will be able to perform its obligations under the lease or assignment.

(c) We will defer, to the maximum extent possible, to the Indian

landowners' determination that the assignment is in their best interest.

(d) We may not unreasonably withhold approval of an assignment.

#### WSR Lease Subleases

##### § 162.578 May a lessee sublease a WSR lease?

(a) A lessee may sublease a WSR lease by meeting the consent requirements in § 162.579 and obtaining our approval of the sublease under §§ 162.580 and 162.581, or by meeting the conditions in paragraph (b) of this section.

(b) The lessee may sublease without meeting consent requirements or obtaining BIA approval of the sublease, if:

(1) The lease provides for subleasing without meeting consent requirements or obtaining BIA approval;

(2) The sublease does not relieve the lessee/sublessor of any liability; and

(3) The parties provide BIA with a copy of the sublease within 30 days after it is executed.

##### § 162.579 What are the consent requirements for a sublease of a WSR lease?

(a) Unless the lease provides otherwise, the lessee must notify all Indian landowners of the proposed sublease.

(b) The Indian landowners, or their representatives under § 162.013, must consent to a sublease in the same percentages and manner as a new WSR lease under § 162.012, unless the lease:

(1) Provides that individual Indian landowners are deemed to have consented where they do not object in writing to the sublease within a specified period of time following the landowners' receipt of the sublease and the lease meets the requirements in paragraph (c) of this section;

(2) Authorizes one or more representatives to consent to a sublease on behalf of all Indian landowners; or

(3) Designates us as the Indian landowners' representative for the purposes of consenting to a sublease.

(c) If the lease provides for deemed consent under paragraph (b)(1) of this section, it must require the parties to submit to us:

(1) A copy of the executed sublease or other documentation of any Indian landowners' actual consent;

(2) Proof of mailing of the sublease to any Indian landowners who are deemed to have consented; and

(3) Any other pertinent information for us to review.

##### § 162.580 What is the approval process for a sublease of a WSR lease?

(a) When we receive a sublease that meets the requirements of this subpart,

we will notify the parties of the date we receive it. If our approval is required, we have 30 days from receipt of the executed sublease, proof of required consents, and required documentation to approve or disapprove the sublease or inform the parties to the sublease and Indian landowners in writing that we need additional review time. Our determination whether to approve the sublease will be in writing and will state the basis for our approval or disapproval.

(b) Our letter informing parties that we need additional review time must identify our initial concerns and invite the parties to respond within 15 days of the date of the letter. We have 30 days from sending the letter informing the parties that we need additional time to approve or disapprove the sublease.

(c) If we do not meet the deadline in paragraph (a) of this section, or paragraph (b) of this section if applicable, the sublease is deemed approved to the extent consistent with Federal law. Unless the lease provides otherwise, provisions of the sublease that are inconsistent with Federal law will be severed and unenforceable; all other provisions of the sublease will remain in force.

**§ 162.581 How will BIA decide whether to approve a sublease of a WSR lease?**

(a) We may disapprove a sublease of a WSR lease only if at least one of the following is true:

- (1) The Indian landowners have not consented and their consent is required;
- (2) The lessee's mortgagees or sureties have not consented;
- (3) The lessee is in violation of the lease;
- (4) The lessee will not remain liable under the lease; and
- (5) We find a compelling reason to withhold our approval in order to protect the best interests of the Indian landowners.

(b) In making the finding required by paragraph (a)(5) of this section, we may consider whether the value of any part of the leased premises not covered by the sublease would be adversely affected.

(c) We will defer, to the maximum extent possible, to the Indian landowners' determination that the sublease is in their best interest.

(d) We may not unreasonably withhold approval of a sublease.

**WSR Leasehold Mortgages**

**§ 162.582 May a lessee mortgage a WSR lease?**

(a) A lessee may mortgage a WSR lease by meeting the consent requirements in § 162.583 and obtaining

our approval of the leasehold mortgage under §§ 162.584 and 162.585.

(b) Refer to § 162.574(c) for information on what happens if a sale or foreclosure under an approved mortgage of the leasehold interest occurs.

