No. 14-55461

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DESERT WATER AGENCY,

Appellant and Plaintiff,

vs.

UNITED STATES DEPARTMENT OF THE INTERIOR, *ET AL.*,

Appellees and Defendants.

On Appeal From the United States District Court
for the Central District of California
Hon. Dolly M. Gee
(213) 894-5452
Case No. 5:13-CV-00606-DMG-OP

BRIEF FOR APPELLANT DESERT WATER AGENCY

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CORPORATE DISCLOSURE STATEMENT

Appellant Desert Water Agency is a political subdivision of the State of California, and is not a nongovernmental corporate party within the meaning of Rule 26.1 of the Federal Rules of Appellate Procedure.

PARTIES

The appellant and plaintiff is Desert Water Agency. The appellees and defendants are the United States Department of the Interior; Kenneth L. Salazar, U.S. Secretary of the Interior; the United States Bureau of Indian Affairs; and Kevin K. Washburn, Assistant Secretary for Indian Affairs.

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JURISDICTIONAL STATEMENT

Plaintiff Desert Water Agency ("DWA") brought an action for declaratory and injunctive relief against the U.S. Department of the Interior, *et al.*, alleging that a regulation adopted by the U.S. Bureau of Indian Affairs ("BIA"), 25 C.F.R. § 162.017—which purports to preempt taxes and other charges imposed by a state or its political subdivisions on Indian leased lands—is unlawful in purportedly preempting DWA's charges on leased lands within the reservation of the Agua Caliente Band of Cahuilla Indians ("Tribe"). DWA's Complaint alleges that DWA's charges are valid under federal law, and that the BIA regulation, in purportedly preempting DWA's charges, exceeds the BIA's authority under federal law and is unlawful. DWA's action was brought under the Administrative Procedure Act, 5 U.S.C. §§ 706(2)(A), -(2)(C), and the Declaratory Judgment Act, 28 U.S.C. § 2201.

On January 21, 2014, the district court issued an order dismissing DWA's Complaint under Rule 12(b)(1) of the Federal Rules of Civil Procedure (FRCP), for lack of subject matter jurisdiction. Excerpts of Record (ER) 25. The district court issued judgment on February 21, 2014. ER 199. The court's decision is final. This appeal was filed on March 21, 2014, within the 60-day period for filing an appeal. ER 200. This court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

The issues on this appeal are:

1. Whether plaintiff DWA, a political subdivision of the State of California, has standing under Article III of the United States Constitution to challenge a regulation adopted by the BIA that purportedly preempts DWA's taxes and charges as applied to non-Indian lessees on the Tribe's reservation.

2. Whether plaintiff DWA's action challenging the foregoing BIA regulation is constitutionally and prudentially ripe for review.

An Addendum to this brief includes the BIA regulation and the BIA's Federal Register notices pertaining to the regulation.

STATEMENT OF THE CASE

Plaintiff DWA brought an action for declaratory and injunctive relief against the Department of the Interior, the BIA, and officials of both agencies, alleging that a BIA regulation is unlawful as applied to DWA. ER 1-24. The regulation provides that leased lands on an Indian reservation "are not subject to any fee, tax, assessment, levy or other charge imposed by any State or political subdivision of a State." 25 C.F.R. § 162.017(a), -(b), -(c) (Addendum, Exh. 1). DWA imposes three types of charges—an *ad valorem* tax, a groundwater

replenishment assessment, and a water service charge—on all persons to whom it provides water service and supplies, including non-Indian lessees on the Tribe's reservation. ER 7-9.

