AGUA CALIENTE BAND OF CAHUILLA INDIANS
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January 30, 2012

Mr. Del Laverdure
Principal Deputy Assistant Secretary- Indian Affairs
U.S. Department of the Interior
Mail Stop 4141
1849 C Street NW
Washington, DC 20240

Re: Comments on Leasing Regulations;
25 CFR Part 162

Dear Mr. Laverdure,

Enclosed please find comments that are submitted on behalf of the Agua Caliente Band of Cahuilla Indians regarding the Proposed Rule concerning Residential, Business, and Wind and Solar Resource Leases on Indian Land, as published in the Federal Register at Vol.76, No. 229, page 73784 on November 29, 2011.

Thank you for your attention to this. If you have any questions, please contact the Tribal offices at 760-699-6800.

Sincerely,

Richard M. Milanovich
Chairman, Tribal Council
AGUA CALIENTE BAND OF CAHUILLA INDIANS

Agua Caliente Band of Cahuilla Indians
Comments on the
November 29, 2011 Proposed Regulations Concerning
Business Leases on Indian Land
(25 C.F.R. Part 162)

Introduction

The Agua Caliente Band of Cahuilla Indians (ACBCI) submits these comments in addition to public comments made at the January 12, 2012 consultation session in Palm Springs, California. While the ACBCI may submit further comments on the proposed regulations regarding leases for residential and wind and solar purposes, these current comments are confined to the proposed regulations concerning business leases, Subpart D, §162.401, et seq. In addition, the ACBCI will present further comments on Subpart D if and when the comment period is extended beyond January 30, 2012, as is urgently requested below.

The proposed regulations for business leases will probably have a greater impact on the Agua Caliente Indian Reservation (ACIR) than on any other reservation in the country. Due to its location in the Coachella Valley in California, and the location of the Cities of Palm Springs, Cathedral City, and Rancho Mirage on parts of the Reservation, the Agua Caliente Indian Reservation has the greatest concentration in a small area of high-dollar business leases, both present and in the future, of any reservation. Approximately 4,300 acres of the more than 31,000-acre Agua Caliente Indian Reservation are leased allotted trust lands, conservatively valued at over $250,000,000. Leased ACIR trust allotments yielded over $23,000,000 in lease payments for FY 2011, representing more than 22% of all BIA-issued lease payments in the U.S.A. in FY 2011. Only 8 BIA agencies handled a higher dollar volume of lease payments in 2011, and those were largely for oil and gas and mineral development, not business leases (e.g., the highest was the Osage Agency).

In recognition of the unique commercial development potential of the trust lands of this Reservation, ACBCI tribal leaders sought, and Congress granted, long-term (99-year) leasing authority for only this Reservation in its Long-Term Leasing Act of September 21, 1959, 25 U.S.C. §415(a). Although Congress has amended the statute many times since 1959 to extend long-term leasing authority to dozens of other tribes, long-term tribal leasing was invented to benefit the ACBCI. On the same day that Congress first granted long-term leasing authority to

the ACBCI, Congress also directed the allotment of nearly the entire Agua Caliente Indian Reservation in the Agua Caliente Equalization Act of September 21, 1959, 25 U.S.C. §951, et seq., for the sole purpose of using long-term leasing as the economic engine for the development of the unique trust assets of the Agua Caliente Indian Reservation.

Such long-term business leases on allotted and unallotted trust land have been a critical factor in the development of the City of Palm Springs and surrounding areas of the Coachella Valley. A great many ACBCI tribal members and their families currently rely on the income streams created by business leases on allotted tribal land, where fractionation has hardly occurred because most allotments were not made until 1961. For these reasons, we are interested in ensuring that the proposed regulations do not have a disruptive effect on existing leases, and do not create unnecessary impediments to future economic development on the Agua Caliente Indian Reservation. We fear that, as they stand, the proposed regulations for business leases will frustrate the desire of Congress to promote the orderly and expeditious development of the trust land of the Agua Caliente Indian Reservation through advantageous long-term leasing.