**§ 162.583 What are the consent requirements for a leasehold mortgage of a WSR lease?**

(a) Unless the lease provides otherwise, the lessee must notify all Indian landowners of the proposed leasehold mortgage.

(b) The Indian landowners, or their representatives under § 162.013, must consent to a leasehold mortgage in the same percentages and manner as a new WSR lease under § 162.012, unless the lease:

(1) States that landowner consent is not required for a leasehold mortgage and identifies what law would apply in case of foreclosure;

(2) Provides that individual Indian landowners are deemed to have consented where they do not object in writing to the leasehold mortgage within a specified period of time following the landowners' receipt of the leasehold mortgage and the lease meets the requirements of paragraph (c) of this section;

(3) Authorizes one or more representatives to consent to a leasehold mortgage on behalf of all Indian landowners; or

(4) Designates us as the Indian landowners' representative for the purposes of consenting to a leasehold mortgage.

(c) If the lease provides for deemed consent under paragraph (b)(2) of this section, it must require the parties to submit to us:

(1) A copy of the executed leasehold mortgage or other documentation of any Indian landowners' actual consent;

(2) Proof of mailing of the leasehold mortgage to any Indian landowners who are deemed to have consented; and

(3) Any other pertinent information for us to review.

**§ 162.584 What is the approval process for a leasehold mortgage of a WSR lease?**

(a) When we receive a leasehold mortgage that meets the requirements of this subpart, we will notify the parties of the date we receive it. We have 20 days from receipt of the executed leasehold mortgage, proof of required consents, and required documentation to approve or disapprove the leasehold mortgage. Our determination whether to approve the leasehold mortgage will be in writing and will state the basis for our approval or disapproval.

(b) If we do not meet the deadline in this section, the lessee may take appropriate action under § 162.588.

**§ 162.585 How will BIA decide whether to approve a leasehold mortgage of a WSR lease?**

(a) We may disapprove a leasehold mortgage of a WSR lease only if at least one of the following is true:

(1) The Indian landowners have not consented and their consent is required;

(2) The lessee's mortgagees or sureties have not consented;

(3) The requirements of this subpart have not been met; or

(4) We find a compelling reason to withhold our approval in order to protect the best interests of the Indian landowners.

(b) In making the finding required by paragraph (a)(4) of this section, we may consider whether:

(1) The leasehold mortgage proceeds would be used for purposes unrelated to the leased premises; and

(2) The leasehold mortgage is limited to the leasehold.

(c) We will defer, to the maximum extent possible, to the Indian landowners' determination that the leasehold mortgage is in their best interest.

(d) We may not unreasonably withhold approval of a leasehold mortgage.

**WSR Lease Effectiveness, Compliance, and Enforcement**

**§ 162.586 When will an amendment, assignment, sublease, or leasehold mortgage of a WSR lease be effective?**

(a) An amendment, assignment, sublease, or leasehold mortgage of a WSR lease will be effective when approved, even if an appeal is filed under part 2 of this chapter, except:

(1) If the amendment or sublease was deemed approved under § 162.572(b) or § 162.580(b), the amendment or sublease becomes effective 45 days from the date the parties mailed or delivered the document to us for our review or, if we sent a letter informing the parties that we need additional time to approve or disapprove the lease, the amendment or sublease becomes effective 45 days from the date of the letter informing the parties that we need additional time to approve or disapprove the lease; and

(2) An assignment that does not require our approval under § 162.574(b) or a sublease that does not require our approval under § 162.578(b) becomes effective on the effective date specified in the assignment or sublease. If the assignment or sublease does not specify the effective date, it becomes effective upon execution by the parties.

(b) We will provide copies of approved documents to the party requesting approval, to the tribe for tribal land, and upon request, to other parties to the lease document.

**§ 162.587 What happens if BIA disapproves an amendment, assignment, sublease, or leasehold mortgage of a WSR lease?**

If we disapprove an amendment, assignment, sublease, or leasehold mortgage of a WSR lease, we will notify the parties immediately and advise the landowners of their right to appeal the decision under part 2 of this chapter.

