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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Case Number 13-16259
Case Number 13-16278

Window Rock Unified School District; Pinon Unified School District,

Plaintiffs-Appellees,

v.

Ann Reeves, Kevin Reeves, Loretta Brutz, Mae Y. John, Clarissa Hale, Michael Coonsis, Barbara Beall; and Richie Nez, Casey Watchman, Ben Smith, Peterson Yazzie, Woody Lee, Jerry Bodie, Evelyn Meadows, and John and Jane Does I-V, Current or Former Members of the Navajo Nation Labor Commission,

Defendants-Appellants.

NAVAJO NATION LABOR COMMISSION APPELLANTS' REPLY BRIEF

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Commission Appellants (Appellants) hereby submit their Reply Brief to Appellees' Answering Brief.

STATEMENT ON ADDENDUM

A separately-bound Reply Addendum (NNRADD) is filed concurrently with this Brief to include new authorities not previously cited in Appellants' Opening Brief (OB).

ARGUMENT

The amount of argument Appellees the School Districts (Districts) deem necessary to include in their Answering Brief (AB) reflects the complexity of the issue before this Court. Indeed, in their Motion to Exceed Word Limits for Answering Brief, the Districts themselves describe the case as "a complicated one of tribal jurisdiction." Motion at 2. Despite this characterization, and the claimed need for 16, 230 words of argumentation, the Districts maintain that the Nation's jurisdiction is "plainly lacking." It is not.

I. THIS COURT SHOULD ADOPT THE EIGHTH CIRCUIT'S DEFINITION OF "PLAINLY LACKING."

The meaning of "plainly lacking" is at the center of this case. However, the contours of the "plainly lacking" exception have yet to be clearly defined by the U.S. Supreme Court or this Court. This Court has stated that the plainly lacking exception does not apply if the Indian nation's jurisdiction is "plausible" or "colorable," but has yet to further define its meaning. *See Elliot v. White Mountain*

Apache Tribal Court, 566 F.3d 842, 848 (2009). Despite their brief's length, the Districts do nothing in their forty-six pages of argument to further define this exception, but instead flatly state that the Nation's jurisdiction is not "colorable" or "plausible." AB at 21.

Commission Appellants suggest that this Court adopt the Eighth Circuit's definition that jurisdiction is plainly lacking "only if the assertion of tribal jurisdiction is frivolous or obviously invalid under clearly established law." *Dish Network Service, L.L.C. v. Laducer*, 725 F.3d 877, 883 (2013). This definition provides more guidance on the meaning of "plausible" or "colorable," and appropriately reflects the narrow nature of the exception. Further, it conforms to the main principle underlying the exhaustion requirement- that the tribal court is the appropriate forum to decide jurisdictional questions in the first instance. *See National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856 (1985).[1]

[1] The Supreme Court has never overruled *National Farmers* or *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987), which both emphasize the importance of tribal exhaustion and reject a categorical rule that an Indian nation lacks civil jurisdiction over non-members. *See National Farmers*, 471 U.S. at 855-56. Importantly for this case, as noted in Appellants' Opening Brief, OB at 15, *National Farmers* itself concerned tribal court jurisdiction over a state-organized school district that operated on state-owned fee land within the Crow Nation's reservation. 471 U.S. at 847. Despite the facts that the defendant was a school district and that the incident giving rise to the tribal lawsuit occurred on fee land, the Court unequivocally remanded the case back for the tribal court's review. 471 U.S. at

Under that rule, cases such as this one, where factual questions remain, and the law is unclear, should first be presented to the Nation's courts. *See Laducer*, 725 F.3d at 883. With little factual background and multiple layers of legal ambiguity present in this case, the Nation's jurisdiction is neither frivolous nor obviously invalid under clearly established law.

Even if the Court does not adopt that standard, the Nation's jurisdiction nonetheless is "plausible" or "colorable."

II. IN THE ABSENCE OF COMPLETE FACTUAL AND LEGAL DEVELOPMENT, THE NATION'S JURISDICTION IS NOT "PLAINLY LACKING."

A. There are significant unresolved factual and legal issues.

There are numerous unresolved issues, both of a legal and factual nature, in this case. Without allowing the Nation's courts an opportunity to explore and answer these questions, this Court cannot find the Nation's jurisdiction plainly lacking.

Some of the factual and legal issues which require further development are the Navajo Nation's historical and contemporary relationships with the United States Government and the State of Arizona, particularly in the area of education. The origin of state-organized school districts within the Nation and their current

857 ("Until petitioners have exhausted the remedies available to them in the Tribal Court system . . . it would be premature for a federal court to consider any relief,").

funding[2] also are relevant factual considerations requiring further exploration. *See* Amicus Brief of Navajo Nation Supreme Court at 5-8 (discussing history of state-organized school districts on the Nation and current state/federal funding structure); *see also* Robert A. Roessel, Jr., Navajo Education, 1948-78: Its Progress and Its Problems 152-55 (1979), NNRADD 125-129 (discussing origins of state-organized school districts and provision of federal funding).[3]

The Districts have a unique status on the Nation as entities organized under

[2] In response to the Navajo Nation Supreme Court's Amicus Brief the Districts argue that federal funding for Indian reservations is no different than its funding for military reservations and other non-taxable federal lands within the State of Arizona. *See* AB at 62-63. However, Congress has explicitly recognized the United States has a trust responsibility to provide resources for Indian education, and therefore its provision of funding for Indian reservation schools is quite different than funding for non-Indian federal lands. *See* 20 U.S.C. § 7401, NNRADD1 ("It is the policy of the United States to fulfill the Federal Government's unique and continuing trust relationship with and responsibility to the Indian people for the education of Indian children"). The federal funding uniquely targeted to assist in fulfilling the federal government's responsibility is a relevant area of inquiry that has yet to be explored in this case.

[3] A review of the history of state public schools on the Nation shows that, despite the Districts' suggestion that their entry onto the Nation was to fulfill the educational mandate of the Enabling Act, state schools were originally constructed as "accommodation schools" to educate non-Indian children of Bureau of Indian Affairs employees. Roessel at 152, NNRADD 126 (mentioning, among other schools, Fort Defiance, now in the Window Rock School District). Further, the State of Arizona resisted providing on-reservation schools for many years, disagreeing with the federal government over who had the ultimate responsibility to educate Navajo children. *Id.* at 154, NNRADD 128. The Districts' embrace of the state mandate asserted in this case is then, at best, a recent development in Arizona.

state law but governed and administered by Navajos for an almost-exclusively Navajo student body. As such, the Navajo citizenship status of the members of their governing boards, staff, and student population is relevant, and part of the necessary factual record.[4] This is particularly true if it can be shown that all-Navajo boards made the employment decisions giving rise to the disputes filed before the Commission, bringing them directly under Navajo jurisdiction, even under the most restrictive application of *Montana v. United States*, 450 U.S. 544 (1981). *See MacArthur v. San Juan County*, 497 F.3d 1057, 1070 (10th Cir. 2007).[5]

Further, the Districts' legal status, for purposes of the jurisdictional issue before this Court, is in question. The Districts claim in their Answering Brief they are not "the State," but instead mere non-sovereign entities created under Arizona law. AB at 62; 66 ("[T]he State is not a party to this case[.]"). They further deny that they are even special-purpose governments under Arizona law, AB at 62,

[4] In *National Farmers*, the U.S. Supreme Court specifically noted as a relevant fact the percentage of students who were citizens of the Crow Nation. 471 U.S. at 847 (noting state-organized school district's student body was 85% Crow).

[5] The Districts believe the Navajo citizenship status of the board members is irrelevant. AB at 40 n.23; 48. However, despite their otherwise enthusiastic citation of *MacArthur*, they mischaracterize the Tenth Circuit's holding that the Navajo board member of the state organization was subject to the Nation's jurisdiction. *See* 497 F.3d at 1070. They instead quote a section of the opinion denying the requested injunction based on principles of comity to suggest the Tenth Circuit ruled jurisdiction was lacking. AB at 40-41, n.23; *MacArthur*, 497 F.3d at 1076.

despite their own statements elsewhere to the contrary.[6]

Nonetheless, the Districts cloak themselves with the status of "the State" for purposes of the Nation's jurisdiction, embracing *Nevada v. Hicks*, 533 U.S. 353 (2001), *MacArthur*, and other cases dealing with actual state governmental officials to allege a categorical rule that the Nation lacks any jurisdiction over them. *See, e.g.*, AB at 42. The contradictory position of the Districts illustrates that the status of state-organized school districts is a relevant factual and legal inquiry that has yet to be fully explored, due to the Districts' haste to evade the fact-finding function of the Commission.

As these issues make evident, the legal relationship between the Navajo Nation and the Districts is unique, requiring significantly more factual and legal context to make the jurisdictional decision in this case. Up to this point, these uniquely Navajo facts and law have not been adequately addressed by any tribunal. The Nation's jurisdiction therefore is not plainly lacking.

B. Prior case law does not create a categorical rule barring Indian nation regulation of state-organized school districts.

Based on the above, this case presents a novel question not answered by

[6] The Districts' claim is especially curious because documents from both Districts readily available on the internet identify them as "special-purpose governments" legally separate and financially independent from the State of Arizona government. *See* Pinon Unified School District Comprehensive Annual Financial Report for Fiscal Year 2012, at 9, NNRADD 124; Window Rock Unified School District Request for Proposal No. 2013-6-7-8, at 35, NNRADD 131.

prior case law, and the factless, categorical bar to tribal jurisdiction the Districts assert cannot apply. Even if the Districts were "the State," which they themselves deny, *Hicks* does not create a categorical rule barring all regulation of state governmental officials and agencies by Indian nations. *See* 533 U.S. at 357, n.2 (restricting holding to "state [law enforcement] officers enforcing state law"). Neither does *MacArthur*, despite the Districts' best efforts to suppress the Tenth Circuit's clear statement that its holding does not apply to tribal regulatory authority over "States qua States" on tribal trust land. *See* 497 F.3d at 1074, n.10.

This Court applies the principle, which the Districts ignore, that questions of tribal jurisdiction are complex and contextual, answered only through a review of the specific historical and contemporary facts and laws relevant to the assertion of that Indian nation's jurisdiction in that case. *See Smith v. Salish Kootenai College*, 434 F.3d 1127, 1130 (2006) ("[Q]uestions of jurisdiction over Indians and Indian Country remain a complex patchwork of federal, state, and tribal law which is better explained by history than logic." (internal quotation marks and citation omitted)). This is consistent with the U.S. Supreme Court's own approach. *See National Farmers*, 471 U.S. at 855-56 (requiring a "careful examination" of tribal sovereignty and a "detailed study" of statutes, treaties, Executive Branch policies, and administrative and judicial decisions).

Therefore, the facts on the ground concerning these specific districts within

the Nation are relevant, despite the Districts' attempts to cast such jurisdictional considerations as improper "flighty, case-by-case issue[s]." AB at 58. Since it is not governed by prior case law, the Nation's jurisdiction is not plainly lacking. This Court should stay its hand and require the Districts to first argue their case before the Nation's tribunals.

III. THE NATION'S JURISDICTION IS PLAUSIBLE UNDER THE TREATY OF 1868.

As shown in Appellants' Opening Brief, the text of the Treaty and subsequent case law interpreting it clearly establish the Nation's jurisdiction here. OB at 21-24. Even in a light most favorable to the Districts, there is, at most, a need to further explore the Treaty's relationship with subsequent federal, Navajo Nation and Arizona legislation. Under either scenario, the Districts fail to show that the Nation's jurisdiction under the Treaty is plainly lacking.

A. The Districts apply none of the actual principles of treaty interpretation to limit the effect of the Nation's treaty in this case.

The Districts make flat conclusions on the meaning of the Treaty not based on its text, its surrounding circumstances,[7] or the principles of treaty interpretation

[7] The Districts deny any relevance to the surrounding circumstances by stating that the State of Arizona did not exist, and therefore such circumstances cannot be relevant. AB at 23, n.6. This is exactly contrary to binding principles of treaty interpretation. As the State of Arizona did not exist, its authorities and interests must conform to the pre-existing power of the Nation acknowledged by the United States in the Treaty, not the other way around. What the Nation's leaders at the time of the Treaty of 1868 believed their right to exclude meant for future entities

actually applied by federal courts. *See* OB at 22 (discussing interpretative principles). Instead, the Districts rely on a narrow reading of prior cases to claim the Treaty's jurisdictional authority is limited to "states' attempts to assert broad authority over tribal lands," and the Nation's "internal and social relations." AB at 25. Even if these cases remotely supported the limitation the Districts have created, which they do not, see OB at 23-4, none of them deal with the precise issue raised here- whether the Nation's right to exclude authorizes the Nation to condition the presence of state-organized school districts through application of the Nation's employment laws.[8]

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and organizations seeking access to the Nation's land must be considered in addition to the text. *See Minnesota v. Mille Lac Band of Chippewa Indians*, 526 U.S. 172, 196 (1999). Nonetheless, the text itself clearly supports the Nation's right to exclude any future state-organized entities, as they are not included in the finite list of officials authorized to enter the Nation without the Nation's consent. *See* Treaty of 1868, June 1. 1868, art. II, 15 Stat. at 668; *Donovan v. Navajo Forest Products Industry*, 692 F.2d 709, 711-712 (10th Cir. 1982). The Districts provide nothing to suggest otherwise, either through an interpretation of the text or the surrounding circumstances.

[8] Curiously, the Districts cite *Equal Employment Opportunity Comm'n v. Peabody*, No. 2:01-cv-01050, 2012 WL 5034276 (D. Ariz. October 18, 2012), as one of the prior cases that allegedly limit the Nation's treaty authority to land and internal affairs. AB at 24. In fact, the district court in that case recognized the Nation's regulatory jurisdiction to apply its employment laws to lessees of tribal land *due to the Treaty right to exclude*, *id.* at *16-17, 19-20, the exact claim Appellants make in this case. Though the case concerned a private lessee, nothing in the opinion suggests the main principle does not apply to state-organized school districts, who, by their own description, are not state sovereign entities. Therefore, the Districts distort the import of that case, even if their representation of the prior cases were otherwise correct.

B. The Districts misapply principles of federal common law jurisdiction as limitations on the Nation's treaty rights.

The Districts further attempt to conflate the Nation's treaty rights with non-treaty jurisdictional limitations. The Districts cite cases and principles concerning an Indian nation's federal common law jurisdiction to suggest the same limitations apply to treaty authority. *See* AB at 25-29 (citing *Hicks*, *Montana*, and *United States v. Wheeler*, 435 U.S. 313 (1978)). Those authorities do not constrain jurisdiction recognized by a treaty, which is a separate source of an Indian nation's authority over non-members. *See Montana*, 450 U.S. at 556, 563-64 (discussing treaty authority separately from common law tribal jurisdiction).

The Districts' conflation of treaty and federal common law jurisdiction principles is most pronounced in its description of *Montana* itself. The Districts claim that the U.S. Supreme Court's interpretation of the nearly-identical treaty provision of the Crow Nation was simply dealing with "freedom from broad state regulation over its land,"[9] AB at 27, n.10. That description is found nowhere in the case itself. Instead, the Supreme Court "readily" agreed with this Court's prior decision in the case that the Crow Nation had regulatory jurisdiction over non-

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[9] Despite the Districts' continual reference to "broad" state authority, they do not define what constitutes "broad" versus "narrow" assertions of state power in Indian Country. Regardless, that distinction finds no support in prior case law, and should not be created here.

members on trust land due to the right to exclude under the Crow treaties. *See Montana*, 450 U.S. at 556; *United States v. Montana*, 604 F.2d 1162, 1166 (9th Cir. 1979) ("The power of the Crow Tribe to exclude those not members of the tribe from hunting and fishing within the exterior boundaries of the reservation has its source in the treaties of 1851 and 1868."). Importantly, this Court looked to the text and surrounding circumstances of those treaties to recognize such right. 604 F.2d at 1166-67.

In *Montana*, the Supreme Court's holding concerning treaty jurisdiction over trust lands was separate and apart from the principle the Districts claim the Court "reiterated," AB at 27, n.10, that tribal power is limited "to protect tribal self-government or to control internal relations." 450 U.S. at 563-64. That statement appears in a separate section of the opinion, and applies solely to federal common-law jurisdiction over non-Indian owned fee lands, from which tribes have no right to exclude. *See id.*. Treaty-based jurisdiction is distinct and not restricted by the federal common-law jurisdictional principles, as recognized by the Supreme Court in *Montana* and subsequent cases. *See id.* at 556; *Atkinson Trading Post v. Shirley*, 532 U.S. 645, 650 (2001); *South Dakota v. Bourland*, 508 U.S. 679, 687-88 (1993).

Nothing in *Hicks* altered the distinction between treaty and federal common law jurisdiction. *Hicks* did not consider treaty-based authority and actually

distinguished in multiple places the sovereignty of Indian nations, like the Navajo Nation, that possess a treaty right to be free from state jurisdiction. *See* 533 U.S. at 361, n.4 (discussing Navajo treaty along with Cherokee treaty as examples of such treaties); 363 n.5 (recognizing some Indian lands are excluded from the territory of a state by treaty). This Court should not accept the Districts' invitation to collapse the clearly-recognized distinction between treaty rights and federal limitations on non-treaty jurisdiction.[10]

C. The Treaty has not been abrogated or waived.

For the first time in response on appeal, the Districts claim an abrogation of the Treaty. This abrogation was allegedly done by Congress authorizing, with the Indian nation's consent, enforcement of state compulsory school attendance laws. *See* 25 U.S.C. § 231, NNRADD 2. The Districts utilize none of the actual principles of abrogation, *see United States v. Dion*, 476 U.S. 734, 740 (1986), but flatly state that state-organized schools must exist on the reservation for truancy officials to be present on the Nation. AB at 34. Based on this interpretation of 25 U.S.C. § 231, the Districts conclude that Congress, *sub silentio*, abrogated the Nation's treaty right to exclude any state-organized school districts for all purposes in perpetuity.

[10] For the same reason, the Districts' claim that the Nation's authority is "withdrawn by implication," AB at 35-36, does not apply to its Treaty right, as that concept applies to non-treaty based jurisdiction, not to treaty rights, which must be affirmatively abrogated by Congress.

Clear evidence of Congressional intent to abrogate must exist before the Court will impute abrogation. *Dion*, 476 U.S. at 739-40. The Districts produce no evidence that Congress actually considered the conflict between the intended action and treaty rights, and choose to resolve the conflict by abrogation. *See Id*. Not only is there no affirmative evidence of abrogation, but the inclusion of the requirement for tribal consent actually supports the Nation's right to exclude, as state truancy officials can only be present *with the permission of the Nation*. *See* 25 U.S.C. § 231(2) ("this subparagraph . . . shall not apply to Indian of any tribe in which a duly constituted governing body exists until such body has adopted a resolution consenting to such application."). How congressional recognition of the tribal right to exclude school officials actually abrogates the Nation's treaty right to exclude school officials is not explained.

According to the Districts, the Navajo Nation Council's consent to the application of school attendance laws means the right to exclude was, *sub silentio*, waived for all state-organized school districts operating on trust land in perpetuity. The mere granting of permission to the State to enforce compulsory school attendance laws does nothing to alter the independent right to condition the building of facilities and the operation of schools on adherence to Navajo Nation law.

The permission granted by the Navajo Nation Council is clearly limited to

enforcement of compulsory school laws, and does not broadly grant state-organized school districts authority free from the Nation's regulation. Under the Nation's statute, compulsory school laws apply "wherever an established public school lies . . . within the Navajo Nation," 10 N.N.C. § 503, NNRADD 26, that is, when the Nation has otherwise consented to the physical presence of such state-organized school districts under the separately applicable leasing conditions set by Navajo Nation and federal law. *See* 10 N.N.C. § 499(D), NNRADD 25 (including, among other requirements, that "[a]ll lessees receiving leases pursuant to this Chapter are subject to the laws of the Navajo Nation in regard to the occupation of and activities conducted upon the leased premises."); 25 U.S.C. § 415(a) (requiring a federally-approved lease with Indian nation to possess tribal trust land); 25 C.F.R. § 162.005(a) (same), NNRADD 38.[11]

D. The word "control" in the Enabling Act does not exempt the Districts from the Nation's Treaty right to exclude.

The Districts further continue to make the expansive claim that the Nation can never exclude them, based on nothing more than their broad and unsupported

[11] In their Opening Brief, Appellants cited to several leasing regulations concerning trespass and school leases. OP at 34-35. Those regulations applied to leases prior to December, 2012, when the Bureau of Indian Affairs promulgated new regulations. Some of the old sections of the regulations referenced in the Opening Brief have been superseded in the new regulations. *See generally* 25 C.F.R. Part 162, NNRADD 28-122. However, the amended regulations continue to state that a federally-approved lease is necessary to possess trust land, and failure to have one is a trespass. *See* 25 C.F.R. § 162.005(a), NNRADD 38.

interpretation of the word "control" in the Enabling Act. AB at 30-31. Importantly, the Districts do not claim the Enabling Act abrogates the Treaty, but, like the District Court, argue that somehow "control" allows unfettered and permanent access to trust lands regardless of the Treaty. *Id.* The conclusory interpretation of the New Mexico Supreme Court divorced from the actual text of the Enabling Act notwithstanding, see *Prince v. Bd. of Ed. of Cent. Consol. Indep. Sch. Dist. No. 22*, 543 P.2d 1176, 1182 (N.M. 1975),[12] the meaning of "control" is, at best, unclear. Regardless, the position that it renders the Districts exempt from exclusion flies in the face of not only the Treaty, the disclaimer provision elsewhere in the Enabling Act, see OB at 26-27, and the federal leasing statute and its regulations,[13] but the *very leases the Districts signed*, which unequivocally state

[12] Even assuming the bare interpretation of the New Mexico Supreme Court was justified through some actual review of the text and legislative history of the provision, the discussion lacks any mention of the Treaty or the New Mexico disclaimer clause, which is identical to Arizona's, see OB at 26-27. Regardless, the court nowhere stated school districts are exempt from acquiring a lease from the Nation due to the term "control," the claim made by the Districts here. In fact, the court was aware of and discussed several leases the New Mexico school districts had with the Nation. *See Prince*, 543 P.2d at 554.