Request for Extension of Comment Period

The proposed leasing regulations have the potential to affect the entire Agua Caliente Indian Reservation, and will directly impact the land holdings and rental income of hundreds of ACBCI's individual allotment holders, as well as unallotted Tribal trust lands. On behalf of the Tribe and its members, we respectfully and urgently request an additional sixty (60) days to continue to study the Proposed Regulations, which were published in the Federal Register on November 29, 2011. The 60-day extension would give the Tribe sufficient time to ensure that each ACBCI tribal member who will be affected by changes in the leasing regulations has had an adequate opportunity to study the Proposed Regulations, to understand the impacts of the changes on his or her land holdings, and to bring all relevant concerns to the attention of the Tribal Council, so that the Tribal Council can make a more comprehensive presentation of its comments on behalf of its members, the holders of some of the most valuable trust assets in the country.

Permits – Section 162.004

The Proposed Regulations (Sec. 162.004) remove the current requirement that permits for the use of Indian land be approved by the BIA. Although this provides some additional flexibility, the tradeoff is that tribal members will no longer have the weight of the BIA's authority in policing and enforcing compliance with permits. As a point of information, there are approximately 22 currently active permits on ACBCI trust land, which generate hundreds of thousands of dollars in income annually from short-term uses such as billboards. Removing BIA oversight of permits means the Palm Springs Agency will have increased difficulty in tracking whether permit payments are collected and distributed properly. We are also concerned that permits may be entered into that are in conflict with Tribal and/or Federal law. Tribal members

have expressed preference for a rule that would allow landowners to opt-in or opt-out of BIA approval and oversight of permits, depending upon whether landowners anticipate the need for the BIA's assistance in enforcing the terms of the permit. Without this option, what is a landowner to do when a permittee fails to make a rent payment, fails to remove improvements or vacate the parcel at the expiration of the permit, or otherwise fails to meet his or her obligations under the permit? Many landowners are simply not equipped to undertake enforcement of their rights to these trust assets without assistance from the BIA.

Leasing Under Life Estates - Sections 162.006 and 162.423

The Proposed Regulations increase the authority of a person holding a life estate (as described in Sec. 162.006(b)(1); ordinarily the non-Indian surviving spouse of a landowner) to lease interests in trust land, even if the holder of the life estate is not a tribal member or an Indian. Reducing the authority of the BIA to approve and monitor leasing by a life estate holder would allow the life estate holder to take advantage of the situation by entering into a long-term lease that requires the majority of lease payments to be made early in the term of the lease, thereby draining the lease of much of its value and resulting in little economic benefit left for the holders of the remainder interests, who are more likely to be tribal members. See also Sec. 162.423, which allows lease payments to be collected on an accelerated schedule, if that provision is included in the lease. If it is clearly the desire of the landowner to achieve this result (such as by express language in a will), there is no objection to so favoring the life estate holder at the expense of the remaindermen. But we do object to such a practice being allowed by default without any clear endorsement by the landowner. For the same reason, we question the Proposed Regulation's suggestion that the BIA will be willing to collect rents on behalf of the holder of a life estate (Sec. 162.006(b)(v)), regardless of whether that person is an Indian. We believe that the services provided by the BIA to non-Indian life estate holders should not exceed those provided to tribal members.

Consent by BIA to New Leases – Section 162.012(c)(6)

ACBCI tribal members have expressed concern that Section 162.012 (c)(6) empowers the BIA to consent to a lease if individual landowners have been unable to reach agreement on their consent to the terms of a proposed lease during a three-month negotiating period. This rule should be drafted to put the interests of the landowners ahead of the lessee's desire to obtain approval. In some cases, there may be legitimate reasons for the objection or disagreement, and it may be in the best interests of some or all of the landowners to continue to have no lease, rather than an unsatisfactory lease imposed by the BIA. Again, the default position should be to favor the Indian landowner, not the typically non-Indian prospective lessee.

Maximum Lease Terms – Section 162.411(b)

Certainty as to the duration of a lease term is critical to attracting new economic development projects to ACBCI land. It is important that the ability of ACBCI and its members to enter into 99-year leases be preserved, as outlined in Section 162.411(b).