**§ 162.588 What happens if BIA does not meet a deadline for issuing a decision on a lease document?**

(a) If a Superintendent does not meet a deadline for issuing a decision on a lease, assignment, or leasehold mortgage, the parties may file a written notice to compel action with the appropriate Regional Director.

(b) The Regional Director has 15 days from receiving the notice to:

(1) Issue a decision; or

(2) Order the Superintendent to issue a decision within the time set out in the order.

(c) The parties may file a written notice to compel action with the BIA Director if:

(1) The Regional Director does not meet the deadline in paragraph (b) of this section;

(2) The Superintendent does not issue a decision within the time set by the Regional Director under paragraph (b)(2) of this section; or

(3) The initial decision on the lease, assignment, or leasehold mortgage is with the Regional Director, and he or she does not meet the deadline for such decision.

(d) The BIA Director has 15 days from receiving the notice to:

(1) Issue a decision; or

(2) Order the Regional Director or Superintendent to issue a decision within the time set out in the order.

(e) If the Regional Director or Superintendent does not issue a decision within the time set out in the order under paragraph (d)(2), then the BIA Director must issue a decision within 15 days from the expiration of the time set out in the order.

(f) The parties may file an appeal from our inaction to the Interior Board of Indian Appeals if the Director does not meet the deadline in paragraph (d) or (e) of this section.

(g) The provisions of 25 CFR 2.8 do not apply to the inaction of BIA officials with respect to a decision on a lease, amendment, assignment, sublease, or leasehold mortgage under this subpart.

**§ 162.589 May BIA investigate compliance with a WSR lease?**

(a) We may enter the leased premises at any reasonable time, upon reasonable notice, and consistent with any notice requirements under applicable tribal law and applicable lease documents, to protect the interests of the Indian landowners and to determine if the lessee is in compliance with the requirements of the lease.

(b) If an Indian landowner notifies us that a specific lease violation has occurred, we will promptly initiate an appropriate investigation.

**§ 162.590 May a WSR lease provide for negotiated remedies if there is a violation?**

(a) A WSR lease of tribal land may provide either or both parties with negotiated remedies in the event of a lease violation, including, but not limited to, the power to terminate the lease. If the lease provides one or both parties with the power to terminate the lease:

(1) BIA approval of the termination is not required;

(2) The termination is effective without BIA cancellation; and

(3) The Indian landowners must notify us of the termination so that we may record it in the LTRO.

(b) A WSR lease of individually owned Indian land may provide either or both parties with negotiated remedies, so long as the lease also specifies the manner in which those remedies may be exercised by or on behalf of the Indian landowners of the applicable percentage of interests under § 162.012 of this part. If the lease provides one or both parties with the power to terminate the lease:

(1) BIA concurrence with the termination is required to ensure that the Indian landowners of the applicable percentage of interests have consented; and

(2) BIA will record the termination in the LTRO.

(c) The parties must notify any surety or mortgagee of any violation that may result in termination and the termination of a WSR lease.

(d) Negotiated remedies may apply in addition to, or instead of, the cancellation remedy available to us, as specified in the lease. The landowners may request our assistance in enforcing negotiated remedies.

(e) A WSR lease may provide that lease violations will be addressed by the tribe, and that lease disputes will be resolved by a tribal court, any other court of competent jurisdiction, or by a tribal governing body in the absence of a tribal court, or through an alternative dispute resolution method. We may not

be bound by decisions made in such forums, but we will defer to ongoing actions and proceedings, as appropriate, in deciding whether to exercise any of the remedies available to us.

**§ 162.591 What will BIA do about a violation of a WSR lease?**

(a) In the absence of actions or proceedings described in § 162.590(e), or if it is not appropriate for us to defer to the actions or proceedings, we will follow the procedures in paragraphs (b) and (c) of this section.

(b) If we determine there has been a violation of the conditions of a WSR lease, other than a violation of payment provisions covered by paragraph (c) of this section, we will promptly send the lessee and any surety and mortgagee a notice of violation by certified mail, return receipt requested.

(1) We will send a copy of the notice of violation to the tribe for tribal land, or provide constructive notice to Indian landowners for individually owned Indian land.