[13] The Districts suggest the Nation lacks the right to exclude them because the federal leasing regulations require action by the Bureau of Indian Affairs to terminate the lease, based on a 1983 opinion from this Court. AB at 32, citing *Yavapai-Prescott Indian Tribe v. Watt*, 707 F.2d 1072, 1073. They also claim that federal leasing regulations "require" a lease to conform with state law when so declared by a federal court. *Id.* Even if true, that does not surrender the authority of the Nation to deny them a lease in the first place, and therefore deny them any right to occupy tribal trust land. It also does not mean leases with state-organized

that the Districts must surrender the land after the expiration of their leases:

> Lessee hereby agrees that at the termination of the lease by normal expiration or otherwise, it will peaceably and without legal process deliver up the leased premises exclusive of the improvements as shall remain its property as herein above provided.[14]

Lease between the Navajo Tribe of Indians and the Hopi Public School District No. 25, April 27, 1982, § 8(a), NNER 57; Lease between the Navajo Tribe of Indians and the Window Rock Unified School District, November 8, 1985, § 8(a), NNER 43 (same); Lease between the Navajo Tribe of Indians and the Window

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school districts automatically incorporate state law to the complete exclusion of the lessor Indian nation's law.

Nevertheless, the regulations cited by the Districts were amended in December, 2012, and currently authorize both the Indian nation and the Bureau independently to enforce the terms of the lease. 25 C.F.R. § 162.022(a), NNRADD 43. Under these amended regulations, state law only applies to a lease when 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*." 25 C.F.R. § 162.014(a)(3)(iii), NNRADD 42 (emphasis added). Further, the regulations recognize that tribal laws apply to leases. 25 C.F.R. § 162.014(a)(2), (b), NNRADD 41, 42. They also explicitly permit the application of an Indian nation's employment preference laws to lessees, with no exception for state educational entities, who fall under the "business lease" classification under the new regulations. *See* 25 C.F.R. §§ 162.015, NNRADD 42; 162.401(a)(3), NNRADD 77.

[14] The leases state that the Districts own any improvements constructed on the leased land, but must remove them within fifteen months of the expiration of the lease, or they then become property of the Nation. Lease between the Navajo Tribe of Indians and the Hopi Public School District No. 25, April 27, 1982, § 6, NNER 57; Lease between the Navajo Tribe of Indians and the Window Rock Unified School District, November 8, 1985, § 6, NNER 42 (same); Lease between the Navajo Tribe of Indians and the Window Rock Unified School District, September 22, 1983, § 6, NNER 51 (same).

Rock Unified School District, September 22, 1983, § 8(a), NNER 51 (same).

For all of these reasons, jurisdiction is plausible under the Treaty therefore not plainly lacking.

IV. THE NATION'S JURISDICTION IS NOT PLAINLY LACKING UNDER *WATER WHEEL*.

The Districts argue that this Court's opinion in *Water Wheel Recreation Area, Inc. v. LaRance*, 642 F.3d 802 (2011), does not support a federal common law right to exclude the Districts, as that opinion allegedly only recognized jurisdiction over private lessees. AB at 37. The Districts are correct that the facts of *Water Wheel* concerned a private lessee who held over its occupancy of trust land after the expiration of a lease. 642 F.3d at 805-06. Nevertheless, the general rule announced by the Court is that an Indian nation has jurisdiction over activities on trust land through the right to exclude, with no stated limitation to strictly private lessees. *Id.* at 812.

The Districts are further correct that this Court appeared to state an exception to its general rule, based on *Hicks*, when "competing state interests" are at play. *Id.* at 804. This Court has not heard a case since *Water Wheel* on what state interests override the common law right to exclude. It is then at best unclear whether the main rule or the exception in *Water Wheel* applies in this case or not. The language of the opinion suggests that the "state interests" exception tracks the specific considerations in *Hicks* to conform to its narrow holding, binding on this

Court, that federal common law jurisdiction cannot extend to state law enforcement acting within the scope of their authority on trust land. *See id.* at 813 ("[*Hicks'*] application of *Montana* to a jurisdictional question arising on tribal land should apply only when the *specific concerns at issue in that case* exist." (emphasis added)). However, as recognized by this Court, *Hicks* concerned actual state government law enforcement officers with a federally-recognized sovereign right to enforce state criminal law within a non-treaty reservation. *Id.* at 813. It did not address self-described non-sovereign school districts operating schools pursuant to a lease on the Nation's treaty reservation. Lacking any clear guidance after *Water Wheel*, jurisdiction is not plainly lacking.

V. JURISDICTION IS NOT PLAINLY LACKING UNDER *MONTANA*.

A. The Leases are Consensual Relationships under *Montana's* first exception.

1. There is no difference between the Districts' leases and a lease explicitly identified in *Montana* as creating a consensual relationship.

The Districts continue to assert that a lease with a non-sovereign state-organized school district is not a consensual relationship under *Montana's* first exception. AB at 41-42. The Districts believe this in spite of the Supreme Court's explicit identification in *Montana* of a lease as one type of consensual relationship. 450 U.S. at 565. Their only argument around *Montana*, which they otherwise

enthusiastically embrace,[15] is that leases with school districts are different, simply because they are somehow the equivalent of "the State" for purposes of the alleged categorical rules of *Hicks* and *MacArthur*. As discussed above, by their own description, they are not "the State," but non-sovereign entities organized under Arizona state law, AB at 41-42, rendering those cases, even if they did support the expansive exemption they assert, inapplicable.

Also, as discussed above, neither the federal leasing regulations, 25 C.F.R. Part 162, NNRADD 28-122, nor the leases the Districts entered into recognize any special status or exemption from the otherwise applicable rules for lessees. The leases in this case are standard leases issued by the Nation and approved by the Bureau of Indian Affairs, with no recognition that the Districts are different from other lessees for purposes of *Montana*, other than the ambiguous consent provision in the Window Rock leases discussed below. Lacking any binding law clearly foreclosing the Nation's fulfillment of the first exception through the leases, this Court cannot conclude the Nation's jurisdiction is "plainly lacking."

2. The Window Rock School District fails to identify any actual "rights" or "obligations" that negate its consent to Navajo law in its lease.

The Window Rock District denies any significance to its consent to Navajo Nation law by alleging the application of the Nation's employment laws would

[15] Except, of course, for its independent recognition of the Crow Nation's jurisdiction over trust land under its treaty. *See supra*, III(B).

violate several purported "rights" and "obligations" they possess as state-organized school districts. AB at 42-44. These "rights" and "obligations" are nowhere specified in the consent provision in the lease, and the District provides no citations to any source recognizing or defining them. Instead, like the District Court, see OB at 40-42, the District merely declares them to exist. In the absence of any clear source defining those "rights" and "obligations," and evidence that the parties at the time of the leases understood the terms in the lease to include them, the Nation's jurisdiction again cannot be plainly lacking.

One alleged "obligation" deserves further discussion: the obligation to not discriminate, which the District alleges it must do to comply with Navajo employment preference requirements. The District states that "school districts cannot discriminate in favor of Navajos and against other Indians in their employment decisions without violating Title VII," citing this Court's decision in *Dawavendewa v. Salt River Project Agr. Imp. & Power Dist*, 154 F.3d 1117, 1120 (9th Cir. 1998). AB at 43. As noted by the Navajo Supreme Court in its amicus brief, Navajo law authorizes a waiver of such preference requirements when approved by a school board. 10 N.N.C. § 124(C), NNRADD 24. Any concern over inconsistencies with Title VII is then easily alleviated.

Interestingly, the District fails to mention that the Federal District Court of Arizona in *Equal Employment Opportunity Comm'n v. Peabody* recently

distinguished *Dawavendewa* for employers operating on Navajo trust lands pursuant to a federally-approved lease, holding Navajo membership preference did not violate Title VII. No. 2:01-cv-01050, 2012 WL 5034276, at *5-6. An appeal of that decision is currently pending before this Court, and the Nation asserts in that case, as correctly held by the district court, that tribal preference requirements as applied to lessees do not violate Title VII.

Finally, independent of that case, current federal leasing regulations explicitly recognize that tribal employment preference laws can apply to lessees of trust land based on the political status of tribal membership. 25 C.F.R. § 162.015, NNRADD 42. Therefore, the District does not have any "obligation" inconsistent with the Navajo Preference in Employment Act.

3. <u>There is a nexus between the leases and the Nation's employment regulation.</u>

The Districts argue there is no "nexus" between the leases and the Nation's employment regulation. The Districts do not attempt to define "nexus," but state simply that there is none here. Ab at 44. As stated in their Opening Brief, the Commission Appellants assert employment regulation of the Districts is sufficiently connected to the leases to create the appropriate "nexus." OB at 38, n.9. More than bare conclusions should be required of the Districts to establish the

Nation's jurisdiction is plainly lacking due to the lack of a nexus.[16]

B. Jurisdiction under *Montana's* second exception is not plainly lacking.

Despite the attempt by the Districts to create a clear meaning for *Montana's* second exception, the uniqueness of this case precludes an answer in the absence of further fact-finding. The Districts reduce the second exception to be limited only to interference with "the tribe's internal functioning" or where the tribe's land or other natural resources are threatened. AB at 46, 49. They then purport to declare, in their subjective view, that the inability of the Nation to regulate them "does not affect tribal self-government." *Id.* at 46. However, the Nation's legitimate concerns over its sovereignty cannot be so flippantly cast aside. The Nation authorized the presence of school districts through leases. The Nation did nothing to surrender its authority.

The District Court's ruling, that the Nation cannot even exclude them from

[16] The Districts further suggest the individual employment contracts mandating Arizona state law are relevant to whether there is a "nexus." AB at 44. The Districts do not suggest such choice of law or choice of forum clause overrides the Nation's jurisdiction, but that somehow they have a closer "connection" to the employment decisions underlying this case. *Id.* A provision referencing state law as a condition of employment for individual employees cannot preclude the Nation's jurisdiction to hear employment claims. The Nation is not a party to these contracts and the Navajo Preference in Employment Act requires a provision to be included in all contracts that the NPEA applies. 15 N.N.C. § 609(A), NNRADD 27. If such a provision is not included, the NPEA imputes that provision to the contract to prevent attempts to evade Navajo jurisdiction through private agreement. *Id.* Regardless, the District should be required to assert the alleged effect of those provisions before the Commission.

using the Nation's land, despite the Districts' best efforts to cabin its effect to employment, AB at 54, surrenders the sovereign authority of the Nation over significant parts of its territory, creating islands within the Nation completely immune from its regulation. And yet the Districts and the District Court do not hesitate to declare, in their own view, that the Nation's sovereignty is not significantly impaired. At a minimum, lacking any real fact-finding on the situation on the ground at these Districts, Court should not affirm the district court's bare conclusion that the Nation's sovereignty is not sufficiently imperiled to fulfill *Montana's* second exception.[17] Jurisdiction is not plainly lacking.

VI. APPLICATION OF CONCURRENT NAVAJO NATION JURISDICTION IS NOT UNTENABLE.

In a final effort to render the Nation's jurisdiction's "plainly lacking," the Districts invoke policy concerns that the concurrent application of the Nation's employment laws places the Districts in an "untenable" situation. AB at 52. The Districts claim that they simply cannot provide alternative employee remedies in the state and Navajo Nation system. *Id.* There is nothing unusual in an employee having several possible forums and remedies for employment claims. Indeed, as

[17] In their brief, the Districts characterize this Court's remand for exhaustion in *Ford Motor Co. v. Todecheene* as only for consideration of the Nation's jurisdiction under the first exception. AB at 60-61. This Court clearly remanded for further exploration of the second exception. 488 F.3d 1215, 1216-17 (2007) (Order) ("The tribal court did not 'plainly' lack jurisdiction under the second exception, recognized in *Montana*[.]").

noted by the Districts themselves, AB at 43-44, they are already subject to Arizona state law and concurrently to federal employment laws such as Title VII that may require them to defend cases in the state or federal court system for employment actions. *See, e.g.*, A.R.S. § 41-1463, NNRADD 12-19 (state law prohibiting employment discrimination); § 41-1481(D), NNRADD 21-22 (providing state cause of action for employment discrimination); 42 U.S.C. § 2000e-2, NNRADD 3-6 (federal law prohibiting employment discrimination); §2000e-5, NNRADD 7-11 (providing cause of action in state and federal administrative tribunals and courts for violation of employment discrimination under federal law).

Just as in those situations, through the use of res judicata and collateral estoppel principles, the Districts can address their concerns with inconsistent rulings. *See, e.g. Kremer v. Chemical Const. Corp.*, 456 U.S. 461 (1982) (adjudication of discrimination claim in state court precludes litigation of Title VII claim in federal forum); *Peabody Western Coal Co. v. Navajo Nation Labor Comm'n*, 8 Nav. R. 313, 318 (Nav. Sup. Ct. 2003) (adjudication of wrongful termination claim through arbitration precludes litigation of NPEA claim in Labor Commission). Indeed, as acknowledged by the Districts, in one of the employment cases underlying this dispute, the Commission dismissed claims under Arizona law the plaintiffs already had already litigated in the Arizona state court system. *See* AB at 10.

CONCLUSION

For any or all of the reasons stated in the Commission's Opening Brief and this Reply Brief, the Nation's jurisdiction is not plainly lacking. This Court should then remand the case for the Districts to present their facts and arguments to the Nation's courts.

In the end, this is a political matter between sovereigns reflecting a unique relationship between the Navajo Nation, the United States Government, and the State of Arizona, for the provision of education to Navajo children. Issues concerning how to implement that education are best left to the sovereigns to negotiate through intergovernmental agreements, and not through the use of the federal courts. It is for the Districts to negotiate as a political matter the extent of the application of Arizona and Navajo law to their operations. In the absence of a negotiated waiver of the Nation's jurisdiction, the Nation has the ultimate authority to condition the presence of anyone utilizing its lands, and this Court should respect that authority by reversing the district court's decision.

DATED, this 3rd day of February, 2014.

/s/ Paul Spruhan
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Signature /Paul Spruhan

Attorney for Commission Appellants

Date February 3, 2014

CERTIFICATE OF SERVICE

I hereby certify that on February 3rd, 2014, the original of this Reply Brief was filed electronically with the Clerk of the Court through the CM/ECF system, with the following counsel receiving notice:

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Case Number 13-16259
Case Number 13-16278

Window Rock Unified School District;
Pinon Unified School District,

Plaintiffs-Appellees,

v.

Ann Reeves, Kevin Reeves, Loretta Brutz, Mae Y. John, Clarissa Hale, Michael Coonsis, Barbara Beall; and Richie Nez, Casey Watchman, Ben Smith, Peterson Yazzie, Woody Lee, Jerry Bodie, Evelyn Meadows, and John and Jane Does I-V, Current or Former Members of the Navajo Nation Labor Commission,

Defendants-Appellants.

NAVAJO NATION
REPLY BRIEF ADDENDUM

NAVAJO NATION ADDENDUM TO REPLY BRIEF
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under section 7345a of this title or subpart 2 of this part if the agency had submitted accurate information under subsection (a) of this section.

(Pub. L. 89–10, title VI, §6231, as added Pub. L. 107–110, title VI, §601, Jan. 8, 2002, 115 Stat. 1897.)

§7355a. Supplement, not supplant

Funds made available under subpart 1 or subpart 2 of this part shall be used to supplement, and not supplant, any other Federal, State, or local education funds.

(Pub. L. 89–10, title VI, §6232, as added Pub. L. 107–110, title VI, §601, Jan. 8, 2002, 115 Stat. 1897.)

§7355b. Rule of construction

Nothing in this part shall be construed to prohibit a local educational agency that enters into cooperative arrangements with other local educational agencies for the provision of special, compensatory, or other education services, pursuant to State law or a written agreement, from entering into similar arrangements for the use, or the coordination of the use, of the funds made available under this part.

(Pub. L. 89–10, title VI, §6233, as added Pub. L. 107–110, title VI, §601, Jan. 8, 2002, 115 Stat. 1897.)

§7355c. Authorization of appropriations

There are authorized to be appropriated to carry out this part $300,000,000 for fiscal year 2002 and such sums as may be necessary for each of the 5 succeeding fiscal years, to be distributed equally between subparts 1 and 2 of this part.

(Pub. L. 89–10, title VI, §6234, as added Pub. L. 107–110, title VI, §601, Jan. 8, 2002, 115 Stat. 1897.)

PART C—GENERAL PROVISIONS

§7371. Prohibition against Federal mandates, direction, or control

Nothing in this subchapter shall be construed to authorize an officer or employee of the Federal Government to mandate, direct, or control a State, local educational agency, or school's specific instructional content, academic achievement standards and assessments, curriculum, or program of instruction, as a condition of eligibility to receive funds under this chapter.

(Pub. L. 89–10, title VI, §6301, as added Pub. L. 107–110, title VI, §601, Jan. 8, 2002, 115 Stat. 1897.)

PRIOR PROVISIONS

A prior section 7371, Pub. L. 89–10, title VI, §6401, as added Pub. L. 103–382, title I, §101, Oct. 20, 1994, 108 Stat. 3712, related to maintenance of effort and supplementary nature of Federal funds, prior to the general amendment of this subchapter by Pub. L. 107–110. See section 7217 of this title.

A prior section 6301 of Pub. L. 89–10 was classified to section 7351 of this title, prior to the general amendment of this subchapter by Pub. L. 107–110.

§7372. Rule of construction on equalized spending

Nothing in this subchapter shall be construed to mandate equalized spending per pupil for a State, local educational agency, or school.

(Pub. L. 89–10, title VI, §6302, as added Pub. L. 107–110, title VI, §601, Jan. 8, 2002, 115 Stat. 1898.)

PRIOR PROVISIONS

A prior section 7372, Pub. L. 89–10, title VI, §6402, as added Pub. L. 103–382, title I, §101, Oct. 20, 1994, 108 Stat. 3713, related to participation of children enrolled in private schools, prior to the general amendment of this subchapter by Pub. L. 107–110. See section 7217a of this title.

A prior section 6302 of Pub. L. 89–10 was classified to section 7352 of this title, prior to the general amendment of this subchapter by Pub. L. 107–110.

A prior section 7373, Pub. L. 89–10, title VI, §6403, as added Pub. L. 103–382, title I, §101, Oct. 20, 1994, 108 Stat. 3715, which related to Federal administration, was omitted in the general amendment of this subchapter by Pub. L. 107–110. See section 7217b of this title.

SUBCHAPTER VII—INDIAN, NATIVE HAWAIIAN, AND ALASKA NATIVE EDUCATION

CODIFICATION

Title VII of the Elementary and Secondary Education Act of 1965, comprising this subchapter, was originally enacted as part of Pub. L. 89–10, Apr. 11, 1965, 79 Stat. 27, amended, and subsequently revised, restated, and amended by other public laws. Title VII is shown, herein, as having been added by Pub. L. 107–110, title VII, §701, Jan. 8, 2002, 115 Stat. 1907, without reference to earlier amendments because of the extensive revision of the title's provisions by Pub. L. 107–110. See Codification note preceding section 6301 of this title.

PART A—INDIAN EDUCATION

§7401. Statement of policy

It is the policy of the United States to fulfill the Federal Government's unique and continuing trust relationship with and responsibility to the Indian people for the education of Indian children. The Federal Government will continue to work with local educational agencies, Indian tribes and organizations, postsecondary institutions, and other entities toward the goal of ensuring that programs that serve Indian children are of the highest quality and provide for not only the basic elementary and secondary educational needs, but also the unique educational and culturally related academic needs of these children.

(Pub. L. 89–10, title VII, §7101, as added Pub. L. 107–110, title VII, §701, Jan. 8, 2002, 115 Stat. 1907.)

PRIOR PROVISIONS

A prior section 7401, Pub. L. 89–10, title VII, §7101, as added Pub. L. 103–382, title I, §101, Oct. 20, 1994, 108 Stat. 3716, set forth short title of Bilingual Education Act, prior to the general amendment of this subchapter by Pub. L. 107–110.

SAVINGS PROVISIONS

Pub. L. 107–110, title VII, §703, Jan. 8, 2002, 115 Stat. 1947, provided that: "Funds appropriated for parts A, B, and C of title IX of the Elementary and Secondary Education Act of 1965 [former 20 U.S.C. 7801 et seq., 7901 et seq., 7931 et seq.] (as in effect on the day before the date of enactment of this Act [Jan. 8, 2002]) shall be available for use under parts A, B, and C, respectively, of title VII of such Act [parts A, B, and C, respectively, of this subchapter], as added by this section [section 701]."

EXECUTIVE ORDER NO. 13096

Ex. Ord. No. 13096, Aug. 6, 1998, 63 F.R. 42681, which related to American Indian and Alaska Native education.

TRANSFER OF FUNCTIONS

For transfer of functions of other officers, employees, and agencies of Department of the Interior, with certain exceptions, to Secretary of the Interior, with power to delegate, see Reorg. Plan No. 3 of 1950, §§ 1, 2, eff. May 24, 1950, 15 F.R. 3174, 64 Stat. 1262, set out in the Appendix to Title 5, Government Organization and Employees.

INDIAN AGENTS

The services of Indian agents have been dispensed with. See note set out under section 64 of this title.

§ 231. Enforcement of State laws affecting health and education; entry of State employees on Indian lands

The Secretary of the Interior, under such rules and regulations as he may prescribe, shall permit the agents and employees of any State to enter upon Indian tribal lands, reservations, or allotments therein (1) for the purpose of making inspection of health and educational conditions and enforcing sanitation and quarantine regulations or (2) to enforce the penalties of State compulsory school attendance laws against Indian children, and parents, or other persons in loco parentis except that this subparagraph (2) shall not apply to Indians of any tribe in which a duly constituted governing body exists until such body has adopted a resolution consenting to such application.

(Feb. 15, 1929, ch. 216, 45 Stat. 1185; Aug. 9, 1946, ch. 930, 60 Stat. 962.)

AMENDMENTS

1946—Act Aug. 9, 1946, permitted proper State officers to invoke penalties of State compulsory school attendance against Indian children, their parents, or other persons in loco parentis.

TRANSFER OF FUNCTIONS

For transfer of functions of other officers, employees, and agencies of Department of the Interior, with certain exceptions, to Secretary of the Interior, with power to delegate, see Reorg. Plan No. 3 of 1950, §§ 1, 2, eff. May 24, 1950, 15 F.R. 3174, 64 Stat. 1262, set out in the Appendix to Title 5, Government Organization and Employees.