DWA's Complaint alleges that DWA is authorized to apply its charges on the non-Indian lessees under two sources of federal law: (1) the "*Bracker* balancing test," which requires a "particularized inquiry" into state, federal, and tribal interests in determining whether state laws apply to non-Indians on Indian reservations, *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980), and (2) a federal leasing statute, 25 U.S.C. § 398c, which authorizes "taxes" by a "State or local authority" on "improvements . . . or other rights, property, or assets of any lessee" of lands within an executive order Indian reservation. ER 10-13. DWA's Complaint alleges that the BIA regulation, on its face and as interpreted by the Secretary of the Interior in the Federal Register notice, purportedly preempts DWA's charges as applied to the non-Indian lessees, and that—since DWA is authorized to apply its charges under federal law—the BIA regulation exceeds the BIA's authority under federal law and is unlawful. ER 15-17 (Second Claim for Relief). DWA brought its action under the Administrative Procedure Act, 5 U.S.C. §§ 706(2)(A), -(2)(C), and the Declaratory Judgment Act, 28 U.S.C. § 2201. ER 17-19.

The United States filed a motion to dismiss DWA's Complaint under Rule 12(b)(6) of the FRCP, arguing that DWA's Complaint fails to state a claim on which relief should be granted. ER 103-134. The United States argued in its motion that (1) DWA lacks Article III standing, (2) DWA lacks prudential standing, (3) DWA's action is not ripe for review, and (4) DWA "waived" its right to challenge the regulation by failing to comment on the regulation during the rulemaking process. ER 117-133.

The district court *sua sponte* dismissed DWA's Complaint under Rule 12(b)(1) of the FRCP on grounds that the court did not have subject matter jurisdiction over DWA's Complaint. ER 26, 31-32, 34, 38. The district court ruled that it did not have subject matter jurisdiction because DWA does not have Article III standing and DWA's action is not constitutionally or prudentially ripe. *Id*. The court dismissed the remaining allegations in the United States' motion to dismiss on grounds of mootness. ER 38.

STATEMENT OF THE FACTS

1. The Tribe's Reservation

The Tribe's reservation, which is located in Riverside County, California, was created by executive orders issued on May 15, 1876, by President Ulysses

S. Grant, and on September 29, 1877, by President Rutherford B. Hayes. ER 6. The reservation consists of a "checkerboard" pattern of lands, in which tribal lands are interspersed with non-tribal lands. *Agua Caliente Band of Mission Indians v. Riverside County*, 442 F.2d 1184, 1185 (9th Cir. 1971). The Tribe and its members have leased a substantial portion of the lands within the reservation to non-Indian lessees, who have built various structures on the leased lands, such as hotels, restaurants, stores and other places of business, and also single family homes and multi-family residential structures. ER 7.

2. Plaintiff Desert Water Agency

Plaintiff DWA is a political subdivision of the State of California. ER 3. DWA was created by the California Legislature's enactment of the Desert Water Agency Law of 1961. Cal. Water Code App. § 100-1 *et seq.* (West 2015) (Addendum, Exh. 4); ER 3-4.[1] DWA provides water supplies to its business

[1] The Desert Water Agency Law, which is uncodified, is included in the Addendum, as Exhibit 4. Under this enactment, DWA is authorized to manage and provide water supplies within its area of jurisdiction, § 2; to acquire waterworks systems and water rights, *id*. at § 15(5); to sell water under DWA's control to cities, public agencies, public corporations, and inhabitants, *id*. at § 15(7); to supply and deliver water at rates, terms and conditions imposed by the agency, *id*. at § 15(8); to issue bonds, borrow money, and incur indebtedness, *id*. at § 15(10); to restrict water use during droughts and other emergencies, *id.* at § 15(13); to acquire, control and distribute water for beneficial use, *id*. at § 15(17); to issue revenue bonds, *id*. at § 15(23); to impose groundwater replenishment assessments on water users in order to replenish groundwater

and residential customers in and near the City of Palm Springs. ER 3, 7. DWA's customers include non-Indian lessees on the Tribe's reservation. ER 9.

3. Desert Water Agency's Charges

DWA imposes certain charges on its customers, including non-Indian lessees on the Tribe's reservation, that compensate DWA for its costs in providing water supplies and service. ER 7-10.