However, the requirement that there be no more than one extension of the term beyond the initial term works against the clear purpose of Congress in authorizing 99-year lease terms for this Reservation. Typically, the initial term of a commercial lease on the Agua Caliente Indian Reservation is 65 years, due largely to the requirements of lenders. Many such leases were entered into on the Agua Caliente Indian Reservation beginning in the 1960's, after long-term leasing was first authorized in 1959, as noted above. The initial terms of those leases were typically 65 years, meaning that their terms will start to expire in the 2030's. The local practice and reality is that, unless the remaining term of a business lease is at least 30 years, many banks will not lend with such a short leasehold interest as security. Many properties subject to such leases cannot now be sold, thereby diminishing their value. Such lessees will not maintain or improve their properties, and assignments to new owners cannot occur, even when otherwise advantageous to the landowner. To remedy this, many landowners negotiate an amendment to their leases by which the initial term is extended by one renewal of up to 25 additional years. However, this still does not give to the landowner the full benefit of the 99-year leasing authority that Congress intended for this Reservation. An initial term of 65 years, plus one renewal of 25 years, adds up to a total term of 90 years, not 99 years. The current proposed regulation preserves this handicap by continuing to allow only one extension of the term of up to 25 years.

The obvious remedy is to allow more than one renewal of the term of a lease, as long as all such renewals do not extend the total term beyond the 99-year limit. Doing so will assist landowners and lessees to make full use of long-term leasing, and will encourage full use and development of leased land for the entire permitted term of the lease.

Taxation of Improvements – Section 162.415(c)

ACBCI supports the provisions of Sec. 162.415(c) which clarify the BIA's position that permanent improvements on leased trust land are not subject to the taxing authority of a State or its political subdivisions. As a matter of equity, this statement of tax exemption for improvements in the hands of a non-Indian lessee should not be limited to just such improvements. In California, the equivalent local tax is not aimed at the improvements in the hands of the non-Indian lessee, but at the possessory leasehold interest of the same non-Indian lessee. Both interests should be equally exempt from such state and local taxation, as both equally diminish the benefit of the lease to the Indian landowner. Therefore, the ACBCI urges that this provision be expanded to include not only such permanent improvements of a non-Indian lessee, but also the possessory interest of such a non-Indian lessee. The exemption should

apply equally and across the board, no matter which interest of the non-Indian lessee is the target of the state or local tax.

Rent at Less than Fair Market Value – Section 162.420(b)(1)

ACBCI is concerned that the willingness of the BIA to approve business leases at less than fair market value (Sec. 162.420(b)(1)) for allotted trust landowners invites the exploitation of specific individual hardships or market conditions by unscrupulous developers or business interests. The increased flexibility created under this revision of the existing rule has the potential to be advantageous, but should be carefully balanced against the risk, and should also be subject to procedural constraints in the approval process. The ACBCI will be glad to work with the BIA on developing proposed regulations that balance the need for flexibility with the need to protect landowners against those who would use this flexibility to take advantage of them.

Direct Pay – Sections 162.424 and 162.426

Proposed Sec. 162.424 is too rigid in allowing direct pay of rent by lessees to lessors only if there are 10 or fewer landowners and only if all consent. Direct pay should be the option of each landowner, and there should be no maximum limit on the number of lessors who have this option. Also, Sec. 162.424(b)(4) permits a lease to provide for payment to parties other than the lessors. This provision should be eliminated or at least carefully circumscribed so as to prevent factoring, etc. Similarly, Sec. 162.426(a)(2) permits payment in forms other than cash. This creates new accounting challenges. Is the BIA equipped to issue 1099 forms that will accurately reflect such payments to the satisfaction of the Internal Revenue Service?

Performance Bonds – Section 162.434(a)(1-4)

As reflected in numerous comments by other tribes, the proposed requirements for performance bonds (Sec 162.434(a)(1-4)) are likely to operate as a significant disincentive to future economic development, particularly in the context of a long-term lease. While the bonding requirement has a noble intent, these requirements should be more clearly defined, and may present obstacles that make development on Indian land non-competitive. Many surety companies are unwilling to issue bonds at all in Indian country. The lack of robust market competition makes the bonds that can be obtained prohibitively expensive in some cases. For some projects, the kinds of expansive bonds called for in the proposed regulation, covering all obligations of the lessee for the entire term of the lease, may simply not be available or feasible. For example, developers and surety companies will balk at a requirement for a bond to ensure the "…restoration and reclamation of the leased premises…" at the end of a 99-year lease term. This section should be revised to minimize the disincentives that the proposed bonding requirements will place on new projects, by limiting the required bonds by subject (e.g.,

construction, minimum guaranteed annual rent but not incalculable percentage rent, etc.) and duration.