§ 232. Jurisdiction of New York State over offenses committed on reservations within State

The State of New York shall have jurisdiction over offenses committed by or against Indians on Indian reservations within the State of New York to the same extent as the courts of the State have jurisdiction over offenses committed elsewhere within the State as defined by the laws of the State: *Provided*, That nothing contained in this section shall be construed to deprive any Indian tribe, band, or community, or members thereof,[1] hunting and fishing rights as guaranteed them by agreement, treaty, or custom, nor require them to obtain State fish and game licenses for the exercise of such rights.

(July 2, 1948, ch. 809, 62 Stat. 1224.)

§ 233. Jurisdiction of New York State courts in civil actions

The courts of the State of New York under the laws of such State shall have jurisdiction in civil actions and proceedings between Indians or between one or more Indians and any other person or persons to the same extent as the courts of the State shall have jurisdiction in other civil actions and proceedings, as now or hereafter defined by the laws of such State: *Provided*, That the governing body of any recognized tribe of Indians in the State of New York shall have the right to declare, by appropriate enactment prior to September 13, 1952, those tribal laws and customs which they desire to preserve, which, on certification to the Secretary of the Interior by the governing body of such tribe shall be published in the Federal Register and thereafter shall govern in all civil cases involving reservation Indians when the subject matter of such tribal laws and customs is involved or at issue, but nothing herein contained shall be construed to prevent such courts from recognizing and giving effect to any tribal law or custom which may be proven to the satisfaction of such courts: *Provided further*, That nothing in this section shall be construed to require any such tribe or the members thereof to obtain fish and game licenses from the State of New York for the exercise of any hunting and fishing rights provided for such Indians under any agreement, treaty, or custom: *Provided further*, That nothing herein contained shall be construed as subjecting the lands within any Indian reservation in the State of New York to taxation for State or local purposes, nor as subjecting any such lands, or any Federal or State annuity in favor of Indians or Indian tribes, to execution on any judgment rendered in the State courts, except in the enforcement of a judgment in a suit by one tribal member against another in the matter of the use or possession of land: *And provided further*, That nothing herein contained shall be construed as authorizing the alienation from any Indian nation, tribe, or band of Indians of any lands within any Indian reservation in the State of New York: *Provided further*, That nothing herein contained shall be construed as conferring jurisdiction on the courts of the State of New York or making applicable the laws of the State of New York in civil actions involving Indian lands or claims with respect thereto which relate to transactions or events transpiring prior to September 13, 1952.

(Sept. 13, 1950, ch. 947, § 1, 64 Stat. 845.)

EFFECTIVE DATE

Act Sept. 13, 1950, ch. 947, § 2, 64 Stat. 846, provided: "This Act [this section] shall take effect two years after the date of its passage [Sept. 13, 1950]."

SUBCHAPTER II—TRAFFIC IN INTOXICATING LIQUORS

§§ 241 to 250. Repealed. June 25, 1948, ch. 645, § 21, 62 Stat. 862

Section 241, R.S. § 2139; acts Feb. 27, 1877, ch. 69, § 1, 19 Stat. 244; July 23, 1892, ch. 234, 27 Stat. 260; June 15, 1938, ch. 435, § 1, 52 Stat. 696, related to sale of intoxicating liquor. See sections 1154 and 1156 of Title 18, Crimes and Criminal Procedure.

Section 241a, act Mar. 1, 1895, ch. 145, §8, 28 Stat. 697, related to punishment for sale of intoxicating liquors. See section 1155 of Title 18.

Section 242, acts Mar. 2, 1917, ch. 146, § 17, 39 Stat. 983; June 13, 1932, ch. 245, 47 Stat. 302, related to manufac-

[1] So in original. Probably should be followed by "of".

(i) authority granted by law to an executive department, agency, or the head thereof; or

(ii) functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(c) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(d) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

BARACK OBAMA.

§ 2000e–1. Exemption

(a) Inapplicability of subchapter to certain aliens and employees of religious entities

This subchapter shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

(b) Compliance with statute as violative of foreign law

It shall not be unlawful under section 2000e–2 or 2000e–3 of this title for an employer (or a corporation controlled by an employer), labor organization, employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining (including on-the-job training programs) to take any action otherwise prohibited by such section, with respect to an employee in a workplace in a foreign country if compliance with such section would cause such employer (or such corporation), such organization, such agency, or such committee to violate the law of the foreign country in which such workplace is located.

(c) Control of corporation incorporated in foreign country

(1) If an employer controls a corporation whose place of incorporation is a foreign country, any practice prohibited by section 2000e–2 or 2000e–3 of this title engaged in by such corporation shall be presumed to be engaged in by such employer.

(2) Sections 2000e–2 and 2000e–3 of this title shall not apply with respect to the foreign operations of an employer that is a foreign person not controlled by an American employer.

(3) For purposes of this subsection, the determination of whether an employer controls a corporation shall be based on—

(A) the interrelation of operations;

(B) the common management;

(C) the centralized control of labor relations; and

(D) the common ownership or financial control,

of the employer and the corporation.

(Pub. L. 88–352, title VII, §702, July 2, 1964, 78 Stat. 255; Pub. L. 92–261, §3, Mar. 24, 1972, 86 Stat. 103; Pub. L. 102–166, title I, §109(b)(1), Nov. 21, 1991, 105 Stat. 1077.)

AMENDMENTS

1991—Pub. L. 102–166 designated existing provisions as subsec. (a) and added subsecs. (b) and (c).

1972—Pub. L. 92–261 reenacted section catchline without change and amended text generally. Prior to amendment, text read as follows: "This subchapter shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, or society of its religious activities or to an educational institution with respect to the employment of individuals to perform work connected with the educational activities of such institution."

EFFECTIVE DATE OF 1991 AMENDMENT

Amendment by Pub. L. 102–166 inapplicable to conduct occurring before Nov. 21, 1991, see section 109(c) of Pub. L. 102–166, set out as a note under section 2000e of this title.

§ 2000e–2. Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) Employment agency practices

It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) Labor organization practices

It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Training programs

It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(e) Businesses or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel of particular religion

Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

(f) Members of Communist Party or Communist-action or Communist-front organizations

As used in this subchapter, the phrase "unlawful employment practice" shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-management committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950 [50 U.S.C. 781 et seq.].

(g) National security

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if—

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

(h) Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of title 29.

(i) Businesses or enterprises extending preferential treatment to Indians

Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

(j) Preferential treatment not to be granted on account of existing number or percentage imbalance

Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by

any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

(k) Burden of proof in disparate impact cases

(1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if—

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

(B)(i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.

(ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of "alternative employment practice".

(2) A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this subchapter.

(3) Notwithstanding any other provision of this subchapter, a rule barring the employment of an individual who currently and knowingly uses or possesses a controlled substance, as defined in schedules I and II of section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)), other than the use or possession of a drug taken under the supervision of a licensed health care professional, or any other use or possession authorized by the Controlled Substances Act [21 U.S.C. 801 et seq.] or any other provision of Federal law, shall be considered an unlawful employment practice under this subchapter only if such rule is adopted or applied with an intent to discriminate because of race, color, religion, sex, or national origin.

(l) Prohibition of discriminatory use of test scores

It shall be an unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin.

(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices

Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

(n) Resolution of challenges to employment practices implementing litigated or consent judgments or orders

(1)(A) Notwithstanding any other provision of law, and except as provided in paragraph (2), an employment practice that implements and is within the scope of a litigated or consent judgment or order that resolves a claim of employment discrimination under the Constitution or Federal civil rights laws may not be challenged under the circumstances described in subparagraph (B).

(B) A practice described in subparagraph (A) may not be challenged in a claim under the Constitution or Federal civil rights laws—

(i) by a person who, prior to the entry of the judgment or order described in subparagraph (A), had—

(I) actual notice of the proposed judgment or order sufficient to apprise such person that such judgment or order might adversely affect the interests and legal rights of such person and that an opportunity was available to present objections to such judgment or order by a future date certain; and

(II) a reasonable opportunity to present objections to such judgment or order; or

(ii) by a person whose interests were adequately represented by another person who had previously challenged the judgment or order on the same legal grounds and with a similar factual situation, unless there has been an intervening change in law or fact.

(2) Nothing in this subsection shall be construed to—

(A) alter the standards for intervention under rule 24 of the Federal Rules of Civil Procedure or apply to the rights of parties who have successfully intervened pursuant to such rule in the proceeding in which the parties intervened;

(B) apply to the rights of parties to the action in which a litigated or consent judgment or order was entered, or of members of a class represented or sought to be represented in such action, or of members of a group on whose behalf relief was sought in such action by the Federal Government;

(C) prevent challenges to a litigated or consent judgment or order on the ground that such judgment or order was obtained through collusion or fraud, or is transparently invalid or was entered by a court lacking subject matter jurisdiction; or

(D) authorize or permit the denial to any person of the due process of law required by the Constitution.

(3) Any action not precluded under this subsection that challenges an employment consent judgment or order described in paragraph (1) shall be brought in the court, and if possible before the judge, that entered such judgment or order. Nothing in this subsection shall preclude a transfer of such action pursuant to section 1404 of title 28.

(Pub. L. 88–352, title VII, §703, July 2, 1964, 78 Stat. 255; Pub. L. 92–261, §8(a), (b), Mar. 24, 1972, 86 Stat. 109; Pub. L. 102–166, title I, §§105(a), 106, 107(a), 108, Nov. 21, 1991, 105 Stat. 1074–1076.)

REFERENCES IN TEXT

The Subversive Activities Control Act of 1950, referred to in subsec. (f), is title I (§§1–32) of act Sept. 23, 1950, ch. 1024, 64 Stat. 987, which is classified principally to subchapter I (§781 et seq.) of chapter 23 of Title 50, War and National Defense. For complete classification of this Act to the Code, see Tables.

The Controlled Substances Act, referred to in subsec. (k)(3), is title II of Pub. L. 91–513, Oct. 27, 1970, 84 Stat. 1242, which is classified principally to subchapter I (§801 et seq.) of chapter 13 of Title 21, Food and Drugs. For complete classification of this Act to the Code, see Short Title note set out under section 801 of Title 21 and Tables.

The Federal Rules of Civil Procedure, referred to in subsec. (n)(2)(A), are set out in the Appendix to Title 28, Judiciary and Judicial Procedure.

AMENDMENTS

1991—Subsec. (k). Pub. L. 102–166, §105(a), added subsec. (k).

Subsec. (l). Pub. L. 102–166, §106, added subsec. (l).

Subsec. (m). Pub. L. 102–166, §107(a), added subsec. (m).

Subsec. (n). Pub. L. 102–166, §108, added subsec. (n).

1972—Subsec. (a)(2). Pub. L. 92–261, §8(a), inserted "or applicants for employment" after "his employees".

Subsec. (c)(2). Pub. L. 92–261, §8(b), inserted "or applicants for membership" after "membership".

EFFECTIVE DATE OF 1991 AMENDMENT

Amendment by Pub. L. 102–166 effective Nov. 21, 1991, except as otherwise provided, see section 402 of Pub. L. 102–166, set out as a note under section 1981 of this title.

SUBVERSIVE ACTIVITIES CONTROL BOARD

Subversive Activities Control Board established by act Sept. 23, 1950, ch. 1024, §12, 64 Stat. 977, and ceased to operate on June 30, 1973.

§ 2000e–3. Other unlawful employment practices

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

(b) Printing or publication of notices or advertisements indicating prohibited preference, limitation, specification, or discrimination; occupational qualification exception

It shall be an unlawful employment practice for an employer, labor organization, employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to print or publish or cause to be printed or published any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, or relating to admission to, or employment in, any program established to provide apprenticeship or other training by such a joint labor-management committee, indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national origin, except that such a notice or advertisement may indicate a preference, limitation, specification, or discrimination based on religion, sex, or national origin when religion, sex, or national origin is a bona fide occupational qualification for employment.

(Pub. L. 88–352, title VII, §704, July 2, 1964, 78 Stat. 257; Pub. L. 92–261, §8(c), Mar. 24, 1972, 86 Stat. 109.)

AMENDMENTS

1972—Subsec. (a). Pub. L. 92–261, §8(c)(1), inserted provision making it an unlawful employment practice for a joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against the specified individuals.

Subsec. (b). Pub. L. 92–261, §8(c)(2), inserted provisions making prohibitions applicable to joint labor-management committees controlling apprenticeship or other training or retraining, including on-the-job training programs, and notices or advertisements of such joint labor-management committees relating to admission to, or employment in, any program established to provide apprenticeship or other training.

§ 2000e–4. Equal Employment Opportunity Commission

(a) Creation; composition; political representation; appointment; term; vacancies; Chairman and Vice Chairman; duties of Chairman; appointment of personnel; compensation of personnel

There is hereby created a Commission to be known as the Equal Employment Opportunity Commission, which shall be composed of five members, not more than three of whom shall be members of the same political party. Members of the Commission shall be appointed by the President by and with the advice and consent of the Senate for a term of five years. Any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed, and all members of the Commission shall continue to serve until their successors are appointed and qualified, except that no such member of the Commission shall

"SEC. 4. The Equal Employment Opportunity Commission, after consultation with all affected departments and agencies, shall issue such rules, regulations, orders, and instructions and request such information from the affected departments and agencies as it deems necessary and appropriate to carry out this Order.

"SEC. 5. All departments and agencies shall cooperate with and assist the Equal Employment Opportunity Commission in the performance of its functions under this Order and shall furnish the Commission such reports and information as it may request. The head of each department or agency shall comply with rules, regulations, orders and instructions issued by the Equal Employment Opportunity Commission pursuant to Section 4 of this Order."

1–103. Executive Order No. 11022, as amended [set out as a note under section 3001 of this title], is further amended by revising Section 1(b) to read as follows:

"(b) The Council shall be composed of the Secretary of Health, Education, and Welfare [now Health and Human Services], who shall be Chairman, the Secretary of the Treasury, the Secretary of Agriculture, the Secretary of Commerce, the Secretary of Labor, the Secretary of Housing and Urban Development, the Secretary of Transportation, the Administrator of Veterans Affairs, the Director of the Office of Personnel Management, the Director of the Community Services Administration, and the Chairman of the Equal Employment Opportunity Commission."

1–104. Executive Order No. 11480 of September 9, 1969 [set out as a note under section 791 of Title 29, Labor], is amended by deleting "and the Chairman of the United States Civil Service Commission" in Section 4 and substituting therefor "Director of the Office of Personnel Management, and the Chairman of the Equal Employment Opportunity Commission".

1–105. Executive Order No. 11830 of January 9, 1975 [set out as a note under section 791 of Title 29, Labor], is amended by deleting Section 2 and revising Section 1 to read as follows:

"In accord with Section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791) and Section 4 of Reorganization Plan No. 1 of 1978 (43 FR 19808) the Interagency Committee on Handicapped Employees is enlarged and composed of the following, or their designees whose positions are Executive level IV or higher:

"(1) Secretary of Defense.

"(2) Secretary of Labor.

"(3) Secretary of Health, Education, and Welfare [now Health and Human Services], Co-Chairman.

"(4) Director of the Office of Personnel Management.

"(5) Administrator of Veterans Affairs.

"(6) Administrator of General Services.

"(7) Chairman of the Federal Communications Commission.

"(8) Chairman of the Equal Employment Opportunity Commission, Co-Chairman.

"(9) Such other members as the President may designate."

1–106. This Order shall be effective on January 1, 1979.

JIMMY CARTER.

EX. ORD. NO. 12144. TRANSFER OF CERTAIN EQUAL PAY AND AGE DISCRIMINATION IN EMPLOYMENT ENFORCEMENT FUNCTIONS

Ex. Ord. No. 12144, June 22, 1979, 44 F.R. 37193, provided:

By the authority vested in me as President of the United States of America by the Constitution and laws of the United States, including Section 9 of Reorganization Plan No. 1 of 1978 (43 FR 19807) [set out above], in order to effectuate the transfer of certain functions relating to the enforcement of equal pay and age discrimination in employment programs from the Department of Labor to the Equal Employment Opportunity Commission, it is hereby ordered as follows:

1–101. Sections 1 and 2 of Reorganization Plan No. 1 of 1978 (43 FR 19807) [set out as a note above] shall become effective on July 1, 1979, with the exception of the transfer of functions from the Civil Service Commission, already effective January 1, 1979 (Executive Order No. 12106 [set out above]).

1–102. The records, property, personnel and positions, and unexpended balances of appropriations or funds, available or to be made available, which relate to the functions transferred as provided in this Order are hereby transferred from the Department of Labor to the Equal Employment Opportunity Commission.

1–103. The Director of the Office of Management and Budget shall make such determinations, issue such Orders, and take all actions necessary or appropriate to effectuate the transfers provided in this Order, including the transfer of funds, records, property, and personnel.

1–104. This Order shall be effective July 1, 1979.

JIMMY CARTER.

§ 2000e–5. Enforcement provisions

(a) Power of Commission to prevent unlawful employment practices

The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e–2 or 2000e–3 of this title.

(b) Charges by persons aggrieved or member of Commission of unlawful employment practices by employers, etc.; filing; allegations; notice to respondent; contents of notice; investigation by Commission; contents of charges; prohibition on disclosure of charges; determination of reasonable cause; conference, conciliation, and persuasion for elimination of unlawful practices; prohibition on disclosure of informal endeavors to end unlawful practices; use of evidence in subsequent proceedings; penalties for disclosure of information; time for determination of reasonable cause

Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d) of this section. If the Commission determines after such investigation

that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d) of this section, from the date upon which the Commission is authorized to take action with respect to the charge.

(c) State or local enforcement proceedings; notification of State or local authority; time for filing charges with Commission; commencement of proceedings

In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a)[1] of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

(d) State or local enforcement proceedings; notification of State or local authority; time for action on charges by Commission

In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective day of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

(e) Time for filing charges; time for service of notice of charge on respondent; filing of charge by Commission with State or local agency; seniority system

(1) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(2) For purposes of this section, an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose in violation of this subchapter (whether or not that discriminatory purpose is apparent on the face of the seniority provision), when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system.

(3)(A) For purposes of this section, an unlawful employment practice occurs, with respect to discrimination in compensation in violation of this subchapter, when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.

(B) In addition to any relief authorized by section 1981a of this title, liability may accrue and an aggrieved person may obtain relief as provided in subsection (g)(1), including recovery of back pay for up to two years preceding the filing of the charge, where the unlawful employment practices that have occurred during the charge filing period are similar or related to unlawful employment practices with regard to discrimination in compensation that occurred outside the time for filing a charge.

[1] So in original. Probably should be subsection "(b)".

(f) Civil action by Commission, Attorney General, or person aggrieved; preconditions; procedure; appointment of attorney; payment of fees, costs, or security; intervention; stay of Federal proceedings; action for appropriate temporary or preliminary relief pending final disposition of charge; jurisdiction and venue of United States courts; designation of judge to hear and determine case; assignment of case for hearing; expedition of case; appointment of master

(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section, is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

(g) Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders

(1) If the court finds that the respondent has intentionally engaged in or is intentionally en-

gaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

(2)(A) No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e–3(a) of this title.

(B) On a claim in which an individual proves a violation under section 2000e–2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court—

(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e–2(m) of this title; and

(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

(h) Provisions of chapter 6 of title 29 not applicable to civil actions for prevention of unlawful practices

The provisions of chapter 6 of title 29 shall not apply with respect to civil actions brought under this section.

(i) Proceedings by Commission to compel compliance with judicial orders

In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under this section, the Commission may commence proceedings to compel compliance with such order.

(j) Appeals

Any civil action brought under this section and any proceedings brought under subsection (i) of this section shall be subject to appeal as provided in sections 1291 and 1292, title 28.

(k) Attorney's fee; liability of Commission and United States for costs

In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

(Pub. L. 88–352, title VII, § 706, July 2, 1964, 78 Stat. 259; Pub. L. 92–261, § 4, Mar. 24, 1972, 86 Stat. 104; Pub. L. 102–166, title I, §§ 107(b), 112, 113(b), Nov. 21, 1991, 105 Stat. 1075, 1078, 1079; Pub. L. 111–2, § 3, Jan. 29, 2009, 123 Stat. 5.)

REFERENCES IN TEXT

This Act, referred to in subsec. (f)(2), means Pub. L. 88–352, July 2, 1964, 78 Stat. 241, known as the Civil Rights Act of 1964, which is classified principally to subchapters II to IX of this chapter (§ 2000a et seq.). For complete classification of this Act to the Code, see Short Title note set out under section 2000a of this title and Tables.

Rules 65 and 53 of the Federal Rules of Civil Procedure, referred to in subsec. (f)(2), (5), are set out in the Appendix to Title 28, Judiciary and Judicial Procedure.

Chapter 6 (§ 101 et seq.) of title 29, referred to in subsec. (h), is a reference to act Mar. 23, 1932, ch. 90, 47 Stat. 70, popularly known as the Norris-LaGuardia Act. For complete classification of this Act to the Code, see Tables.

AMENDMENTS

2009—Subsec. (e)(3). Pub. L. 111–2 added par. (3).

1991—Subsec. (e). Pub. L. 102–166, § 112, designated existing provisions as par. (1) and added par. (2).

Subsec. (g). Pub. L. 102–166, § 107(b), designated existing provisions as pars. (1) and (2)(A) and added par. (2)(B).

Subsec. (k). Pub. L. 102–166, § 113(b), inserted "(including expert fees)" after "attorney's fee".

1972—Subsec. (a). Pub. L. 92–261, § 4(a), added subsec. (a). Former subsec. (a) redesignated (b) and amended generally.

Subsec. (b). Pub. L. 92–261, § 4(a), redesignated former subsec. (a) as (b), modified the procedure for the filing and consideration of charges by the Commission, subjected to coverage unlawful employment practices of joint labor-management committees controlling apprenticeship or other training or retraining, including on-the-job training programs, required the Commission to accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law in its determination of reasonable cause, and inserted provision setting forth the time period, after charges have been filed, allowed to the Commission to determine reasonable cause. Former subsec. (b) redesignated (c).