(2) The notice of violation will advise the lessee that, within 10 business days of the receipt of a notice of violation, the lessee must:

(i) Cure the violation and notify us, and the tribe for tribal land, in writing that the violation has been cured;

(ii) Dispute our determination that a violation has occurred; or

(iii) Request additional time to cure the violation.

(3) The notice of violation may order the lessee to cease operations under the lease.

(c) A lessee's failure to pay compensation in the time and manner required by a WSR lease is a violation of the lease, and we will issue a notice of violation in accordance with this paragraph.

(1) We will send the lessees and any surety and mortgagee a notice of violation by certified mail, return receipt requested:

(i) Promptly following the date on which payment was due, if the lease requires that payments be made to us; or

(ii) Promptly following the date on which we receive actual notice of non-payment from the Indian landowners, if the lease provides for payment directly to the Indian landowners.

(2) We will send a copy of the notice of violation to the tribe for tribal land, or provide constructive notice to the Indian landowners for individually owned Indian land.

(3) The notice of violation will require the lessee to provide adequate proof of payment.

(d) The lessee and its sureties will continue to be responsible for the

obligations in the lease until the lease expires or is terminated or cancelled.

**§ 162.592 What will BIA do if a lessee does not cure a violation of a WSR lease on time?**

(a) If the lessee does not cure a violation of a WSR lease within the required time period, or provide adequate proof of payment as required in the notice of violation, we will consult with the tribe for tribal land or, where feasible, with Indian landowners for individually owned Indian land, and determine whether:

- (1) We should cancel the lease;
- (2) The Indian landowners wish to invoke any remedies available to them under the lease;
- (3) We should invoke other remedies available under the lease or applicable law, including collection on any available performance bond or, for failure to pay compensation, referral of the debt to the Department of the Treasury for collection; or
- (4) The lessee should be granted additional time in which to cure the violation.

(b) Following consultation with the tribe for tribal land or, where feasible, with Indian landowners for individually

owned Indian land, we may take action to recover unpaid compensation and any associated late payment charges.

(1) We do not have to cancel the lease or give any further notice to the lessee before taking action to recover unpaid compensation.

(2) We may still take action to recover any unpaid compensation if we cancel the lease.

(c) If we decide to cancel the lease, we will send the lessee and any surety and mortgagee a cancellation letter by certified mail, return receipt requested, within 5 business days of our decision. We will send a copy of the cancellation letter to the tribe for tribal land, and will provide Indian landowners for individually owned Indian land with actual or constructive notice of the cancellation. The cancellation letter will:

- (1) Explain the grounds for cancellation;
- (2) If applicable, notify the lessee of the amount of any unpaid compensation or late payment charges due under the lease;
- (3) Notify the lessee of the lessee's right to appeal under part 2 of this chapter, including the possibility that the official to whom the appeal is made

may require the lessee to post an appeal bond;

(4) Order the lessee to vacate the property within 31 days of the date of receipt of the cancellation letter, if an appeal is not filed by that time; and

(5) Order the lessee to take any other action BIA deems necessary to protect the Indian landowners.

(d) We may invoke any other remedies available to us under the lease, including collecting on any available performance bond, and the Indian landowners may pursue any available remedies under tribal law.

**§ 162.593 Will late payment charges or special fees apply to delinquent payments due under a WSR lease?**

(a) Late payment charges will apply as specified in the lease. The failure to pay these amounts will be treated as a lease violation.

(b) We may assess the following special fees to cover administrative costs incurred by the United States in the collection of the debt, if compensation is not paid in the time and manner required, in addition to late payment charges that must be paid to the Indian landowners under the lease:

The lessee will pay . . .	For . . .
(1) \$50.00 .....	Any dishonored check.
(2) \$15.00 .....	Processing of each notice or demand letter.
(3) 18 percent of balance due .....	Treasury processing following referral for collection of delinquent debt.

**§ 162.594 How will payment rights relating to WSR leases be allocated?**

The WSR lease may allocate rights to payment for insurance proceeds, trespass damages, compensation awards, settlement funds, and other payments between the Indian landowners and the lessee. If not specified in the lease, insurance policy, order, award, judgment, or other document, the Indian landowners will be entitled to receive these payments.