The Complete Lease Package – Section 162.438

The ACBCI supports the effort of the BIA to describe, for the first time, exactly what documents are needed to comprise a complete lease package, one that starts the 60-day approval period running (Sec. 162.438). However, some of the categories on the list are so open-ended that lessors and lessees will still not know exactly what they must submit to provide a complete package. Several items on the list (e.g., items (a), (f), (h), and (k)) are so open to interpretation as to give virtually no useful guidance to lessors or lessees. How does a prospective lessee know when a set of documents intended to satisfy item (c) will suffice? What kind of a tribal statement will satisfy item (e)? Will a short, conclusory statement on Tribal letterhead do, or will more be needed and, if so, what more? In what cases will a restoration and reclamation plan (item (g)) be needed? In all cases? Is that requirement feasible for a 99-year non-mineral business lease? Item (h) is discussed separately in these Comments.

But the most pernicious item on the list is item (l), the catch-all: "Any additional documentation we determine to be reasonably necessary for approval." This item swallows the regulation, and defeats its purpose of placing a limit on the number of categories of documents needed for a complete package. If an item is not fairly within one of the above-described categories, no catch-all should invite endless further submissions. There must be an end to the process. The 60-day approval requirement is meaningless if lessors and lessees cannot know what they have to do to start it.

Tribal Approval of Proposed Land Use – Sections 162.438(e) and (h)

The ACBCI tribal government does not currently examine any proposed lease to determine whether the lease complies with land use regulations or other applicable regulations, (as noted in Sec. 162.438(e)), and does not consider that function to be within the scope of the Tribe's responsibility. Similarly, the Tribe anticipates a major disruption of the leasing process from the implementation of Sec. 162.438 (h), requiring documentation of the lessee's history as a developer. On the Agua Caliente Indian Reservation, many commercial lessees are single-project Limited Liability Companies (LLCs) formed specifically for the one project contemplated by the lease, and thus have no relevant previous development history. These sections should be revised to put the onus on the lessee to demonstrate compliance with land use constraints and to show viability as a developer in terms of current capitalization and capacity to perform, but not prior performance when there has been no prior history at all.

"Deemed Approved", LTRO and TAAMS – Section 162.439(b)

ACBCI appreciates that the mechanism in the Proposed Regulations under which a lease amendment, assignment, sublease, or leasehold mortgage will be "deemed approved" after 60

days (Sec. 162.439(b)) is intended to respond to legitimate concerns about the length of time that such approvals have taken in the past. However, we anticipate that if lease actions are deemed approved, and therefore do not have the traditional BIA approval documents, significant new challenges will be created for those offices that are responsible for verification of title and other record keeping functions. In cases where such lease actions are deemed approved, it will be much more difficult, and perhaps impossible, to accurately maintain and track title records. Affirmative BIA consent and transmittal documents serve a useful purpose in tracking the processing and status of lease transactions at the Land, Title and Records Office (LTRO) as well as in the TAAMS database. Gaps in the TAAMS database will at least make it more difficult to ensure, and might perhaps prevent, correct and timely payments to landowners. Major modifications to the current internal processes of the BIA and LTRO will be needed to prevent the new regulations from causing confusion in the recording process at LTRO and in the TAAMS database. As of now, even with affirmative BIA approvals being recorded at the LTRO, the backlog for certified Title Status Reports (TSR) is so great that it typically takes 6-10 years for an allottee-owner to get a certified TSR. Will the LTRO *ever* be able to produce an accurate TSR if it must guess as to which lease actions are "deemed approved", as opposed to those actions that at least have an affirmative BIA approval page?

Also, due to the unique nature of the ACBCI Reservation, and the demands of the local development and financing community, land leases and land records concerning the Agua Caliente Indian Reservation are routinely recorded by the Riverside County Recorder's Office. In cases where a lease is deemed approved, the absence of an affirmative BIA approval document will prevent maintaining accurate records at the county's offices, where the County Recorder will not record a document that is not accompanied by an affirmative BIA approval. We recommend that the "deemed approved" process go one step further and include a provision that a lease that has been deemed to be approved will carry with it written BIA approval, assuming that the lease meets approval qualifications.

Assignments Without Consent – Sections 162.447 and 162.448

As currently written, Sections 162.447 and 162.448 of the Proposed Rule may result in "deemed consent" to an assignment of an existing lease, which presents recordkeeping and accounting issues as discussed above. Assignments that are approved without the express consent of all landowners could circumvent the proper due diligence that might otherwise be necessary to protect the interests of landowners; for example, by establishing that the new lessee receiving the assignment is suitable and capable of performing under the lease terms.