Subsecs. (c), (d). Pub. L. 92–261, § 4(a), redesignated former subsecs. (b) and (c) as (c) and (d), respectively. Former subsec. (d) redesignated (e).

Subsec. (e). Pub. L. 92–261, § 4(a), redesignated former subsec. (d) as (e), extended from ninety to one hundred and eighty days after the occurrence of the alleged unlawful employment practice the time for filing charges under this section and from two hundred and ten to three hundred days the time for filing such charges where the person aggrieved initially instituted proceedings with a State or local agency, and inserted requirement that notice of the charge be served on the respondent within ten days after filing. Former subsec. (e) redesignated (f)(1).

Subsec. (f). Pub. L. 92–261, § 4(a), redesignated former subsec. (e) as par. (1), substituted provisions setting forth the procedure for civil actions where the Commission was unable to secure from the respondents a conciliation agreement to prevent further unlawful employment practices for provisions setting forth the procedure for civil actions where the Commission was unable to obtain voluntary compliance with this subchapter and inserted provisions setting forth the procedure for civil action where the respondent is a govern-

ment, governmental agency, or political subdivision and the Commission could not secure a conciliation agreement, added par. (2), redesignated former subsec. (f) as par. (3), substituted "aggrieved person" for "plaintiff", and added pars. (4) and (5).

Subsec. (g). Pub. L. 92–261, § 4(a), inserted provisions which authorized the court to order affirmative action not limited solely to the enumerated affirmative acts and such other equitable relief as deemed appropriate, and provisions which set forth the accrual date for back pay.

Subsecs. (f), (j). Pub. L. 92–261, § 4(b)(1), (2), substituted "this section" for "subsection (e) of this section".

EFFECTIVE DATE OF 2009 AMENDMENT

Pub. L. 111–2, § 8, Jan. 29, 2009, 123 Stat. 7, provided that: "This Act [amending this section and section 2000e–16 of this title and sections 626, 633a, and 794a of Title 29, Labor, and enacting provisions set out as notes under this section and section 2000a of this title], and the amendments made by this Act, take effect as if enacted on May 28, 2007 and apply to all claims of discrimination in compensation under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.), the Age Discrimination in Employment Act of 1967 (29 U.S.C. 621 et seq.), title I and section 503 of the Americans with Disabilities Act of 1990 [42 U.S.C. 12111 et seq., 12203], and sections 501 and 504 of the Rehabilitation Act of 1973 [29 U.S.C. 791, 794], that are pending on or after that date."

EFFECTIVE DATE OF 1991 AMENDMENT

Amendment by Pub. L. 102–166 effective Nov. 21, 1991, except as otherwise provided, see section 402 of Pub. L. 102–166, set out as a note under section 1981 of this title.

EFFECTIVE DATE OF 1972 AMENDMENT

Section 14 of Pub. L. 92–261 provided that: "The amendments made by this Act to section 706 of the Civil Rights Act of 1964 [this section] shall be applicable with respect to charges pending with the Commission on the date of enactment of this Act [Mar. 24, 1972] and all charges filed thereafter."

FINDINGS

Pub. L. 111–2, § 2, Jan. 29, 2009, 123 Stat. 5, provided that: "Congress finds the following:

"(1) The Supreme Court in Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007), significantly impairs statutory protections against discrimination in compensation that Congress established and that have been bedrock principles of American law for decades. The Ledbetter decision undermines those statutory protections by unduly restricting the time period in which victims of discrimination can challenge and recover for discriminatory compensation decisions or other practices, contrary to the intent of Congress.

"(2) The limitation imposed by the Court on the filing of discriminatory compensation claims ignores the reality of wage discrimination and is at odds with the robust application of the civil rights laws that Congress intended.

"(3) With regard to any charge of discrimination under any law, nothing in this Act [amending this section and section 2000e–16 of this title and sections 626, 633a, and 794a of Title 29, Labor, and enacting provisions set out as notes under this section and section 2000a of this title] is intended to preclude or limit an aggrieved person's right to introduce evidence of an unlawful employment practice that has occurred outside the time for filing a charge of discrimination.

"(4) Nothing in this Act is intended to change current law treatment of when pension distributions are considered paid."

APPLICATION TO OTHER LAWS

Pub. L. 111–2, § 5(a), (b), Jan. 29, 2009, 123 Stat. 6, provided that:

"(a) AMERICANS WITH DISABILITIES ACT OF 1990.—The amendments made by section 3 [amending this section] shall apply to claims of discrimination in compensation brought under title I and section 503 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq., 12203), pursuant to section 107(a) of such Act (42 U.S.C. 12117(a)), which adopts the powers, remedies, and procedures set forth in section 706 of the Civil Rights Act of 1964 (42 U.S.C. 2000e–5).

"(b) REHABILITATION ACT OF 1973.—The amendments made by section 3 shall apply to claims of discrimination in compensation brought under sections 501 and 504 of the Rehabilitation Act of 1973 (29 U.S.C. 791, 794), pursuant to—

"(1) sections 501(g) and 504(d) of such Act (29 U.S.C. 791(g), 794(d)), respectively, which adopt the standards applied under title I of the Americans with Disabilities Act of 1990 [42 U.S.C. 12111 et seq.] for determining whether a violation has occurred in a complaint alleging employment discrimination; and

"(2) paragraphs (1) and (2) of section 505(a) of such Act (29 U.S.C. 794a(a)) (as amended by subsection (c))."

§ 2000e–6. Civil actions by the Attorney General

(a) Complaint

Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a complaint (1) signed by him (or in his absence the Acting Attorney General), (2) setting forth facts pertaining to such pattern or practice, and (3) requesting such relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described.

(b) Jurisdiction; three-judge district court for cases of general public importance; hearing, determination, expedition of action, review by Supreme Court; single judge district court; hearing, determination, expedition of action

The district courts of the United States shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section, and in any such proceeding the Attorney General may file with the clerk of such court a request that a court of three judges be convened to hear and determine the case. Such request by the Attorney General shall be accompanied by a certificate that, in his opinion, the case is of general public importance. A copy of the certificate and request for a three-judge court shall be immediately furnished by such clerk to the chief judge of the circuit (or in his absence, the presiding circuit judge of the circuit) in which the case is pending. Upon receipt of such request it shall be the duty of the chief judge of the circuit or the presiding circuit judge, as the case may be, to designate immediately three judges in such circuit, of whom at least one shall be a circuit judge and another of whom shall be a district judge of the court in which the proceeding

41-1463. Discrimination; unlawful practices; definition

A. Nothing contained in this article shall be interpreted to require that the less qualified be preferred over the better qualified simply because of race, color, religion, sex, age or national origin or on the basis of disability.

B. It is an unlawful employment practice for an employer:

1. To fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to the individual's compensation, terms, conditions or privileges of employment because of the individual's race, color, religion, sex, age or national origin or on the basis of disability.

2. To limit, segregate or classify employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect the individual's status as an employee, because of the individual's race, color, religion, sex, age or national origin or on the basis of disability.

3. To fail or refuse to hire, to discharge, or to otherwise discriminate against any individual based on the results of a genetic test received by the employer, notwithstanding subsection I, paragraph 2 of this section.

C. It is an unlawful employment practice for an employment agency to fail or refuse to refer for employment or otherwise to discriminate against any individual because of the individual's race, color, religion, sex, age or national origin or on the basis of disability or to classify or refer for employment any individual on the basis of the individual's race, color, religion, sex, age or national origin or on the basis of disability.

D. It is an unlawful employment practice for a labor organization:

1. To exclude or to expel from its membership or otherwise to discriminate against any individual because of the individual's race, color, religion, sex, age or national origin or on the basis of disability.

2. To limit, segregate or classify its membership or applicants for membership or to classify or fail or refuse to refer for employment any individual in any way which would deprive or tend to deprive the individual of employment opportunities or would limit those employment opportunities or otherwise adversely affect the individual's status as an employee or as an applicant for employment because of the individual's race, color, religion, sex, age or national origin or on the basis of disability.

3. To cause or attempt to cause an employer to discriminate against an individual in violation of this section.

E. It is an unlawful employment practice for any employer, labor organization or joint labor-management committee controlling apprenticeship or other training or retraining programs, including on-the-job training programs, to discriminate against any individual because of the individual's race, color, religion, sex, age or national origin or on the basis of disability in admission to or employment in any program established to provide apprenticeship or other training and, if the individual is an otherwise qualified individual, to fail or refuse to reasonably accommodate the individual's disability.

F. With respect to a qualified individual, it is an unlawful employment practice for a covered entity to:

1. Participate in any contractual or other arrangement or relationship that has the effect of subjecting a qualified individual who applies with

or who is employed by the covered entity to unlawful employment discrimination on the basis of disability.

2. Use standards, criteria or methods of administration that have the effect of discriminating on the basis of disability or that perpetuate the discrimination of others who are subject to common administrative control.

3. Exclude or otherwise deny equal jobs or benefits to an individual qualified for the job or benefits because of the known disability of an individual with whom the individual qualified for the job or benefits is known to have a relationship or association.

4. Not make reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual who is an applicant or employee unless the covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of the covered entity or the individual only meets the definition of disability as prescribed in section 41-1461, paragraph 4, subdivision (c).

5. Deny employment opportunities to a job applicant or employee who is an otherwise qualified individual if the denial is based on the need of the covered entity to make reasonable accommodation to the physical or mental impairment of the applicant or employee.

6. Use qualification standards, employment tests or other selection criteria, including those based on an individual's uncorrected vision, that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities, unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job related for the position in question and is consistent with business necessity.

7. Fail to select and administer tests relating to employment in the most effective manner to ensure that, when the test is administered to a job applicant or employee who has a disability that impairs sensory, manual or speaking skills, the test results accurately reflect the skills or aptitude or whatever other factor of the applicant or employee that the test purports to measure, rather than reflecting the impaired sensory, manual or speaking skills of the applicant or employee, except if the skills are the factors that the test purports to measure.

G. Notwithstanding any other provision of this article, it is not an unlawful employment practice:

1. For an employer to hire and employ employees, for an employment agency to classify or refer for employment any individual, for a labor organization to classify its membership or classify or refer for employment any individual, or for an employer, labor organization or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of the individual's religion, sex or national origin in those certain instances when religion, sex or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.

2. For any school, college, university or other educational institution or institution of learning to hire and employ employees of a particular religion if the school, college, university or other educational institution or institution of learning is in whole or in substantial part owned, supported, controlled or managed by a particular religion or religious corporation, association or society, or if the curriculum of the school, college, university or other educational institution or institution of learning is directed toward the propagation of a particular religion.

3. For an employer to fail or refuse to hire or employ any individual for

any position, for an employment agency to fail or refuse to refer any individual for employment in any position or for a labor organization to fail or refuse to refer any individual for employment in any position, if both of the following apply:

(a) The occupancy of the position or access to the premises in or upon which any part of the duties of the position are performed or are to be performed is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any executive order of the president of the United States.

(b) The individual has not fulfilled or has ceased to fulfill that requirement.

4. With respect to age, for an employer, employment agency or labor organization:

(a) To take any action otherwise prohibited under subsection B, C or D of this section if age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business or if the differentiation is based on reasonable factors other than age.

(b) To observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, deferred compensation or insurance plan, which is not a subterfuge to evade the purposes of the age discrimination provisions of this article, except that no employee benefit plan may excuse the failure to hire any individual and no seniority system or employee benefit plan may require or permit the involuntary retirement of any individual specified by section 41-1465 because of the individual's age.

(c) To discharge or otherwise discipline an individual for good cause.

H. As used in this article, unlawful employment practice does not include any action or measure taken by an employer, labor organization, joint labor-management committee or employment agency with respect to an individual who is a member of the communist party of the United States or of any other organization required to register as a communist-action or communist-front organization by final order of the subversive activities control board pursuant to the subversive activities control act of 1950.

I. Notwithstanding any other provision of this article, it is not an unlawful employment practice:

1. For an employer to apply different standards of compensation or different terms, conditions or privileges of employment pursuant to a bona fide seniority or merit system or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that these differences are not the result of an intention to discriminate because of race, color, religion, sex or national origin.

2. For an employer to give and act upon the results of any professionally developed ability test provided that the test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin.

3. For any employer to differentiate upon the basis of sex or disability in determining the amount of the wages or compensation paid or to be paid to employees of the employer if the differentiation is authorized by the provisions of section 6(d) or section 14 of the fair labor standards act of 1938, as amended (29 United States Code section 206(d)).

J. Nothing contained in this chapter applies to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of the business or enterprise under which a preferential treatment is given to any individual because the individual is an Indian living on or near a reservation.

K. Nothing contained in this article or article 6 of this chapter requires any employer, employment agency, labor organization or joint labor-management committee subject to this article to grant preferential treatment to any individual or group because of the race, color, religion, sex or national origin of the individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization or admitted to or employed in any apprenticeship or other training program, in comparison with the total number or percentage of persons of that race, color, religion, sex or national origin in any community, state, section or other area, or in the available work force in any community, state, section or other area.

L. Nothing in the age discrimination prohibitions of this article may be construed to prohibit compulsory retirement of any employee who has attained sixty-five years of age and who, for the two year period immediately before retirement, is employed in a bona fide executive or high policymaking position, if the employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit sharing, savings or deferred compensation plan or any combination of plans of the employer for the employee, which equals, in the aggregate, at least forty-four thousand dollars. In applying the retirement benefit test of this subsection, if any retirement benefit is in a form other than a straight life annuity, with no ancillary benefits, or if employees

contribute to the plan or make rollover contributions, the benefit shall be adjusted in accordance with rules adopted by the division so the benefit is the equivalent of a straight life annuity, with no ancillary benefits, under a plan to which employees do not contribute and under which no rollover contributions are made.

M. A covered entity may require that an individual with a disability shall not pose a direct threat to the health or safety of other individuals in the workplace. For the purposes of this subsection, "direct threat" means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.

N. This article does not alter the standards for determining eligibility for benefits under this state's workers' compensation laws or under state and federal disability benefit programs.

O. For the purposes of this section and section 41-1481, with respect to employers or employment practices involving a disability, "individual" means a qualified individual.

41-1481. Filing charges; investigation; findings; conciliation; compliance proceedings; appeals; attorney fees; violation; classification

A. A charge under this section shall be filed within one hundred eighty days after the alleged unlawful employment practice occurred. A charge is deemed filed upon receipt by the division from or on behalf of a person claiming to be aggrieved or, if filed by a member of the division, when executed by such member upon oath or affirmation. A charge is deemed filed by or on behalf of a person claiming to be aggrieved if received from the United States equal employment opportunity commission. A charge shall be in writing upon oath or affirmation and shall contain such information, including the date, place and circumstances of the alleged unlawful employment practice, and be in such form as the division requires. Charges shall not be made public by the division.

B. Whenever a charge is filed by or on behalf of a person claiming to be aggrieved or by a member of the division, referred to as the charging party, alleging that an employer, employment agency, labor organization or joint labor-management committee controlling apprenticeship or other training or retraining programs, including on-the-job training programs, has engaged in an unlawful employment practice, the division shall serve notice of and a copy of the charge on such employer, employment agency, labor organization or joint labor-management committee, referred to as the respondent, within ten days and shall make an investigation of the charge. If the division determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall enter an order determining the same and dismissing the charge and shall notify the charging party and the respondent of its action. If the

division determines after such investigation that there is reasonable cause to believe that the charge is true, it shall enter an order containing its findings of fact and shall endeavor to eliminate the alleged unlawful employment practice by informal methods of conference, conciliation and persuasion. Any party to such informal proceeding may be represented by counsel. Counsel need not be a member of the state bar if he is licensed to practice law in any other state or territory of the United States. Nothing said or done during and as a part of such informal endeavors may be made public by the division or its officers or employees or used as evidence in a subsequent proceeding without the written consent of the persons concerned. If a civil action resulting from a charge is commenced in any federal or state court, evidence collected by or submitted to the division during the investigation of the charge and the source of the evidence shall be subject to discovery by the parties to the civil action. Any person who makes public information in violation of this subsection is guilty of a class 1 misdemeanor. The division shall make its determination on reasonable cause as promptly as possible and as far as practicable not later than sixty days from the filing of the charge. If more than two years have elapsed after the alleged unlawful employment practice occurred, and if the charging party has received a notice of right to sue, the division may cease investigation of a charge without reaching a determination.

C. All conciliation agreements shall provide that the charging party waives, releases and covenants not to sue the respondent or claim against the respondent in any forum with respect to the matters which were alleged as charges filed with the division, subject to performance by the respondent of the promises and representations contained in the conciliation agreement. The charging party or the respondent may prepare a conciliation agreement which the division shall submit to the other party and which, if accepted by the other party, shall be accepted by the division.

D. If within thirty days after the division has made a determination that reasonable cause exists to believe that the charge is true the division has not accepted a conciliation agreement to which the charging party and the respondent are parties, the division may bring a civil action against the respondent, other than the state, named in the charge. The charging party shall have the right to intervene in a civil action brought by the division. If a charge filed with the division pursuant to subsection

A of this section is dismissed by the division or if within ninety days from the filing of such charge the division has not filed a civil action under this section or has not entered into a conciliation agreement with the charging party, the division shall so notify the charging party. Within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge by the charging party or, if such charge was filed by a member of the division, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. In no event shall any action be brought pursuant to this article more than one year after the charge to which the action relates has been filed. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs or security. Upon timely application, the court may in its discretion permit the division to intervene in civil actions in which the state is not a defendant upon certification that the case is of general public importance. Upon request the court may stay further proceedings for not more than sixty days pending the further efforts of the parties or the division to obtain voluntary compliance.

E. Whenever a charge is filed with the division and the division concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this article or article 4 of this chapter, the division may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with the supreme court rules of civil procedure. The court having jurisdiction over such proceedings shall assign such action for hearing at the earliest practicable date and cause the action to be expedited in every way.

F. The court shall assign any action brought under this article for hearing at the earliest practicable date and cause the action to be in every way expedited. If the action has not been scheduled for trial within one hundred twenty days after issue has been joined, the judge may appoint a master pursuant to rule 53 of the supreme court rules of civil procedure.

G. If the court finds that the defendant has intentionally engaged in or is intentionally engaging in an unlawful employment practice alleged in the complaint, the court

may enjoin the defendant from engaging in such unlawful employment practice and order such affirmative action as may be appropriate. Affirmative action may include, but is not limited to, reinstatement or hiring of employees with or without back pay payable by the employer, employment agency or labor organization responsible for the unlawful employment practice or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of the charge with the division. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union or the hiring, reinstatement or promotion of an individual as an employee or the payment to him of any back pay if such individual was refused admission, suspended or expelled or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, age, handicap or national origin or a violation of section 41-1464.

H. In any case in which an employer, employment agency or labor organization fails to comply with an order of a court issued in a civil action brought under this section, a party to the action or the division upon the written request of a person aggrieved by such failure may commence proceedings to compel compliance with such order.

I. Any civil action brought under this section and any proceedings brought under subsection H of this section are subject to appeal as provided in sections 12-120.21, 12-120.22 and 12-120.24.

J. In any action or proceeding under this section the court may allow the prevailing party, other than the division, a reasonable attorney's fee as part of the costs.

tion, social interaction, occupationally specific skills and responsibility skills that are required for employment. Vocational education programs should be determined according to identified needs, employment statistics, current occupational surveys, and local, state and national labor market demands, including the demands of new and emerging occupations. They should reflect the skills needed to develop the Navajo economy.

History

CJY-37-05, July 19, 2005. The Navajo Sovereignty in Education Act of 2005 generally amended Title 10 of the Navajo Nation Code.

CN-61-84, November 14, 1984.

§ 123. Accountability and academic assessment

A. The Board shall establish and maintain a Navajo Education Information System (NEIS) that will provide a comprehensive database on the schools and students. Through the database stored in NEIS, the Navajo Nation will be able to track academic performance of students in all school systems.

B. The Department of Diné Education shall collaborate with all schools and educational entities serving the Navajo Nation to develop and implement an educational accountability system. The educational accountability system will be based upon academic standards and the Navajo Nation-adopted academic assessment, and other relevant academic indicators.

C. The Department of Diné Education shall establish a level of standard or academic achievement for each grade level that students will meet to demonstrate mastery in order to make satisfactory academic progress.

D. To assure an effective educational accountability system, each school serving the Navajo Nation shall provide academic test scores on each individual student to the Department of Diné Education. The Department of Diné Education will use student test data to create Navajo achievement profiles. The achievement profiles will be shared with each school to assist them in improving academic achievement. On an annual basis, the Department of Diné Education will publish an Accountability Report on student achievement and related information for public dissemination.

E. The Department of Diné Education shall comply with the confidentiality and student privacy provisions of the Family Educational Rights and Privacy Act ("FERPA") in the use of student information for reports and research purposes.

F. The Department of Diné Education shall collaborate and guide a span of educational research with research organizations, post-secondary institutions, and the Navajo Nation Institutional Research Review Board.

History

CJY-37-05, July 19, 2005. The Navajo Sovereignty in Education Act of 2005 generally amended Title 10 of the Navajo Nation Code.

Note. Previous § 123, Vocational rehabilitation and opportunities for the handicapped, adopted by CN-61-84, November 14, 1984, amended and renumbered to § 1402.

Library References

Indians ⇐8.
Westlaw Topic No. 209.
C.J.S. Indians § 48.

United States Code

Family Educational Rights and Privacy Act, (FERPA), see 20 U.S.C. § 1232g.

§ 124. Navajo preference and Indian preference

A. The ultimate goal of the Navajo Nation is self-determination. In order to assure the survival and growth of the Navajo Nation as a people of distinct language and culture and with a domestic economic base, the Navajo Nation requires Navajo preference in employment of school and educational personnel in all schools serving the Navajo Nation. In addition, whenever application of the Navajo preference policy does not result in the selection of a Navajo applicant or candidate, a policy of Indian preference shall be applied to the remaining applicants of candidates. Local school governing boards and education administrators responsible for hiring shall comply with the requirements of this policy in regard to the recruitment, employment, promotion and retention of all personnel.