**§ 162.595 When will a cancellation of a WSR lease be effective?**

(a) A cancellation involving a WSR lease will not be effective until 31 days after the lessee receives a cancellation letter from us, or 41 days from the date we mailed the letter, whichever is earlier.

(b) The cancellation decision will not be effective if an appeal is filed unless the cancellation is made immediately effective under part 2 of this chapter. While a cancellation decision is ineffective, the lessee must continue to pay compensation and comply with the other terms of the lease.

**§ 162.596 What will BIA do if a lessee remains in possession after a WSR lease expires or is terminated or cancelled?**

If a lessee remains in possession after the expiration, termination, or cancellation of a WSR lease, we may treat the unauthorized possession as a trespass under applicable law in consultation with the Indian landowners. Unless the Indian landowners of the applicable percentage of interests under § 162.012 have notified us in writing that they are engaged in good faith negotiations with the holdover lessee to obtain a new lease, we may take action to recover possession on behalf of the Indian landowners, and pursue any additional remedies available under applicable law, such as a forcible entry and detainer action.

**§ 162.597 Will BIA appeal bond regulations apply to cancellation decisions involving WSR leases?**

(a) Except as provided in paragraph (b) of this section, the appeal bond provisions in part 2 of this chapter will

apply to appeals from lease cancellation decisions.

(b) The lessee may not appeal the appeal bond decision. The lessee may, however, request that the official to whom the appeal is made reconsider the appeal bond decision, based on extraordinary circumstances. Any reconsideration decision is final for the Department.

**§ 162.598 When will BIA issue a decision on an appeal from a WSR leasing decision?**

BIA will issue a decision on an appeal from a WSR leasing decision within 60 days of receipt of all pleadings.

**§ 162.599 What happens if the lessee abandons the leased premises?**

If a lessee abandons the leased premises, we will treat the abandonment as a violation of the lease. The lease may specify a period of non-use after which the lease premises will be considered abandoned.

■ 16. Add subpart G to read as follows:

**Subpart G—Records**

Sec.

162.701 Who owns the records associated with this part?

162.702 How must records associated with this part be preserved?

162.703 How does the Paperwork Reduction Act affect this part?

### Subpart G—Records

#### § 162.701 Who owns the records associated with this part?

(a) Records are the property of the United States if they:

(1) Are made or received by a tribe or tribal organization in the conduct of a Federal trust function under 25 U.S.C. 450f *et seq.*, including the operation of a trust program; and

(2) Evidence the organization, functions, policies, decisions, procedures, operations, or other activities undertaken in the performance of a Federal trust function under this part.

(b) Records not covered by paragraph (a) of this section that are made or received by a tribe or tribal organization in the conduct of business with the

Department of the Interior under this part are the property of the tribe.

#### § 162.702 How must records associated with this part be preserved?

(a) Any organization, including a tribe or tribal organization, that has records identified in § 162.701(a) of this part, must preserve the records in accordance with approved Departmental records retention procedures under the Federal Records Act, 44 U.S.C. chapters 29, 31 and 33. These records and related records management practices and safeguards required under the Federal Records Act are subject to inspection by the Secretary and the Archivist of the United States.

(b) A tribe or tribal organization should preserve the records identified in § 162.701(b) of this part, for the period of time authorized by the Archivist of the United States for similar Department of the Interior records under 44 U.S.C. chapter 33. If a tribe or tribal organization does not preserve records associated with its conduct of business with the Department of the Interior

under this part, it may prevent the tribe or tribal organization from being able to adequately document essential transactions or furnish information necessary to protect its legal and financial rights or those of persons directly affected by its activities.

#### § 162.703 How does the Paperwork Reduction Act affect this part?

The collections of information in this part have been approved by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.* and assigned OMB Control Number 1076–0155. Response is required to obtain a benefit. A Federal agency may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a currently valid OMB Control Number.

Dated: June 7, 2012.

**Donald E. Laverdure,**

*Acting Assistant Secretary—Indian Affairs.*

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