B. All schools and school systems operating within the Navajo Nation shall seek the professional services of qualified Navajo professionals as educators, counselors, administrators and support personnel to adequately serve the linguistically and culturally unique children of the Navajo people. In addition, all affected schools and school districts shall give preference to Navajo personnel in providing professional training opportunities, subject to the needs of the schools to obtain specialized training opportunities for staff serving particular functions. In seeking educational and support personnel, schools and school districts shall include within the position description, as a preferred qualification, a knowledge and familiarity with the Navajo language, culture and people.

C. Notwithstanding any other provision of law, including the Navajo Preference in Employment Act, 15 N.N.C. § 601, *et seq.*, as amended, the local governing board of a school or school district may waive the requirements of this Section by a formal vote of the board. Such waiver may apply only to individual employment, retention or promotion decisions, as determined by the board on a case-by-case basis. In each case where a waiver of Navajo preference-based hiring, retention or promotion occurs, the local governing board shall make a written record of the occurrence for inclusion in the official minutes of the board.

History

CJY-37-05, July 19, 2005. The Navajo Sovereignty in Education Act of 2005 generally amended Title 10 of the Navajo Nation Code.

Note. This § 124 amends and renumbers previous § 108 adopted by CN-61-84, November 14, 1984.

Note. Previous § 124, Post secondary education, adopted by CN-61-84, November 14, 1984, amended and renumbered to § 910.

Cross References

Navajo Preference in Employment Act, see 15 N.N.C. § 601 *et seq.*

United States Code

Operation and financial support of the Bureau of Indian Affairs funded school system, see 25 U.S.C. § 2001 *et seq.*

Annotations

1. Consent to policies

"We note, for example, that there are 'Navajo Educational Policies' which apply to all schools within the Navajo Nation, and to which the School District agreed in its lease." *Office of Navajo Labor Relations v. Central Consolidated School District No. 22*, No. SC-CV-13-98, slip op. at 8 (Nav. Sup. Ct. June 5, 2000).

C. It shall also be the policy of the Navajo Nation that official endorsement of such changes or proposals by the Navajo Nation shall be withheld until every effort has been made by the responsible agency, organization, or group to obtain the approval and endorsement of the Navajo people affected, and such Navajo Nation laws regarding the planning and undertaking of such change or proposal have been complied with. Such endorsement of proposed plans or changes shall be obtained prior to the implementation of such educational programs.

History

CJY-37-05, July 19, 2005. The Navajo Sovereignty in Education Act of 2005 generally amended Title 10 of the Navajo Nation Code.

Note. This § 497 amends and renumbers previous § 2 adopted by CN-61-84, November 14, 1984. See also, 1922-1951 Res. p. 114, February 20, 1947.

Library References

Indians ⇐8, 32(4.1).
Westlaw Topic No. 209.

§ 498. Size and locations of facilities

A. It is the declared policy of the Navajo Nation, in every instance and to the fullest extent possible, for the Education Committee of the Navajo Nation Council, the Navajo Nation Board of Education, and the Department of Diné Education to work closely with all appropriate education providers and governmental entities on the size and location of all educational facilities to be constructed for Navajo students in order that maximum benefit can be obtained from them by the Navajo people.

B. The Education Committee is authorized to approve and recommend to the appropriate standing committee(s) of the Navajo Nation Council, the approval of site locations on the Navajo Nation for any educational facilities, including school houses or buildings, residential facilities, teacher and faculty quarters including areas sufficient for power and light, gas, sewers, and other necessary facilities. All facilities shall be in compliance with and meet the handicapped accessible specifications and codes.

C. All education facilities constructed on the Navajo Nation or for the education of Navajo students shall be constructed in compliance with the laws of the Navajo Nation and Americans with Disabilities Act regarding school facilities, including 10 N.N.C. § 121, "School Facilities and Operations".

History

CJY-37-05, July 19, 2005. The Navajo Sovereignty in Education Act of 2005 generally amended Title 10 of the Navajo Nation Code.

Note. This § 498 amends and renumbers previous § 4 adopted by CN-61-84, November 14, 1984. See also, CJA-6-60, January 14, 1960.

Library References

Indians ⇐8, 32(4.1).
Westlaw Topic No. 209.

§ 499. Withdrawal of land for school purposes; leases and permits—Authority

A. Withdrawals of Navajo Nation land, and the issuance of leases and permits for the use of such land for school or other legitimate educational purposes are authorized and subject to applicable Navajo Nation law.

B. All such withdrawals, leases and permits shall provide for cancellation in case the land embraced ceases to be used primarily for school or other legitimate educational purposes for an uninterrupted period of two years or for interrupted periods of six months or more totaling two years.

C. Such withdrawals, permits, and leases may provide for use of the land for teachers' housing, and other noncommercial uses reasonable connected with education, in addition to the primary use as a site for a school or other educational facility.

D. All lessees receiving leases pursuant to the Chapter are subject to the laws of the Navajo Nation in regard to the occupation of an activities conducted upon the leased premises.

History

CJY-37-05, July 19, 2005. The Navajo Sovereignty in Education Act of 2005 generally amended Title 10 of the Navajo Nation Code.

Note. This § 499 renumbers previous § 1201 adopted by CN-61-84, November 14, 1984. See also, CJ-37-58, July 21, 1958; and CN-76-53, November 6, 1953.

Cross References

Education Committee authority, see 2 N.N.C. § 481 *et seq.*
Resources Committee authority, see 2 N.N.C. § 691 *et seq.*
Transportation and Community Development Committee authority, see 2 N.N.C. § 420 *et seq.*

Library References

Indians ⇐8.
Schools ⇐68.
Westlaw Topic Nos. 209, 345.
C.J.S. Indians § 48.
C.J.S. Schools and School Districts §§ 362 to 368.

Annotations

1. **Tribal boundaries**

"Exception to general rule under *Montana* that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers on non-Indian fee land located within reservation boundaries, which permits a tribe to exercise civil authority over conduct of nonmembers on fee lands within reservation when that conduct threatens or has some direct effect on the political integrity, economic security, or health or welfare of tribe, grants Indian tribes nothing beyond what is necessary to protect tribal self-government or to control internal relations." *Atkinson Trading Co. v. Shirley*, 121 S.Ct. 1825 (2001).

"While as a general proposition the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers on non-Indian fee land located within reservation boundaries, under *Montana* rule, two possible bases exist for tribal jurisdiction over non-Indian fee land: first, a tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with tribe or its members, through commercial dealings, contracts, leases, or other arrangements, and second, a tribe may exercise civil authority over conduct of nonmembers on fee lands within reservation when that conduct threatens or has some direct effect on the political integrity, economic security, or health or welfare of tribe." *Atkinson Trading Co. v. Shirley*, 121 S.Ct. 1825 (2001).

"Exception to Montana rule, that absent Congressional direction, Indian tribes lack civil authority over conduct of nonmembers on non-Indian land within a reservation, exists for activities of nonmembers who enter consensual relationships with tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Strate v. A-1 Contractors*, 117 S.Ct. 1404 (1997).

"When accident occurred on a portion of public highway maintained by state under federally granted right-of-way over Indian reservation land, tribal courts could not entertain civil action against allegedly negligent driver and driver's employer, neither of whom was a member of tribe, absent a statute or treaty authorizing tribe to govern conduct of nonmembers on highway in question; such a case fell within state or federal regulatory and adjudicatory governance." *Strate v. A-1 Contractors*, 117 S.Ct. 1404 (1997).

xcess of cost requirements for their respective activities shall be dispersed
.ocal School Boards in a manner established by the Area School Boar

History

CF-25-74, February 14, 1974
CAU-87-69, August 8, 1969.

Library References

Indians ⇐8.
Westlaw Topic No. 209.
C.J.S. Indians § 48.

Chapter 5. School Attendance

ection
01. Annual enrollment and school attendance
02. Compulsory school attendance—Generally
03. Application of state and Navajo Nation laws
04. Plans and procedures for enforcement

§ 501. Annual enrollment and school attendance

A. An annual enrollment and school attendance "drive" shall be conducte
etween the first of August and the fifteenth of November of each yea

B. The goal of the "drive" shall be to insure the enrollment and continue
ttendance of all Navajo children between the ages of six and 16 in available
chools.

C. The Education Committee and the President of the Navajo Nation sha
e responsible for detailed planning, coordination and stimulation of th
'drive".

D. All Navajo Nation Council members and Chapter officers shall be re
ponsible for disseminating information regarding the "drive" in their loca
ommunities.

History

CO-38-55, October 13, 1955.

Library References

Indians ⇐8.
Westlaw Topic No. 209.
C.J.S. Indians § 48.

§ 502. Compulsory school attendance—Generally

Education in Navajo schools shall be compulsory as to children between th
ages of five and 18 years as prescribed and defined in 10 N.N.C. § 118 of th
Navajo Education Policies.

History

CN-61-84, November 14, 1984.
1922-1951 Res. p. 114, February 20, 1947.

Library References

Indians ⇐8.
Schools ⇐160.
Westlaw Topic Nos. 209, 345.
C.J.S. Indians § 48.
C.J.S. Schools and School Districts §§ 734 to 739.

United States Code

Regulations by Secretary of the Interior to secure attendance at school, see 25 U.S.C. § 282.

§ 503. Application of state laws and Navajo Nation laws

The Navajo Nation Council consents to the application of state compulsory school attendance laws to the Indians of the Navajo Nation and their enforcement on Indian lands of the Navajo Nation wherever an established public school district lies or extends within the Navajo Nation. In addition, 10 N.N.C. § 118 of the Navajo Education Policies regarding compulsory attendance shall apply to all Navajo minors between the ages of five and 18 and to all persons having care and custody of such minors who are within the civil or criminal jurisdiction of the Navajo Nation.

History

CN-61-84, November 14, 1984.
CA-39-52, August 11, 1952.
Revision note. Slightly reworded.

Library References

Indians ⇐8.
Westlaw Topic No. 209.
C.J.S. Indians § 48.

United States Code

Regulations by Secretary of the Interior to secure attendance at school, see 25 U.S.C. § 282.

§ 504. Plans and procedures for enforcement

A. The Education Committee of the Navajo Nation Council, after consultation with the President of the Navajo Nation, is authorized and directed to develop plans and procedures in conjunction with local schools, communities, parents and other governmental entities for the enforcement of the compulsory school attendance laws among the Navajo Nation, including, but not limited to, provision for bringing action against responsible parents in Navajo Nation Courts.

B. The Education Committee is further authorized to designate areas where such plans and procedures shall be implemented.

C. The Education Committee is directed to continue to encourage regular school attendance through all means available.

expressed as a percentage of the applicable journeyman rate specified in the prevailing wage rate; and (b) the fringe benefit amount prescribed in the registered program or, if not specified, the fringe benefit amount set in the prevailing wage rate for the applicable journeyman classification. An apprentice who is not enrolled in a registered program (within the meaning of § 607(A)(6)), shall be paid wages in an amount of not less than the level prescribed for the applicable journeyman classification specified in the prevailing wage rate.

8. With the exception of the provisions of § 607(C), a trainee provided that the trainee is paid not less than: (a) the basic hourly rate prescribed in the approved program for the trainee's level of progress, expressed as a percentage of the applicable journeyman rate specified in the prevailing wage rate; and (b) the fringe benefit amount prescribed in the approved program or, if not specified and as to federally approved programs only, the fringe benefit amount set in the prevailing wage rate for the applicable journeyman classification. A trainee who is not enrolled in an approved program (within the meaning of § 607(A)(7)), shall be paid wages in an amount not less than the level prescribed for the applicable journeyman classification specified in the prevailing wage rate.

[1] Repealed by Pub.L. 107-217, § 6(b), Aug. 21, 2002, 116 Stat. 1308. See, now, 40 U.S.C. § 3141 *et seq.*

History

CO-73-90, October 25, 1990.
CAU-63-85, August 1, 1985.

§ 608. Health and safety of Navajo workers

Employers shall, with respect to business conducted within the territorial jurisdiction of the Navajo Nation, adopt and implement work practices which conform to occupational safety and health standards imposed by law.

History

CO-73-90, October 25, 1990.
CAU-63-85, August 1, 1985.

Cross References

Navajo Nation OSHA, 15 N.N.C. § 1401 *et seq.*

§ 609. Contract compliance

A. All transaction documents, including without limitation, leases, subleases, contracts, subcontracts, permits, and collective bargaining agreements between employers and labor organizations (herein collectively "transaction documents"), which are entered into by or issued to any employer and which are to be performed within the territorial jurisdiction of the Navajo Nation shall contain a provision pursuant to which the employer and any other contracting party affirmatively agree to strictly abide by all requirements of this Act. With respect to any transaction document which does not contain the foregoing

provision, the terms and provisions of this Act are incorporated therein as a matter of law and the requirements of the Act shall constitute affirmative contractual obligations of the contracting parties. In addition to the sanctions prescribed by the Act, violation of the Act shall also provide grounds for the Navajo Nation to invoke such remedies for breach as may be available under the transaction document or applicable law. To the extent of any inconsistency or conflict between a transaction document and the Act, the provision of the transaction document in question shall be legally invalid and unenforceable and the Act shall prevail and govern the subject of the inconsistency or conflict.

B. Every bid solicitation, request for proposals and associated notices and advertisements which relate to prospective contracts to be performed within the territorial jurisdiction of the Navajo Nation shall expressly provide that the contract shall be performed in strict compliance with this Act. With respect to any such solicitation, request, notice or advertisement which does not contain the foregoing provision, the terms and provisions of this Act are incorporated therein as a matter of law.

History

CO-73-90, October 25, 1990.
CAU-63-85, August 1, 1985.

Annotations

1. Construction and application

"On appeal, Central Consolidated additionally argued that the Navajo Preference in Employment Act, 15 N.N.C. § 601 *et seq.*, conflicts with the New Mexico Human Rights Act, § 28-1-1, *et seq.* NMSA 1978, and was not enforceable according to the Lease. This Court issued a memorandum decision affirming the Navajo Nation Labor Commission. We held that Central Consolidated consented to the application of the NPEA and that the NPEA was not in conflict with the New Mexico Human Rights Act." *Office of Navajo Labor Relations v. Central Consolidated School District No. 22*, No. SC-CV-37-00, slip op. at 2-3 (Nav. Sup. Ct. June 23, 2004).

"The NPEA, then and now, requires a separate provision providing that the contracting party agrees to Navajo preference." *Office of Navajo Labor Relations v. Central Consolidated School District No. 22*, No. SC-CV-37-00, slip op. at 6 (Nav. Sup. Ct. June 23, 2004).

2. Jurisdiction

"Like FECA, the NPEA is a more narrowly drawn statute. We find that NPEA claims should function in a manner analogous to FECA claims. However, while FECA provides access to the federal courts, the NPEA provides access to tribal courts." *Stago v. Wide Ruins Community School Inc.*, No. SC-CV-63-99, slip op. at 11 (Nav. Sup. Ct. August 29, 2002).

"Upon reconsideration we hold that Dr. Stago's NPEA claim falls outside the Federal Tort Claims Act (FTCA) and that the NNLC [Navajo Nation Labor Commission] has jurisdiction over her claim." *Stago v. Wide Ruins Community School Inc.*, No. SC-CV-63-99, slip op. at 1 (Nav. Sup. Ct. August 29, 2002).

§ 610. Monitoring and enforcement

A. Responsible Agency. Compliance with the Act shall be monitored and enforced by ONLR.

B. Charges.

1. Charging Party. Any Navajo may file a charge ("Individual Charge") claiming a violation of his or her rights under the Act. ONLR, on its own initiative, may file a charge ("ONLR Charge") claiming a violation of rights under the Act held by identified Navajos or a class of Navajos, including a

§ 161.801 May decisions under this part be appealed?

(a) Appeals of BIA decisions issued under this part may be taken in accordance with procedures in part 2 of 25 CFR.

(b) All appeals of decisions by the Grazing Committee and Resources Committee will be forwarded to the Navajo Nation's Office of Hearings and Appeals.

§ 161.802 How will the Navajo Nation recommend amendments to this part?

The Resources Committee will have final authority on behalf of the Navajo Nation to approve amendments to the Navajo Partitioned Lands grazing provisions, upon the recommendation of the Grazing Committee and the Navajo-Hopi Land Commission, and the concurrence of BIA.

PART 162—LEASES AND PERMITS

Subpart A—General Provisions

PURPOSE, DEFINITIONS, AND SCOPE

WHEN TO GET A LEASE

HOW TO GET A LEASE

LEASE ADMINISTRATION

Subpart B—Agricultural Leases

GENERAL PROVISIONS

Subpart C—Residential Leases

Subpart E—Wind and Solar Resource Leases

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.*

SOURCE: 66 FR 7109, Jan. 22, 2001, unless otherwise noted.

Subpart A—General Provisions

SOURCE: 77 FR 72467, Dec. 5, 2012, unless otherwise noted.

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.

If you are . . .	then you must obtain a lease under this part . . .
(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.
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

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

For purposes of this subpart:

Adult means an individual who is 18 years of age or older.

Agricultural land means Indian land or Government land suited or used for the production of crops, livestock or other agricultural products, or Indian land suited or used for a business that supports the surrounding agricultural community.

Agricultural lease means a lease of agricultural land for farming and/or grazing purposes.

AIARMA means the American Indian Agricultural Resources Management Act of December 3, 1993 (107 Stat. 2011, 25 U.S.C. 3701 *et seq.*), as amended on November 2, 1994 (108 Stat. 4572).

Assignment means an agreement between a tenant and an assignee, whereby the assignee acquires all of the tenant's rights, and assumes all of the tenant's obligations, under a lease.

BIA means the Bureau of Indian Affairs within the Department of the Interior and any tribe acting on behalf of BIA under § 162.109 of this part.

Bond means security for the performance of certain lease obligations, as furnished by the tenant, or a guaranty of such performance as furnished by a third-party surety.

Day means a calendar day.

Emancipated minor means a person under 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.

Fair annual rental means the amount of rental income that a leased tract of Indian land would most probably command in an open and competitive market.

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 by the United States and administered by BIA, not including tribal land that has been reserved for administrative purposes.

Immediate family means a spouse, brother, sister, lineal ancestor, lineal descendant, or member of the household of an individual Indian landowner.

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.

Indian landowner means a tribe or individual Indian who owns an interest in Indian land in trust or restricted status.

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

Interest, when used with respect to Indian land, means an ownership right to the surface estate of Indian land that is unlimited or uncertain in duration, including a life estate.

Lease means a written agreement between Indian landowners and a tenant or lessee, whereby the tenant or lessee is granted a right to possession of Indian land, for a specified purpose and duration. Unless otherwise provided, the use of this term will also include permits, as appropriate.

Lessee means tenant, as defined in this section.

Life estate means an interest in Indian land that is limited, in duration, to the life of the life tenant holding the interest, or the life of some other person.

Majority interest means more than 50% of the trust or restricted interests in a tract of Indian land.

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

Mortgage means a mortgage, deed of trust or other instrument that pledges a tenant's leasehold interest as security for a debt or other obligation owed by the tenant to a lender or other mortgagee.

NEPA means the National Environmental Policy Act (42 U.S.C. § 4321, *et seq.*)

Non compos mentis means a person who has been legally determined by a court of competent jurisdiction to be of unsound mind or incapable of managing his or her own affairs.

Permit means a written agreement between Indian landowners and the applicant for the permit, also referred to as a permittee, whereby the permittee is

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

Remainder 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.

Restricted land or restricted status means land the title to which is held by an individual Indian or a tribe and which can only be alienated or encumbered by the owner with the approval of the Secretary because of limitations contained in the conveyance instrument pursuant to federal law.

Secretary means the Secretary of the Interior or an authorized representative.

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

Surety means one who guarantees the performance of another.

Tenant means a person or entity who has acquired a legal right of possession to Indian land by a lease or permit under this part.

Trespass means an unauthorized possession, occupancy or use of Indian land.

Tribal land means the surface estate of land or any interest therein held by the United States in trust for a tribe, band, community, group or pueblo of Indians, and land that is held by a tribe, band, community, group or pueblo of Indians, subject to federal restrictions against alienation or encumbrance, and includes such land reserved for BIA administrative purposes when it is not immediately needed for such purposes. The term also includes 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. 984; 25 U.S.C. §476).

Tribal laws means the body of law that governs land and activities under the jurisdiction of a tribe, including ordinances and other enactments by the tribe, tribal court rulings, and tribal common law.

Trust land means any tract, or interest therein, that the United States holds in trust status for the benefit of a tribe or individual Indian.

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.

Us/We/Our means the Secretary or BIA and any tribe acting on behalf of the Secretary or BIA under §162.110 of this part.

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

[66 FR 7109, Jan. 22, 2001, as amended at 77 FR 72474, Dec. 5, 2012]

§ 162.105 Can tracts with different Indian landowners be unitized for agricultural leasing purposes?

(a) An agricultural lease negotiated by Indian landowners may cover more than one tract of Indian land, but the minimum consent requirements for leases granted by Indian landowners under subparts B through D of this part will apply to each tract separately. We may combine multiple tracts into a unit for leases negotiated or advertised by us, if we determine that unitization is in the Indian landowners' best interests and consistent with the efficient administration of the land.

(b) Unless otherwise provided in the agricultural lease, the rent or other consideration derived from a unitized agricultural lease will be distributed based on the size of each landowner's interest in proportion to the acreage within the entire unit.

[66 FR 7109, Jan. 22, 2001, as amended at 77 FR 72474, Dec. 5, 2012; 78 FR 19100, Mar. 29, 2013]

§ 162.106 What will BIA do if possession is taken without an approved agricultural lease or other proper authorization?

(a) If an agricultural lease is required, and possession is taken without an agricultural lease by a party other than an Indian landowner of the tract, we will treat the unauthorized use as a trespass. Unless we have reason to believe that the party in possession is engaged in negotiations with the Indian landowners to obtain an agricultural

lease, we will take action to recover possession on behalf of the Indian landowners, and pursue any additional remedies available under applicable law.

(b) Where a trespass involves Indian agricultural land, we will also assess civil penalties and costs under part 166, subpart I, of this chapter.

[66 FR 7109, Jan. 22, 2001, as amended at 77 FR 72474, Dec. 5, 2012; 78 FR 19100, Mar. 29, 2013]

§ 162.107 What are BIA's objectives in granting or approving agricultural leases?

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

(a) We will assist Indian landowners in leasing their land, either through negotiations or advertisement. In reviewing a negotiated lease for approval, we will defer to the landowners' determination that the lease is in their best interest, to the maximum extent possible. In granting a lease on the landowners' behalf, we will obtain a fair annual rental and attempt to ensure (through proper notice) that the use of the land is consistent with the landowners' wishes. We will also recognize the rights of Indian landowners to use their own land, so long as their Indian co-owners are in agreement and the value of the land is preserved.

(b) We will recognize the governing authority of the tribe having jurisdiction over the land to be leased, preparing and advertising leases in accordance with applicable tribal laws and policies. We will promote tribal control and self-determination over tribal land and other land under the tribe's jurisdiction, 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.*

[66 FR 7109, Jan. 22, 2001, as amended at 77 FR 72474, Dec. 5, 2012]

§ 162.108 What are BIA's responsibilities in administering and enforcing agricultural leases?

(a) We will ensure that tenants meet their payment obligations to Indian landowners, through the collection of rent on behalf of the landowners and the prompt initiation of appropriate collection and enforcement actions. We will also assist landowners in the enforcement of payment obligations that run directly to them, and in the exercise of any negotiated remedies that apply in addition to specific remedies made available to us under these or other regulations.

(b) We will ensure that tenants comply with the operating requirements in their agricultural leases, through appropriate inspections and enforcement actions as needed to protect the interests of the Indian landowners and respond to concerns expressed by them. We will take immediate action to recover possession from trespassers operating without an agricultural lease, and take other emergency action as needed to preserve the value of the land.

[66 FR 7109, Jan. 22, 2001, as amended at 77 FR 72474, Dec. 5, 2012]

§ 162.109 What laws, other than these regulations, will apply to agricultural leases granted or approved under this part?

(a) Agricultural leases granted or approved under this part will be subject to federal laws of general applicability and any specific federal statutory requirements that are not incorporated in these regulations.

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

(1) The tribal laws are consistent with the enacting tribe's governing documents;

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

(3) 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

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

(c) State law may apply to agricultural lease disputes or define the remedies available to the Indian landowners in the event of an agricultural lease violation by the tenant, if the agricultural lease so provides and the Indian landowners have expressly agreed to the application of state law.

[66 FR 7109, Jan. 22, 2001, as amended at 77 FR 72474, Dec. 5, 2012]

§ 162.110 Can these regulations be administered by tribes, on the Secretary's or on BIA's behalf?

Except insofar as these regulations provide for the granting, approval, or enforcement of agricultural leases and permits, the provisions in these regulations that authorize or require us to take certain actions will extend to any tribe or tribal organization that is administering specific programs or providing specific services under a contract or self-governance compact entered into under the Indian Self-Determination and Education Assistance Act (25 U.S.C. § 450f *et seq.*).

[66 FR 7109, Jan. 22, 2001, as amended at 77 FR 72474, Dec. 5, 2012]

§ 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:

(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 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.

[66 FR 7109, Jan. 22, 2001, as amended at 77 FR 72474, Dec. 5, 2012]

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

(a) Any organization, including tribes and tribal organizations, that have records identified in § 162.111(a) 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 § 162.111(b) for the period of time authorized by the Archivist of the United States for similar Department of the Interior records in accordance with 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.

§ 162.113 May decisions under this subpart be appealed?

Yes. Except where otherwise provided in this subpart, appeals from decisions by the BIA under this subpart may be taken pursuant to 25 CFR subpart 2.

[66 FR 7109, Jan. 22, 2001, as amended at 77 FR 72474, Dec. 5, 2012]

General Provisions

§ 162.200 What types of leases are covered by this subpart?

The regulations in this subpart apply to agricultural leases, as defined in this part. The regulations in this subpart may also apply to business leases on agricultural land, where appropriate.

§ 162.201 Must agricultural land be managed in accordance with a tribe's agricultural resource management plan?

(a) Agricultural land under the jurisdiction of a tribe must be managed in

accordance with the goals and objectives in any agricultural resource management plan developed by the tribe, or by us in close consultation with the tribe, under AIARMA.

(b) A ten-year agricultural resource management and monitoring plan must be developed through public meetings and completed within three years of the initiation of the planning activity. Such a plan must be developed through public meetings, and be based on the public meeting records and existing survey documents, reports, and other research from federal agencies, tribal community colleges, and land grant universities. When completed, the plan must:

(1) Determine available agricultural resources;

(2) Identify specific tribal agricultural resource goals and objectives;

(3) Establish management objectives for the resources;

(4) Define critical values of the Indian tribe and its members and identify holistic management objectives; and

(5) Identify actions to be taken to reach established objectives.

(c) Where the regulations in this subpart are inconsistent with a tribe's agricultural resource management plan, we may waive the regulations under part 1 of this title, so long as the waiver does not violate a federal statute or judicial decision or conflict with our general trust responsibility under federal law.

§ 162.202 How will tribal laws be enforced on agricultural land?

(a) Unless prohibited by federal law, we will recognize and comply with tribal laws regulating activities on agricultural land, including tribal laws relating to land use, environmental protection, and historic or cultural preservation.

(b) While the tribe is primarily responsible for enforcing tribal laws pertaining to agricultural land, we will:

(1) Assist in the enforcement of tribal laws;

(2) Provide notice of tribal laws to persons or entities undertaking activities on agricultural land, under § 162.204(c) of this subpart; and

(3) Require appropriate federal officials to appear in tribal forums when requested by the tribe, so long as such an appearance would not:

(i) Be inconsistent with the restrictions on employee testimony set forth at 43 CFR Part 2, Subpart E;

(ii) Constitute a waiver of the sovereign immunity of the United States; or

(iii) Authorize or result in a review of our actions by a tribal court.

(c) Where the regulations in this subpart are inconsistent with a tribal law, but such regulations cannot be superseded or modified by the tribal law under § 162.109 of this part, we may waive the regulations under part 1 of this chapter, so long as the waiver does not violate a federal statute or judicial decision or conflict with our general trust responsibility under federal law.

§ 162.203 When can the regulations in this subpart be superseded or modified by tribal laws and leasing policies?

(a) The regulations in this subpart may be superseded or modified by tribal laws, under the circumstances described in § 162.109(b) of this part.

(b) When specifically authorized by an appropriate tribal resolution establishing a general policy for the leasing of tribal and individually-owned agricultural land, we will:

(1) Waive the general prohibition against tenant preferences in leases advertised for bid under § 162.212 of this subpart, by allowing prospective Indian tenants to match the highest responsible bid (unless the tribal leasing policy specifies some other manner in which the preference must be afforded);

(2) Waive the requirement that a tenant post a bond under § 162.234 of this subpart;

(3) Modify the requirement that a tenant post a bond in a form described in § 162.235 of this subpart;

(4) Approve leases of tribal land at rates established by the tribe, as provided in § 162.222(b) of this subpart.

(c) When specifically authorized by an appropriate tribal resolution establishing a general policy for the leasing of "highly fractionated undivided heirship lands" (as defined in the tribal leasing policy), we may waive or modify the three-month notice requirement in § 162.209(b) of this subpart, so long as:

(1) The tribal law or leasing policy adopts an alternative plan for providing notice to Indian landowners, before an agricultural lease is granted by us on their behalf; and

(2) A waiver or modification of the three-month notice requirement is needed to prevent waste, reduce idle land acreage, and ensure lease income to the Indian landowners.

(d) Tribal leasing policies of the type described in paragraphs (b) through (c) of this section will not apply to individually-owned land that has been made exempt from such laws or policies under § 162.205 of this subpart.

§ 162.204 Must notice of applicable tribal laws and leasing policies be provided?

(a) A tribe must provide us with an official copy of any tribal law or leasing policy that supersedes or modifies these regulations under §§ 162.109 or 162.203 of this part. If the tribe has not already done so, we will provide notice of such a tribal law or leasing policy to affected Indian landowners and persons or entities undertaking activities on agricultural land. Such notice will be provided in the manner described in paragraphs (b) through (c) of this section.

(b) We will provide notice to Indian landowners, as to the superseding or modifying effect of any tribal leasing policy and their right to exempt their land from such a policy. Such notice will be provided by:

(1) Written notice included in a notice of our intent to lease the land, issued under § 162.209(b) of this subpart; or

(2) Public notice posted at the tribal community building or the United States Post Office, or published in the local newspaper that serves the area in which the Indian owners' land is located, at the time the tribal leasing policy is adopted.

(c) We will provide notice to persons or entities undertaking activities on agricultural land, as to the general applicability of tribal laws and the superseding or modifying effect of particular tribal laws and leasing policies. Such notice will be provided by:

(1) Written notice included in advertisements for lease, issued under § 162.212 of this subpart; or

(2) Public notice posted at the tribal community building or the United States Post Office, or published in a local newspaper of general circulation, at the time the tribal law is enacted or the leasing policy adopted.

§ 162.205 Can individual Indian landowners exempt their agricultural land from certain tribal leasing policies?

(a) Individual Indian landowners may exempt their agricultural land from the application of a tribal leasing policy of a type described in § 162.203(b) through (c) of this subpart, if the Indian owners of at least 50% of the trust or restricted interests in the land submit a written objection to us before a lease is granted or approved.

(b) Upon our receipt of a written objection from the Indian landowners that satisfies the requirements of paragraph (a) of this section, we will notify the tribe that the owners' land has been exempted from a specific tribal leasing policy. If the exempted land is part of a unitized lease tract, such land will be removed from the unit and leased separately, if appropriate.

(c) The procedures described in paragraphs (a) and (b) of this section will also apply to withdrawing an approved exemption.

How to Obtain a Lease

§ 162.206 Can the terms of an agricultural lease be negotiated with the Indian landowners?

An agricultural lease may be obtained through negotiation. We will assist prospective tenants in contacting the Indian landowners or their representatives for the purpose of negotiating a lease, and we will assist the landowners in those negotiations upon request.

§ 162.207 When can the Indian landowners grant an agricultural lease?

(a) Tribes grant leases of tribally-owned agricultural land, including any tribally-owned undivided interest(s) in a fractionated tract, subject to our approval. Where tribal land is subject to a land assignment made to a tribal

member or some other individual under tribal law or custom, the individual and the tribe must both grant the lease, subject to our approval.

(b) Adult Indian owners, or emancipated minors, may grant agricultural leases of their land, including undivided interests in fractionated tracts, subject to our approval.

(c) An agricultural lease of a fractionated tract may be granted by the owners of a majority interest in the tract, subject to our approval. Although prior notice to non-consenting individual Indian landowners is generally not needed prior to our approval of such a lease, a right of first refusal must be offered to any non-consenting Indian landowner who is using the entire lease tract at the time the lease is entered into by the owners of a majority interest. Where the owners of a majority interest grant such a lease on behalf of all of the Indian owners of a fractionated tract, the non-consenting Indian landowners must receive a fair annual rental.

(d) As part of the negotiation of a lease, Indian landowners may advertise their land to identify potential tenants with whom to negotiate.

§ 162.208 Who can represent the Indian landowners in negotiating or granting an agricultural lease?

The following individuals or entities may represent an individual Indian landowner:

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

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

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

(1) Meets all of the formal requirements of any applicable tribal or state law;

(2) Identifies the attorney-in-fact and the land to be leased; and

(3) Describes the scope of the power granted and any limits thereon.

§ 162.209 When can BIA grant an agricultural lease on behalf of an Indian landowner?

(a) We may grant an agricultural lease on behalf of:

(1) Individuals who are found to be non compos mentis by a court of competent jurisdiction;

(2) Orphaned minors;

(3) The undetermined heirs and devisees of deceased Indian owners;

(4) Individuals who have given us a written power of attorney to lease their land; and

(5) Individuals whose whereabouts are unknown to us, after reasonable attempts are made to locate such individuals; and

(6) The individual Indian landowners of fractionated Indian land, when necessary to protect the interests of the individual Indian landowners.

(b) We may grant an agricultural lease on behalf of all of the individual Indian owners of a fractionated tract, where:

(1) We have provided the Indian landowners with written notice of our intent to grant a lease on their behalf, but the Indian landowners are unable to agree upon a lease during a three-month negotiation period immediately following such notice, or any other notice period established by a tribe under § 162.203(c) of this subpart; and

(2) The land is not being used by an Indian landowner under § 162.104(b) of this part.

§ 162.210 When can BIA grant a permit covering agricultural land?

(a) We may grant a permit covering agricultural land in the same manner as we would grant an agricultural lease under § 162.209 of this part. We may also grant a permit on behalf of individual Indian landowners, without prior notice, if it is impractical to provide notice to the owners and no substantial injury to the land will occur.

(b) We may grant a permit covering agricultural land, but not an agricultural lease, on government land.

(c) We will not grant a permit on tribal agricultural land, but a tribe may grant a permit, subject to our approval, in the same manner as it would grant a lease under § 162.207(a) of this subpart.

§ 162.211 What type of valuation or evaluation methods will be applied in estimating the fair annual rental of Indian land?

(a) To support the Indian landowners in their negotiations, and to assist in our consideration of whether an agricultural lease is in the Indian landowners' best interest, we must determine the fair annual rental of the land prior to our grant or approval of the lease, unless the land may be leased at less than a fair annual rental under §162.222(b) through (c) of this subpart.

(b) A fair annual rental may be determined by competitive bidding, appraisal, or any other appropriate valuation method. Where an appraisal or other valuation is needed to determine the fair annual rental, the appraisal or valuation must be prepared in accordance with USPAP.

§ 162.212 When will the BIA advertise Indian land for agricultural leases?

(a) We will generally advertise Indian land for agricultural leasing:

(1) At the request of the Indian landowners; or

(2) Before we grant a lease under §162.209(b) of this subpart.

(b) Advertisements will provide prospective tenants with notice of any superseding tribal laws and leasing policies that have been made applicable to the land under §§162.109 and 162.203 of this part, along with certain standard terms and conditions to be included in the lease. Advertisements will prohibit tenant preferences, and bidders at lease sales will not be afforded any preference, unless a preference in favor of individual Indians is required by a superseding tribal law or leasing policy.

(c) Advertisements will require sealed bids, and they may also provide for further competitive bidding among the prospective tenants at the conclusion of the bid opening. Competitive bidding should be supported, at a minimum, by a market study or rent survey that is consistent with USPAP.

§ 162.213 What supporting documents must be provided prior to BIA's grant or approval of an agricultural lease?

(a) If the tenant is a corporation, partnership or other legal entity, it must provide organizational and financial documents, as needed to show that the lease will be enforceable against the tenant and the tenant will be able to perform all of its lease obligations.

(b) Where a bond is required under §162.234 of this subpart, the bond must be furnished before we grant or approve the lease.

(c) The tenant must provide environmental and archaeological reports, surveys, and site assessments, as needed to document compliance with NEPA and other applicable federal and tribal land use requirements.

§ 162.214 How and when will BIA decide whether to approve an agricultural lease?

(a) Before we approve a lease, we must determine in writing 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 (including preparation of the appropriate review documents under NEPA);

(3) Assure ourselves that adequate consideration has been given, as appropriate, to:

(i) The relationship between the use of the leased premises and the use of neighboring lands;

(ii) The height, quality, and safety of any structures or other facilities to be constructed on the leased premises;

(iii) The availability of police and fire protection, utilities, and other essential community services;

(iv) The availability of judicial forums for all criminal and civil matters arising on the leased premises; and

(v) The effect on the environment of the proposed land use.

(4) Require any lease modifications or mitigation measures that are needed to satisfy any requirements of this subpart, or any other federal or tribal land use requirements.

(b) Where an agricultural lease is in a form that has previously been accepted or approved by us, and all of the documents needed to support the findings

required by paragraph (a) of this section have been received, we will decide whether to approve the lease within 30 days of the date of our receipt of the lease and supporting documents. If we decide to approve or disapprove a lease, we will notify the parties immediately and advise them of their right to appeal the decision under part 2 of this chapter. Copies of agricultural leases that have been approved will be provided to the tenant, and made available to the Indian landowners upon request.

§ 162.215 When will an agricultural lease be effective?

Unless otherwise provided in the lease, an agricultural lease will be effective on the date on which the lease is approved by us. An agricultural lease may be made effective on some past or future date, by agreement, but such a lease may not be approved more than one year prior to the date on which the lease term is to commence.

§ 162.216 When will a BIA decision to approve an agricultural lease be effective?

Our decision to approve an agricultural lease will be effective immediately, notwithstanding any appeal that may be filed under part 2 of this chapter.

§ 162.217 Must an agricultural lease or permit be recorded?

(a) An agricultural lease or permit must be recorded in our Land Titles and Records Office with jurisdiction over the land. We will record the lease or permit immediately following our approval under this subpart.

(b) Agricultural leases of tribal land that do not require our approval, under § 162.102 of this part, must be recorded by the tribe in our Land Titles and Records Office with jurisdiction over the land.

LEASE REQUIREMENTS

§ 162.218 Is there a standard agricultural lease form?

Based on the need for flexibility in advertising, negotiating and drafting of appropriate lease terms and conditions, there is no standard agricultural lease form that must be used. We will assist the Indian landowners in drafting lease provisions that conform to the requirements of this part.

§ 162.219 Are there any provisions that must be included in an agricultural lease?

In addition to the other requirements of this part, all agricultural leases must provide that:

(a) The obligations of the tenant and its sureties to the Indian landowners will also be enforceable by the United States, so long as the land remains in trust or restricted status;

(b) Nothing contained in this lease shall operate to delay or prevent a termination of federal trust responsibilities with respect to the land by the issuance of a fee patent or otherwise during the term of the lease; however, such termination shall not serve to abrogate the lease. The owners of the land and the lessee and his surety or sureties shall be notified of any such change in the status of the land;

(c) There must not be any unlawful conduct, creation of a nuisance, illegal activity, or negligent use or waste of the leased premises; and

(d) The tenant must comply with all applicable laws, ordinances, rules, regulations, and other legal requirements, including tribal laws and leasing policies.

§ 162.220 Are there any formal requirements that must be satisfied in the execution of an agricultural lease?

(a) An agricultural lease must identify the Indian landowners and their respective interests in the leased premises, and the lease must be granted by or on behalf of each of the Indian landowners. One who executes a lease in a representative capacity under § 162.208 of this subpart must identify the owner being represented and the authority under which such action is being taken.

(b) An agricultural lease must be executed by individuals having the necessary capacity and authority to bind the tenant under applicable law.

(c) An agricultural lease must include a citation of the provisions in

this subpart that authorize our approval, along with a citation of the formal documents by which such authority has been delegated to the official taking such action.

§ 162.221 How should the land be described in an agricultural lease?

An agricultural lease should 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 a legal description or other description that is sufficient to identify the leased premises, subject to our approval. Where there are undivided interests owned in fee status, the aggregate portion of trust and restricted interests should be identified in the description of the leased premises.

§ 162.222 How much rent must be paid under an agricultural lease?

(a) An agricultural lease must provide for the payment of a fair annual rental at the beginning of the lease term, unless a lesser amount is permitted under paragraphs (b) through (d) of this section. The tenant's rent payments may be:

(1) In fixed amounts; or

(2) Based on a share of the agricultural products generated by the lease, or a percentage of the income to be derived from the sale of such agricultural products.

(b) We will approve an agricultural lease of tribal land at a nominal rent, or at less than a fair annual rental, if such a rent is negotiated or established by the tribe.

(c) We will approve an agricultural lease of individually-owned land at a nominal rent or at less than a fair annual rental, if:

(1) The tenant is a member of the Indian landowner's immediate family, or a co-owner in the lease tract; or

(2) The tenant is a cooperative or other legal entity in which the Indian landowners directly participate in the revenues or profits generated by the lease.

(d) We will grant or approve a lease at less than a fair annual rental, as previously determined by an appraisal or some other appropriate valuation method, if the land is subsequently advertised and the tenant is the highest responsible bidder.

§ 162.223 Must the rent be adjusted under an agricultural lease?

(a) Except as provided in paragraph (c) of this section, an agricultural lease must provide for one or more rental adjustments if the lease term runs more than five years, unless the lease provides for the payment of:

(1) Less than a fair annual rental, as permitted under §162.222(b) through (c) of this part; or

(2) A rental based primarily on a share of the agricultural products generated by the lease, or a percentage of the income derived from the sale of agricultural products.

(b) If rental adjustments are required, the lease must specify:

(1) How adjustments are made;

(2) Who makes the adjustments;

(3) When the adjustments are effective; and

(4) How disputes about the adjustments are resolved.

(c) An agricultural lease of tribal land may run for a term of more than five years, without providing for a rental adjustment, if the tribe establishes such a policy under §162.203(b)(4) and negotiates such a lease.

§ 162.224 When are rent payments due under an agricultural lease?

An agricultural lease must specify the dates on which all rent payments are due. Unless otherwise provided in the lease, rent payments may not be made or accepted more than one year in advance of the due date. Rent payments are due at the time specified in the lease, regardless of whether the tenant receives an advance billing or other notice that a payment is due.

§ 162.225 Will untimely rent payments made under an agricultural lease be subject to interest charges or late payment penalties?

An agricultural lease must specify the rate at which interest will accrue on any rent payment not made by the due date or any other date specified in the lease. A lease may also identify additional late payment penalties that will apply if a rent payment is not

made by a specified date. Unless otherwise provided in the lease, such interest charges and late payment penalties will apply in the absence of any specific notice to the tenant from us or the Indian landowners, and the failure to pay such amounts will be treated as a lease violation under §162.251 of this subpart.

§ 162.226 To whom can rent payments be made under an agricultural lease?

(a) An agricultural lease must specify whether rent payments will be made directly to the Indian landowners or to us on behalf of the Indian landowners. If the lease provides for payment to be made directly to the Indian landowners, the lease must also require that the tenant retain specific documentation evidencing proof of payment, such as canceled checks, cash receipt vouchers, or copies of money orders or cashier's checks, consistent with the provisions of §§162.112 and 162.113 of this part.

(b) Rent payments made directly to the Indian landowners must be made to the parties specified in the lease, unless the tenant receives notice of a change of ownership. Unless otherwise provided in the lease, rent payments may not be made payable directly to anyone other than the Indian landowners.

(c) A lease that provides for rent payments to be made directly to the Indian landowners must also provide for such payments to be suspended and the rent thereafter paid to us, rather than directly to the Indian landowners, if:

(1) An Indian landowner dies;

(2) An Indian landowner requests that payment be made to us;

(3) An Indian landowner is found by us to be in need of assistance in managing his/her financial affairs; or

(4) We determine, in our discretion and after consultation with the Indian landowner(s), that direct payment should be discontinued.

§ 162.227 What form of rent payment can be accepted under an agricultural lease?

(a) When rent payments are made directly to the Indian landowners, the form of payment must be acceptable to the Indian landowners.

(b) Payments made to us may be delivered in person or by mail. We will not accept cash, foreign currency, or third-party checks. We will accept:

(1) Personal or business checks drawn on the account of the tenant;

(2) Money orders;

(3) Cashier's checks;

(4) Certified checks; or

(5) Electronic funds transfer payments.

§ 162.228 What other types of payments are required under an agricultural lease?

(a) The tenant may be required to pay additional fees, taxes, and/or assessments associated with the use of the land, as determined by the tribe having jurisdiction over the land. The tenant must pay these amounts to the appropriate tribal official.

(b) Except as otherwise provided in part 171 of this chapter, if the leased premises are within an Indian irrigation project or drainage district, the tenant must pay all operation and maintenance charges that accrue during the lease term. The tenant must pay these amounts to the appropriate official in charge of the irrigation project or drainage district. Failure to make such payments will constitute a violation of the lease under §162.251.

§ 162.229 How long can the term of an agricultural lease run?

(a) An agricultural lease must provide for a definite lease term, specifying the commencement date. The commencement date of the lease may not be more than one year after the date on which the lease is approved.

(b) The lease term must be reasonable, given the purpose of the lease and the level of investment required. Unless otherwise provided by statute, the maximum term may not exceed ten years, unless a substantial investment in the improvement of the land is required. If such a substantial investment is required, the maximum term may be up to 25 years.

(c) Where all of the trust or restricted interests in a tract are owned by a deceased Indian whose heirs and devisees have not yet been determined,

the maximum term may not exceed two years.

(d) An agricultural lease may not provide the tenant with an option to renew, and such a lease may not be renewed or extended by holdover.

§ 162.230 Can an agricultural lease be amended, assigned, sublet, or mortgaged?

(a) An agricultural lease may authorize amendments, assignments, subleases, or mortgages of the leasehold interest, but only with the written consent of the parties to the lease in the same manner the original lease was approved, and our approval. An attempt by the tenant to mortgage the leasehold interest or authorize possession by another party, without the necessary consent and approval, will be treated as a lease violation under § 162.251 of this subpart.

(b) An agricultural lease may authorize us, one or more of the Indian landowners, or a designated representative of the Indian landowners, to consent to an amendment, assignment, sublease, mortgage, or other type of agreement, on the landowners' behalf. A designated landowner or representative may not negotiate or consent to an amendment, assignment, or sublease that would:

(1) Reduce the rentals payable to the other Indian landowners; or

(2) Terminate or modify the term of the lease.

(c) Where the Indian landowners have not designated a representative for the purpose of consenting to an amendment, assignment, sublease, mortgage, or other type of agreement, such consent may be granted by or on behalf of the landowners in the same manner as a new lease, under §§ 162.207 through 162.209 of this subpart.

§ 162.231 How can the land be used under an agricultural lease?

(a) An agricultural lease must describe the authorized uses of the leased premises. Any use of the leased premises for an unauthorized purpose, or a failure by the tenant to maintain continuous operations throughout the lease term, will be treated as a lease violation under § 162.251 of this subpart.

(b) An agricultural lease must require that farming and grazing operations be conducted in accordance with recognized principles of sustained yield management, integrated resource management planning, sound conservation practices, and other community goals as expressed in applicable tribal laws, leasing policies, or agricultural resource management plans. Appropriate stipulations or conservation plans must be developed and incorporated in all agricultural leases.

§ 162.232 Can improvements be made under an agricultural lease?

An agricultural lease must generally describe the type and location of any improvements to be constructed by the lessee. Unless otherwise provided in the lease, any specific plans for the construction of those improvements will not require the consent of the Indian owners or our approval.

§ 162.233 Who will own the improvements made under an agricultural lease?

(a) An agricultural lease may specify who will own any improvements constructed by the tenant, during the lease term. The lease must indicate whether any improvements constructed by the tenant will remain on the leased premises upon the expiration or termination of the lease, providing for the improvements to either:

(1) Remain on the leased premises, in a condition satisfactory to the Indian landowners and us; or

(2) Be removed within a time period specified in the lease, at the tenant's expense, with the leased premises to be restored as close as possible to their condition prior to construction of such improvements.

(b) If the lease allows the tenant to remove the improvements, it must also provide the Indian landowners with an option to waive the removal requirement and take possession of the improvements if they are not removed within the specified time period. If the Indian landowners choose not to exercise this option, we will take appropriate enforcement action to ensure removal at the tenant's expense.

§ 162.234 Must a tenant provide a bond under an agricultural lease?

Unless otherwise provided by a tribe under §162.203 of this subpart, or waived by us at the request of the owners of a majority interest in an agricultural lease tract, the tenant must provide a bond to secure:

(a) The payment of one year's rental;

(b) The construction of any required improvements;

(c) The performance of any additional lease obligations, including the payment of operation and maintenance charges under §162.228(b) of this subpart; and

(d) The restoration and reclamation of the leased premises, to their condition at the commencement of the lease term or some other specified condition.

§ 162.235 What form of bond can be accepted under an agricultural lease?

(a) Except as provided in paragraph (b) of this section, a bond must be deposited with us and made payable only to us, and such a bond may not be modified or withdrawn without our approval. We will only accept a bond in one of the following forms:

(1) Cash;

(2) Negotiable Treasury securities that:

(i) Have a market value at least equal to the bond amount; and

(ii) Are accompanied by a statement granting full authority to us to sell such securities in case of a violation of the terms of the lease.

(3) Certificates of deposit that indicate on their face that our approval is required prior to redemption by any party;

(4) Irrevocable letters of credit issued by federally-insured financial institutions authorized to do business in the United States. A letter of credit must:

(i) Contain a clause that grants us the authority to demand immediate payment if the tenant violates the lease or fails to replace the letter of credit at least 30 days prior to its expiration date;

(ii) Be payable to us;

(iii) Be irrevocable during its term and have an initial expiration date of not less than one year following the date of issuance; and

(iv) Be automatically renewable for a period of not less than one year, unless the issuing financial institution provides us with written notice that it will not be renewed, at least 90 calendar days before the letter of credit's expiration date.

(5) A surety bond issued by a company approved by the U.S. Department of the Treasury; or

(6) Any other form of highly liquid, non-volatile security that is easily convertible to cash and for which our approval is required prior to redemption by any party.

(b) A tribe may accept and hold any form of bond described in paragraph (a) of this section, to secure performance under an agricultural lease of tribal land.

§ 162.236 How will a cash bond be administered?

(a) If a cash bond is submitted, we will retain the funds in an account established in the name of the tenant.

(b) We will not pay interest on a cash performance bond.

(c) If the bond is not forfeited under §162.252(a) of this subpart, we will refund the bond to the tenant upon the expiration or termination of the lease.

§ 162.237 What insurance is required under an agricultural lease?

When necessary to protect the interests of the Indian landowners, an agricultural lease must require that a tenant provide insurance. Such insurance may include property, crop, liability and/or casualty insurance. If insurance is required, it must identify both the Indian landowners and the United States as insured parties, and be sufficient to protect all insurable improvements on the leased premises.

§ 162.238 What indemnities are required under an agricultural lease?

(a) An agricultural lease must require that the tenant indemnify and hold the United States and the Indian landowners harmless from any loss, liability, or damages resulting from the tenant's use or occupation of the leased premises, unless:

(1) The tenant would be prohibited by law from making such an agreement;

or (2) The interests of the Indian landowners are adequately protected by insurance.

(b) Unless the tenant would be prohibited by law from making such an agreement, an agricultural lease must specifically require that the tenant indemnify 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 materials from the leased premises that occurs during the lease term, regardless of fault.

§ 162.239 How will payment rights and obligations relating to agricultural land be allocated between the Indian landowners and the tenant?

(a) Unless otherwise provided in an agricultural lease, the Indian landowners will be entitled to receive any settlement funds or other payments arising from certain actions that diminish the value of the land or the improvements thereon. Such payments may include (but are not limited to):

(1) Insurance proceeds;

(2) Trespass damages; and

(3) Condemnation awards.

(b) An agricultural lease may provide for the tenant to assume certain cost-share or other payment obligations that have attached to the land through past farming and grazing operations, so long as those obligations are specified in the lease and considered in any determination of fair annual rental made under this subpart.

§ 162.240 Can an agricultural lease provide for negotiated remedies in the event of a violation?

(a) A lease of tribal agricultural land may provide the tribe with certain negotiated remedies in the event of a lease violation, including the power to terminate the lease. An agricultural lease of individually-owned land may provide the individual Indian landowners with similar remedies, so long as the lease also specifies the manner in which those remedies may be exercised by or on behalf of the landowners.

(b) The negotiated remedies described in paragraph (a) of this section will apply in addition to the cancellation remedy available to us under § 162.252(c) of this subpart. If the lease specifically authorizes us to exercise any negotiated remedies on behalf of the Indian landowners, the exercise of such remedies may substitute for cancellation.

(c) An agricultural lease may provide for lease disputes to be resolved in tribal court or any other court of competent jurisdiction, or through arbitration or some other alternative dispute resolution method. We may not be bound by decisions made in such forums, but we will defer to ongoing proceedings, as appropriate, in deciding whether to exercise any of the remedies available to us under § 162.252 of this subpart.

LEASE ADMINISTRATION

§ 162.241 Will administrative fees be charged for actions relating to agricultural leases?

(a) We will charge an administrative fee each time we approve an agricultural lease, amendment, assignment, sublease, mortgage, or related document. These fees will be paid by the tenant, assignee, or subtenant, to cover our costs in preparing or processing the documents and administering the lease.

(b) Except as provided in paragraph (c) of this section, we will charge administrative fees based on the rent payable under the lease. The fee will be 3% of the annual rent payable, including any percentage-based rent that can be reasonably estimated.

(c) The minimum administrative fee is $10.00 and the maximum administrative fee is $500.00, and any administrative fees that have been paid will be non-refundable. However, we may waive all or part of these administrative fees, in our discretion.

(d) If all or part of the expenses of the work are paid from tribal funds, the tribe may establish an additional or alternate schedule of fees.

§ 162.242 How will BIA decide whether to approve an amendment to an agricultural lease?

We will approve an agricultural lease amendment if:

(a) The required consents have been obtained from the parties to the lease under § 162.230 and any sureties; and

(b) We find the amendment to be in the best interest of the Indian landowners, under the standards set forth in § 162.213 of this subpart.

§ 162.243 How will BIA decide whether to approve an assignment or sublease under an agricultural lease?

(a) We will approve an assignment or sublease under an agricultural lease if:

(1) The required consents have been obtained from the parties to the lease under § 162.230 and the tenant's sureties;

(2) The tenant is not in violation of the lease;

(3) The assignee agrees to be bound by, or the subtenant agrees to be subordinated to, the terms of the lease; and

(4) We find no compelling reason to withhold our approval in order to protect the best interests of the Indian owners.

(b) In making the finding required by paragraph (a)(4) of this section, we will consider whether:

(1) The Indian landowners should receive any income derived by the tenant from the assignment or sublease, under the terms of the lease;

(2) The proposed use by the assignee or subtenant will require an amendment of the lease;

(3) The value of any part of the leased premises not covered by the assignment or sublease would be adversely affected; and

(4) The assignee or subtenant has bonded its performance and provided supporting documents that demonstrate that the lease or sublease will be enforceable against the assignee or subtenant, and that the assignee or subtenant will be able to perform its obligations under the lease or sublease.

§ 162.244 How will BIA decide whether to approve a leasehold mortgage under an agricultural lease?

(a) We will approve a leasehold mortgage under an agricultural lease if:

(1) The required consents have been obtained from the parties to the lease under § 162.230 and the tenant's sureties;

(2) The mortgage covers only the tenant's interest in the leased premises, and no unrelated collateral;

(3) The loan being secured by the mortgage will be used only in connection with the development or use of the leased premises, and the mortgage does not secure any unrelated debts owed by the tenant to the mortgagee; and

(4) We find no 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 will consider whether:

(1) The tenant's ability to comply with the lease would be adversely affected by any new loan obligations;

(2) Any lease provisions would be modified by the mortgage;

(3) The remedies available to us or to the Indian landowners would be limited (beyond any additional notice and cure rights to be afforded to the mortgagee), in the event of a lease violation; and

(4) Any rights of the Indian landowners would be subordinated or adversely affected in the event of a loan default by the tenant.

§ 162.245 When will a BIA decision to approve an amendment, assignment, sublease, or mortgage under an agricultural lease be effective?

Our decision to approve an amendment, assignment, sublease, or mortgage under an agricultural lease will be effective immediately, notwithstanding any appeal that may be filed under part 2 of this chapter. Copies of approved documents will be provided to the party requesting approval, and made available to the Indian landowners upon request.

§ 162.246 Must an amendment, assignment, sublease, or mortgage approved under an agricultural lease be recorded?

An amendment, assignment, sublease, or mortgage approved under an agricultural lease must be recorded in our Land Titles and Records Office that has jurisdiction over the leased premises. We will record the document immediately following our approval under this subpart.

LEASE ENFORCEMENT

§ 162.247 Will BIA notify a tenant when a rent payment is due under an agricultural lease?

We may issue bills or invoices to a tenant in advance of the dates on which rent payments are due under an agricultural lease, but the tenant's obligation to make such payments in a timely manner will not be excused if such bills or invoices are not delivered or received.

§ 162.248 What will BIA do if rent payments are not made in the time and manner required by an agricultural lease?

(a) A tenant's failure to pay rent in the time and manner required by an agricultural lease will be a violation of the lease, and a notice of violation will be issued under § 162.251 of this subpart. If the lease requires that rent payments be made to us, we will send the tenant and its sureties a notice of violation within five business days of the date on which the rent payment was due. If the lease provides for payment directly to the Indian landowners, we will send the tenant and its sureties a notice of violation within five business days of the date on which we receive actual notice of non-payment from the landowners.

(b) If a tenant fails to provide adequate proof of payment or cure the violation within the requisite time period described in § 162.251(b) of this subpart, and the amount due is not in dispute, we may immediately take action to recover the amount of the unpaid rent and any associated interest charges or late payment penalties. We may also cancel the lease under § 162.252 of this subpart, or invoke any other remedies available under the lease or applicable law, including collection on any available bond or referral of the debt to the Department of the Treasury for collection. An action to recover any unpaid amounts will not be conditioned on the prior cancellation of the lease or any further notice to the tenant, nor will such an action be precluded by a prior cancellation.

(c) Partial payments may be accepted by the Indian landowners or us, but acceptance will not operate as a waiver with respect to any amounts remaining unpaid or any other existing lease violations. Unless otherwise provided in the lease, overpayments may be credited as an advance against future rent payments, or refunded.

(d) If a personal or business check is dishonored, and a rent payment is therefore not made by the due date, the failure to make the payment in a timely manner will be a violation of the lease, and a notice of violation will be issued under § 162.251 of this subpart. Any payment made to cure such a violation, and any future payments by the same tenant, must be made by one of the alternative payment methods listed in § 162.227(b) of this subpart.

§ 162.249 Will any special fees be assessed on delinquent rent payments due under an agricultural lease?

The following special fees will be assessed if rent is not paid in the time and manner required, in addition to any interest or late payment penalties that must be paid to the Indian landowners under an agricultural lease. The following special fees will be assessed to cover administrative costs incurred by the United States in the collection of the debt:

The tenant will pay * * *	For * * *
(a) $50.00	Administrative fee for dishonored checks.
(b) $15.00	Administrative fee for BIA processing of each notice or demand letter.
(c) 18% of balance due.	Administrative fee charged by Treasury following referral for collection of delinquent debt.

§ 162.250 How will BIA determine whether the activities of a tenant under an agricultural lease are in compliance with the terms of the lease?

(a) Unless an agricultural lease provides otherwise, we may enter the leased premises at any reasonable time, without prior notice, to protect the interests of the Indian landowners and ensure that the tenant is in compliance with the operating requirements of the lease.

(b) If an Indian landowner notifies us that a specific lease violation has occurred, we will initiate an appropriate investigation within five business days of that notification.

§ 162.251 What will BIA do in the event of a violation under an agricultural lease?

(a) If we determine that an agricultural lease has been violated, we will send the tenant and its sureties a notice of violation within five business days of that determination. The notice of violation must be provided by certified mail, return receipt requested.

(b) Within ten business days of the receipt of a notice of violation, the tenant must:

(1) Cure the violation and notify us in writing that the violation has been cured;

(2) Dispute our determination that a violation has occurred and/or explain why we should not cancel the lease; or

(3) Request additional time to cure the violation.

§ 162.252 What will BIA do if a violation of an agricultural lease is not cured within the requisite time period?

(a) If the tenant does not cure a violation of an agricultural lease within the requisite time period, we will consult with the Indian landowners, as appropriate, and determine whether:

(1) The lease should be canceled by us under paragraph (c) of this section and §§ 162.253 through 162.254 of this subpart;

(2) We should invoke any other remedies available to us under the lease, including collecting on any available bond;

(3) The Indian landowners wish to invoke any remedies available to them under the lease; or

(4) The tenant should be granted additional time in which to cure the violation.

(b) If we decide to grant a tenant additional time in which to cure a violation, the tenant must proceed diligently to complete the necessary corrective actions within a reasonable or specified time period from the date on which the extension is granted.

(c) If we decide to cancel the lease, we will send the tenant and its sureties a cancellation letter within five business days of that decision. The cancellation letter must be sent to the tenant by certified mail, return receipt requested. We will also provide actual or constructive notice of a cancellation decision to the Indian landowners, as appropriate. The cancellation letter will:

(1) Explain the grounds for cancellation;

(2) Notify the tenant of the amount of any unpaid rent, interest charges, or late payment penalties due under the lease;

(3) Notify the tenant of its right to appeal under part 2 of this chapter, as modified by § 162.253 of this subpart, including the amount of any appeal bond that must be posted with an appeal of the cancellation decision; and

(4) Order the tenant to vacate the property within 30 days of the date of receipt of the cancellation letter, if an appeal is not filed by that time.

§ 162.253 Will BIA's regulations concerning appeal bonds apply to cancellation decisions involving agricultural leases?

(a) The appeal bond provisions in § 2.5 of part 2 of this chapter will not apply to appeals from lease cancellation decisions made under § 162.252 of this subpart. Instead, when we decide to cancel an agricultural lease, we may require that the tenant post an appeal bond with an appeal of the cancellation decision. The requirement to post an appeal bond will apply in addition to all of the other requirements in part 2 of this chapter.

(b) An appeal bond should be set in an amount necessary to protect the Indian landowners against financial losses that will likely result from the delay caused by an appeal. Appeal bond requirements will not be separately appealable, but may be contested during the appeal of the lease cancellation decision.

§ 162.254 When will a cancellation of an agricultural lease be effective?

A cancellation decision involving an agricultural lease will not be effective until 30 days after the tenant receives a cancellation letter from us. The cancellation decision will remain ineffective if the tenant files an appeal under § 162.253 of this subpart and part 2 of this chapter, unless the decision is made immediately effective under part

2. While a cancellation decision is ineffective, the tenant must continue to pay rent and comply with the other terms of the lease. If an appeal is not filed in accordance with §162.253 of this subpart and part 2 of this chapter, the cancellation decision will be effective on the 31st day after the tenant receives the cancellation letter from us.

§ 162.255 Can BIA take emergency action if the leased premises are threatened with immediate and significant harm?

If a tenant or any other party causes or threatens to cause immediate and significant harm to the leased premises during the term of an agricultural lease, we will take appropriate emergency action. Emergency action may include trespass proceedings under part 166, subpart I, of this chapter, or judicial action seeking immediate cessation of the activity resulting in or threatening the harm. Reasonable efforts will be made to notify the Indian landowners, either before or after the emergency action is taken.

§ 162.256 What will BIA do if a tenant holds over after the expiration or cancellation of an agricultural lease?

If a tenant remains in possession after the expiration or cancellation of an agricultural lease, we will treat the unauthorized use as a trespass. Unless we have reason to believe that the tenant is engaged in negotiations with the Indian landowners to obtain a new lease, we will take action to recover possession on behalf of the Indian landowners, and pursue any additional remedies available under applicable law, including the assessment of civil penalties and costs under part 166, subpart I, of this chapter.

Subpart C—Residential Leases

SOURCE: 77 FR 72474, Dec. 5, 2012, unless otherwise noted.

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.

§§ 162.336–162.337 [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 LTRO.

(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 LTRO.

(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 nonpayment 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

SOURCE: 77 FR 72474, Dec. 5, 2012, unless otherwise noted.

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:

(1) 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 nonpayment 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 E—Wind and Solar Resource Leases

SOURCE: 77 FR 72494, Dec. 5, 2012, unless otherwise noted.

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;

(7) Due diligence requirements, under § 162.517; and

(8) Insurance requirements, under § 162.527.

(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.

(e) We may treat any provision of a lease document that violates Federal law as a violation of the lease.

[77 FR 72494, Dec. 5, 2012, as amended at 78 FR 19100, Mar. 29, 2013]

§ 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 nonpayment 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.

Subpart F—Special Requirements for Certain Reservations

§ 162.500 Crow Reservation.

(a) Notwithstanding the regulations in other sections of this part 162, Crow Indians classified as competent under the Act of June 4, 1920 (41 Stat. 751), as amended, may lease their trust lands and the trust lands of their minor children for farming or grazing purposes without the approval of the Secretary pursuant to the Act of May 26, 1926 (44 Stat. 658), as amended by the Act of March 15, 1948 (62 Stat. 80). However, at their election Crow Indians classified as competent may authorize the Secretary to lease, or assist in the leasing of such lands, and an appropriate notice of such action shall be made a matter of record. When this prerogative is exercised, the general regulations contained in this part 162 shall be applicable. Approval of the Secretary is required on leases signed by Crow Indians not classified as competent or made on inherited or devised trust lands owned by more than five competent devisees or heirs.

(b) The Act of May 26, 1926 (44 Stat. 658), as amended by the Act of March 15, 1948 (62 Stat. 80), provides that no lease for farming or grazing purposes shall be made for a period longer than five years, except irrigable lands under the Big Horn Canal; which may be leased for periods of ten years. No such lease shall provide the lessee a preference right to future leases which, if exercised, would thereby extend the total period of encumbrance beyond the five or ten years authorized by law.

(c) All leases entered into by Crow Indians classified as competent, under the above-cited special statutes, must be recorded at the Crow Agency. Such recording shall constitute notice to all persons. Under these special statutes, Crow Indians classified as competent are free to lease their property within certain limitations. The five-year (ten-year in the case of lands under the Big Horn Canal) limitation is intended to afford a protection to the Indians. The essence of this protection is the right to deal with the property free, clear, and unencumbered at intervals at least as frequent as those provided by law. If lessees are able to obtain new leases long before the termination of existing leases, they are in a position to set their own terms. In these circumstances lessees could perpetuate their leaseholds and the protection of the statutory limitations as to terms would be destroyed. Therefore, in implementation of the foregoing interpretation, any lease which, on its face, is in violation of statutory limitations or requirements, and any grazing lease executed more than 12 months, and any farming lease executed more than 18 months, prior to the commencement of the term thereof or any lease which purports to cancel an existing lease with the same lessee as of a future date and take effect upon such cancellation will not be recorded. Under a Crow tribal program, approved by the Department of the Interior, competent Crow Indians may, under certain circumstances, enter into agreements which require that, for a specified term, their leases be approved. Information concerning whether a competent Crow Indian has executed such an instrument is available at the office of the Superintendent of the Crow Agency, Bureau of Indian Affairs, Crow Agency, Montana. Any lease entered into with a competent Crow Indian during the time such instrument is in effect and which is not in accordance with such instrument will be returned without recordation.

(d) Where any of the following conditions are found to exist, leases will be recorded but the lessee and lessor will be notified upon discovery of the condition:

(1) The lease in single or counterpart form has not been executed by all owners of the land described in the lease;

(2) There is, of record, a lease on the land for all or a part of the same term;

(3) The lease does not contain stipulations requiring sound land utilization plans and conservation practices; or

(4) There are other deficiencies such as, but not limited to, erroneous land descriptions, and alterations which are not clearly endorsed by the lessor.

(e) Any adult Crow Indian classified as competent shall have the full responsibility for obtaining compliance with the terms of any lease made by him pursuant to this section. This shall not preclude action by the Secretary to assure conservation and protection of these trust lands.

(f) Leases made by competent Crow Indians shall be subject to the right to issue permits and leases to prospect for, develop, and mine oil, gas, and other minerals, and to grant rights-of-way and easements, in accordance with applicable law and regulations. In the issuance or granting of such permits, leases, rights-of-way or easements due consideration will be given to the interests of lessees and to the adjustment of any damages to such interests. In the event of a dispute as to the amount of such damage, the matter will be referred to the Secretary whose determination will be final as to the amount of said damage.

§ 162.501 Fort Belknap Reservation.

Not to exceed 20,000 acres of allotted and tribal lands (non-irrigable as well as irrigable) on the Fort Belknap Reservation in Montana may be leased for the culture of sugar beets and other crops in rotation for terms not exceeding ten years.

§ 162.502 Cabazon, Augustine, and Torres-Martinez Reservations, California.

(a) Upon a determination by the Secretary that the owner or owners are not making beneficial use thereof, restricted lands on the Cabazon, Augustine, and Torres-Martinez Indian Reservations which are or may be irrigated from distribution facilities administered by the Coachella Valley County Water District in Riverside County, California, may be leased by the Secretary in accordance with the regulations in this part for the benefit of the owner or owners.

(b) All leases granted or approved on restricted lands of the Cabazon, Augustine, and Torres-Martinez Indian Reservations shall be filed for record in the office of the county recorder of the county in which the land is located, the cost thereof to be paid by the lessee. A copy of each such lease shall be filed by the lessee with the Coachella Valley County Water District or such other irrigation or water district within which the leased lands are located. All such leases shall include a provision that the lessee, in addition to the rentals provided for in the lease, shall pay all irrigation charges properly assessed against the land which became payable during the term of the lease. Act of August 25, 1950 (64 Stat. 470); Act of August 28, 1958 (72 Stat. 968).

§ 162.503 San Xavier and Salt River Pima-Maricopa Reservations.

(a) *Purpose and scope.* The Act of November 2, 1966 (80 Stat. 1112), provides statutory authority for long-term leasing on the San Xavier and Salt River Pima-Maricopa Reservations, Arizona, in addition to that contained in the Act of August 9, 1955 (69 Stat. 539), as amended (25 U.S.C. 415). When leases are made under the 1955 Act on the San Xavier or Salt River Pima-Maricopa Reservations, the regulations in part 162 apply. The purpose of this section is to provide regulations for implementation of the 1966 Act. The 1966 Act does not apply to leases made for purposes that are subject to the laws governing mining leases on Indian lands.

(b) *Duration of leases.* Leases made under the 1966 Act for public, religious, educational, recreational, residential, or business purposes may be made for terms of not to exceed 99 years. The terms of a grazing lease shall not exceed ten years; the term of a farming lease that does not require the making of a substantial investment in the improvement of the land shall not exceed ten years; and the term of a farming lease that requires the making of a substantial investment in the improvement of the land shall not exceed 40 years. No lease shall contain an option

to renew which extends the total term beyond the maximum term permitted by this section.

(c) *Required covenant and enforcement thereof.* Every lease under the 1966 Act shall contain a covenant on the part of the lessee that he will not commit or permit on the leased land any act that causes waste or a nuisance or which creates a hazard to health of persons or to property wherever such persons or property may be.

(d) *Notification regarding leasing proposals.* If the Secretary determines that a proposed lease to be made under the 1966 Act for public, religious, educational, recreational, residential, or business purposes will substantially affect the governmental interests of a municipality contiguous to the San Xavier Reservation or the Salt River Pima-Maricopa Reservation, as the case may be, he shall notify the appropriate authority of such municipality of the pendency of the proposed lease. The Secretary may, in his discretion, furnish such municipality with an outline of the major provisions of the lease which affect its governmental interests and shall consider any comments on the terms of the lease affecting the municipality or on the absence of such terms from the lease that the authorities may offer. The notice to the authorities of the municipality shall set forth a reasonable period, not to exceed 30 days, within which any such comments shall be submitted.

(e) *Applicability of other regulations.* The regulations in part 162 of this title shall apply to leases made under the 1966 Act except where such regulations are inconsistent with this section.

(f) *Mission San Xavier del Bac.* Nothing in the 1966 Act authorizes development that would detract from the scenic, historic, and religious values of the Mission San Xavier del Bac owned by the Franciscan Order of Friars Minor and located on the San Xavier Reservation.

Subpart G—Records

SOURCE: 77 FR 72494, Dec. 5, 2012, unless otherwise noted.

§ 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.

PART 163—GENERAL FORESTRY REGULATIONS

Subpart A—General Provisions

Subpart B—Forest Management and Operations

Subpart C—Forestry Education, Education Assistance, Recruitment and Training

Subpart D—Alaska Native Technical Assistance Program

Subpart E—Cooperative Agreements

Subpart F—Program Assessment

AUTHORITY: 25 U.S.C. 2, 5, 9, 13, 406, 407, 413, 415, 466; and 3101–3120.

SOURCE: 60 FR 52260, Oct. 5, 1995, unless otherwise noted.

Subpart A—General Provisions

§ 163.1 Definitions.

Advance deposits means, in Timber Contract for the Sale of Estimated Volumes, contract-required deposits in advance of cutting which the purchaser furnishes to maintain an operating balance against which the value of timber to be cut will be charged.

Advance payments means, in Timber Contract for the Sale of Estimated Volumes, non-refundable partial payments of the estimated value of the timber to be cut. Payments are furnished within 30 days of contract approval and prior to cutting. Advance payments are normally 25 percent of the estimated value of the forest products on each allotment. Advance payments may be required for tribal land.

Alaska Native means native as defined in section 3(b) of the Alaska Native Claims Settlement Act of December 18, 1971 (43 U.S.C. 1604).

ANCSA corporation means both profit and non-profit corporations established pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1604).

PINON UNIFIED SCHOOL DISTRICT NO. 4
PINON, ARIZONA

COMPREHENSIVE ANNUAL FINANCIAL REPORT
FOR THE FISCAL YEAR
ENDED JUNE 30, 2012

development and adoption of a school program; and the establishment, organization and operation of schools. The Governing Board also has broad financial responsibilities, including the approval of the annual budget, and the establishment of a system of accounting and budgetary controls.

The financial reporting entity consists of a primary government and its component units. A component unit is a legally separate entity that must be included in the reporting entity in conformity with generally accepted accounting principles. The District is a primary government because it is a special-purpose government that has a separately elected governing body, is legally separate, and is fiscally independent of other state or local governments. The District has one component unit included in its financial statements. See the Notes to Financial Statements section for a description of the component unit. Furthermore, the District is not included in any other governmental reporting entity. Consequently, the District's financial statements include only the funds of those organizational entities for which its elected governing board is financially accountable. The District's major operations include education, student transportation, construction and maintenance of District facilities, food services, bookstore, and athletic functions.

The Pinon Unified School District No. 4 Municipal Property Corporation (MPC) was formed for the sole purpose of acting as a lessor, with the Governing Board acting as lessee to finance the acquisition and/or construction of facilities to be used in the District's operations. The MPC's board of directors consists of three members who are appointed by the Pinon Unified School District Governing Board. Separate financial statements for the MPC are not prepared. There was no financial activity in the MPC in the fiscal year 2011-12; therefore the MPC is not presented in this financial report.

The District lies in the north end of Navajo County, approximately 150 miles northeast of Flagstaff, Arizona, and encompasses approximately 2,000 square miles. U.S. Interstate 40 is 90 miles south of the district, and provides access to a variety of scenic areas and outdoor activities such as hiking, fishing, and camping.

The primary towns in the District are the Navajo Nation Chapters of Pinon, Black Mesa, Blue Gap, Forest Lake, Hard Rock, Low Mountain, Tselani-Cottonwood, and Whippoorwill. Each Chapter functions as an independent community within the Navajo Nation, and each is geographically separated from the others. The estimated number of people living within the District is 8,721. Much of the traditional Navajo culture continues today, blended with more modern mainstream culture in an internet-connected technology-driven lifestyle that maintains respect for and practice of traditional Navajo lifestyle and values.

There is a severe lack of housing in the area as well as a network of primarily dirt roads that presents challenges to living and moving about within the District. The District provides housing for its teachers as needed, but the isolation and primitive roads continue to dissuade many would-be residents from moving to the area. This, combined with a severe lack of taxable property has had a limiting effect on community growth and District revenue.

NAVAJO EDUCATION, 1948 - 1978

ITS PROGRESS AND ITS PROBLEMS

(Navajo History, Vol. III, Part A)

BY

ROBERT A. ROESSEL, JR.

Published by

NAVAJO CURRICULUM CENTER
ROUGH ROCK DEMONSTRATION SCHOOL

Star Route 1
Rough Rock, Navajo Nation, Arizona 86503
1979

CHAPTER 17
PUBLIC SCHOOLS

History

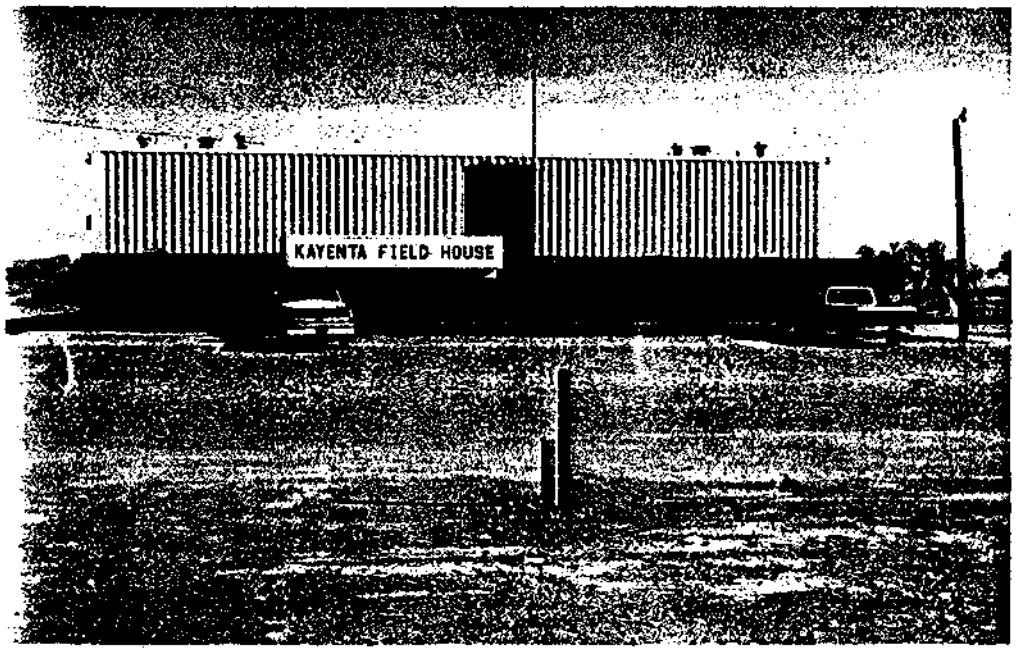
Public education on the Navajo Reservation was not a widely available resource until well after the conclusion of World War II. In fact, the few small public schools were primarily for non-Navajo children who were ineligible to attend federal schools. These "accommodation schools," as they were known, were located where there were numerous non-Navajo Indian service employees, such as Crownpoint, Chinle, Fort Defiance, Tuba City, Mexican Springs and Toadlena.

The Johnson O'Malley Act of 1934 provided a means for the Secretary of the Interior to enter into contracts with public school districts to educate Indian children where non-taxable Indian lands made it difficult for public school districts to provide services for such students. Nevertheless, there was little or no use of JOM funds by Navajo Reservation public schools until the 1950s.

In recent years the use and amount of JOM funds has changed considerably. Originally, the monies were used by public school districts to help defray operational expenses. In those few districts where adequate resources prevailed JOM funds were used for supplemental purposes above and beyond the regular budget. During the early 1970s frequent and bitter attacks were made by Indian groups, often urban, against using JOM money for operational expenses. As a result, Congress developed a revised set of regulations which basically required all JOM money to be for supplemental purposes. This requirement has worked, and will continue to work, a real hardship on Navajo Reservation school districts which already have too little operational money to provide an adequate education.

The second major source of public school operational money is PL 874. In 1950 Congress passed a law (PL-874) which has come to be known as "impact aid." Federal funds could be given to school districts which were financially burdened with the education of students whose parents lived on or worked at

The Kayenta Public High School gym (1978).



The Kayenta Field House -- 1978.

federal installations related to the military effort since these federal lands were not taxable and therefore could not generate local funds to support the education of such students. The same year, PL 815 was passed which provided school construction funds for such districts. Originally, these two acts were not intended to provide funds for Indian children residing on non-taxable Indian lands.

However, working cooperatively, the BIA and HEW and the involved states, were able to get Congress to amend PL 815 and PL 874 so that these funds could be used by reservation public school districts.

This action really accelerated the construction and operation of public schools on the Navajo Reservation. Hildegarde Thompson, who was head of BIA education at Washington, stated:

> ...By the end of 1960...public schools built under the authority of PL 815 operated in 21 locations, serving a total Navajo enrollment of 7,470 pupils. Over $20,000,000 in PL 815 funds were made available to construct these schools, plus annual appropriations under PL 874 to operate them. In 1973, according to the statistics published by the Bureau of Indian Affairs, 29,378 Navajo children attended public schools as compared to 2,830 in 1954.[91]

As has been discussed, one of the problems which prevented the operation of substantial public schools on the Navajo Reservation was the lack of an adequate tax base. Because title to Indian reservation land actually was held by the United States government as the trustee, and because federal land cannot be taxed by the state, the affected states felt that the sole responsibility for educating Indians fell to the federal government. This problem (this excuse) has persisted down to today (1978).

Public education on the Navajo Reservation does not provide educational opportunities that are equal to off-reservation public schools. Further, public education on the Navajo Reservation is very uneven in terms of quality. Some districts where there are larger amounts of taxable property and improvements, have excellent facilities and offer many of the same opportunities offered in off-reservation schools. But even with these most fortunate districts there still is a large discrepancy between them and other districts located off the reservation.

Equalization is a phrase often heard and widely used by state legislators, but in practice it simply does not exist. The State of Arizona is notorious in terms of its poor track record toward adequate support of public schools on the Navajo Reservation.

Exactly whose responsibility is Indian education is a question without an easy answer and one that largely remains unanswered. The federal government points to each state's constitution and/or enabling act which declares that education of all resident children is the responsibility of that particular state. On the other hand, the states in which the Navajo Reservation lies point to the Navajo Treaty of 1868 which they believe makes education a federal responsibility.

It is exactly this procedure of both the federal and state governments pointing to the other and declaring that there lies all responsibility for Indian education that prevents Navajo students from obtaining equal educational opportunities. Much has been said and written about the needs of Navajo education, but the problems will remain until there is some resolution of the question as to whose responsibility is the education of Navajo students. The answer perhaps should lie not in either the federal or state government accepting total responsibility but in a division of responsibility. But that division must be made crystal clear and must be agreed to by all parties. The present state of confusion effectively destroys any chance for quality education for Navajos, regardless of the type of school they attend.

It is absolutely tragic that most public schools on the reservation, particularily in Arizona, are unable to obtain adequate finances necessary to provide equal educational opportunities (for all students).

While the BIA pressure organization, NASBA, is richly funded and fully staffed, the Public School counterpart is totally without funds or staff. In 1971 informal meetings began to be held on a somewhat regular basis by the superintendents of the various reservation Public Schools. Those early meetings were more like times to share and compare than times to plan and develop -- the members were more like an exclusive club than a pressure group.

In 1974 an organization known as the Reservation-wide Public School Association was created. Membership was open to Public School boards, superintendents and key administrative staff personnel. A formal set of bylaws and a constitution were adopted which called for monthly meetings to be rotated among the various school districts. The organization in the beginning consisted of only Public School districts located on the Navajo Reservation in Arizona, although membership was, and is, open to similar schools in New Mexico and Utah.

In the period of 1974-1975, when reservation Public Schools in Arizona were in a state of extreme crisis, the organization proved to be an effective spokesman for the needs of public education. Under the leadership of Peterson Zah, Chairman of the Reservation-wide Public School Association, who also was President of the Window Rock Public School Board, the organization became an advocate for adequate financial support for reservation Public Schools. A monthly newsletter was begun under the able direction of Patrick Graham, also with the Window Rock School District.

In spite of repeated unsuccessful efforts to obtain funds to provide at least one or two persons as a staff, the organization has absolutely no money and no staff. And there is no way in which this inept and unfunded association can remotely approach the power of the BIA's NASBA. As a result, Public School needs and problems in reality have no voice or way to speak in a united and influential manner.

	Window Rock Unified School District, #8 Request for Proposals		PO Box 559 Ft Defiance, AZ 86504 (928) 729-6713
	RFP: 2013-6-7-8 PROJECT: **Audit Services**	Page 1 of 53	

REQUEST FOR PROPOSAL #	**2013-6-7-8**
MATERIAL OR SERVICE	**Audit Services**
DUE DATE	**July 23, 2013, 1:00 P.M. Mountain Standard Time**
OPENING LOCATION	Window Rock Unified School District, #8 Business Office PO Box 559 Navajo Route 12 Ft Defiance, AZ 86504
PRE-PROPOSAL CONFERENCE DATE	None
TIME	
LOCATION	

This solicitation may be obtained from our website at http://ww.wrschool.net/. All addendums will be posted to the website. Any interested offerors without internet access may obtain a copy of this solicitation by calling (928) 729-6713, or a copy may be picked up during regular business hours at the District's Business Department, PO Box 559, Ft Defiance, AZ 86504. If you experience any problems receiving this Request for Proposal, please call (928) 729-6713.

If you do not wish to bid on this solicitation, please provide written notification of your decision. Failure to respond could result in deletion of your name from the District's vendor listing. This form may be returned to the address above, or faxed to 928.729-7673. A "No Bid" will be considered a response.

☐ **I am submitting a "No Bid" at this time.**
Please keep my name on the District's Bidder's List.

☐ **I cannot provide services of this nature.**
Please remove my name from this category. I will submit a revised Vendor Registration Form
A copy of the Vendor Registration Form is at http://ww.wrschool.net/

☐ **I am eager to do business with Window Rock Unified School District as I provide these services. I will download it from the website.**

Name of Company _____ Date Signed _____

Authorized Signature/Local Representative _____ Telephone/Fax Number _____

Type Name and Position Held with Company _____

Mailing Address _____ City _____ _____ Zip _____

RFP Notice faxed: 7/8/2013

Window Rock Unified School District #8 is a political subdivision of the State of Arizona located in Apache County. The District consists of approximately 2,300 students. The District operates on a July 1 thru June 30 fiscal year.

The accounting policies of Window Rock Unified School District #8 conform to generally accepted accounting principles (GAAP) as adopted by the government Accounting Standards Board (GASB) or Financial Accounting Standards Board (FASB), as applicable.

B. Reporting Entity

The District is a special-purpose government that is governed by a separately elected governing body. It is legally separate from and fiscally independent of other state and local governments.

Furthermore, there are no component units combined with the District for financial statement presentation purposes, and it is not included in any other governmental reporting entity. Consequently, the District's financial statements present only the activities of those organizational entities for which its elected governing board is financially accountable.

C. District Funds

The basic financial statements include both government-wide statements and fund financial statements. The government-wide statements focus on the District as a whole, while the fund financial statements focus on major funds. Each presentation provides valuable information that can be analyzed and compared between years and between governments to enhance the usefulness of the information. The District reports the following governmental and enterprise funds and other fund types.

Governmental	Number of Funds
General Fund	1
Major Fund(s)	3
Non-Major Fund(s)	20

Enterprise	Number of Funds
General Fund	1
Non-Major Fund(s)	18

Other Fund Types	Number of Funds
Internal Service	
Agency	

D. Federal and State Financial Assistance

The District receives federal state financial assistance.