First, DWA imposes an *ad valorem* tax on parcels of property to which DWA provides water supplies. ER 8. DWA obtains its water supplies from the State Water Project ("SWP") pursuant to a contract with the California Department of Water Resources ("DWR"). ER 7-8. Under the contract, DWA is required to pay a share of DWR's annual fixed costs. *Id.* DWA's *ad valorem* tax compensates DWA for its costs in paying its share of DWR's annual fixed costs. *Id.*

Second, DWA imposes a groundwater replenishment assessment on persons who extract groundwater from the groundwater basin. ER 8. This

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supplies, *id.* at § 15.4; to establish water rates that will result in revenues sufficient to recover the agency's operation and maintenance expenses, *id.* at § 25; and to impose and collect levies sufficient for the purpose of paying obligations, *id*. at § 26.

assessment compensates DWA for its costs in obtaining SWP water that DWA imports into the groundwater basin in order to recharge the basin. *Id.* This assessment is a variable charge based on the amount of groundwater that the person actually extracts. *Id.*

Third, DWA imposes a monthly water service charge on its customers who receive water service from DWA's retail water delivery system. ER 9. This charge includes a minimum monthly component for each connection to DWA's water system, plus a unit charge for each 100 cubic feet of water delivered through the service connection. *Id.* The charge compensates DWA for its costs in delivering water to its retail customers. *Id.*

4. The Bureau of Indian Affairs Regulation (25 C.F.R. § 162.017)

On December 5, 2012, the BIA adopted regulations, which became effective on January 4, 2013, regulating leases on Indian lands. "Residential, Business, and Wind and Solar Resources on Indian Land," 77 Fed. Reg. 72440 (Dec. 5, 2012). The regulations address "residential leases, business leases, wind energy evaluation leases, and wind and solar development leases on Indian land . . . ." *Id.* The regulations are codified at 25 Code of Federal Regulations (C.F.R.) §§ 162.001 *et seq*.

Section 162.017 of the regulations addresses the question of "[w]hat taxes apply to leases approved under this part." 25 C.F.R. § 162.017 (Addendum, Exh. 1). Subsection (c) thereof provides in relevant part:

> 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.

Id. at § 162.017(c). Subsection (a) provides that "permanent improvements on the leased land" are not subject to the same taxes and charges. *Id*. at § 162.017(a). Subsection (b) provides that "activities under a lease conducted on the leased premises" are not subject to the same taxes and charges. *Id*. at § 162.017(b). Since this action involves DWA's charges as applied to leasehold and possessory interests on the Tribe's reservation, subsection (c) is the applicable provision here.

SUMMARY OF ARGUMENT

Plaintiff DWA, a political subdivision of the State of California, imposes certain charges—an *ad valorem* tax, a groundwater replenishment assessment, and a water service charge[2]—on its customers to whom it provides water supplies and service, including non-Indian lessees on the Tribe's reservation. The charges compensate DWA for its costs in obtaining and providing water

[2] DWA's *ad valorem* tax, groundwater replenishment assessment and water service charge will be collectively referred to as "charges."

supplies for its customers. DWA alleges that it has the right to impose these charges on the non-Indian lessees under two sources of federal law: (1) the "*Bracker* balancing test," which requires a "particularized inquiry" into state, federal, and tribal interests in determining whether state laws apply to non-Indians on Indian reservations, *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980), and (2) a federal leasing statute, 25 U.S.C. § 398c, which authorizes "taxes" by a "State or local authority" upon "improvements … or other rights, property, or assets of any lessee" of lands within an executive order Indian reservation.

The BIA recently adopted a regulation providing that "the leasehold or possessory interest [on an Indian reservation] is not subject to any fee, tax, assessment, levy, or other charge imposed by any State or political subdivision of a State." 25 C.F.R. § 162.017(c). DWA's Complaint alleges that, since DWA is authorized under federal law to apply its charges on the leasehold interests of non-Indian lessees on the Tribe's reservation, the BIA regulation, in preempting DWA's charges,[3] exceeds the BIA's authority under federal law and is invalid as applied to DWA.

[3] This brief, in stating that the BIA regulation "preempts" DWA's charges, means only that the regulation *purports* to preempt DWA's charges, and that the

1. DWA Has Constitutional Standing.

Article III of the Constitution requires that a plaintiff demonstrate that it has standing, which requires a showing that the defendant's action has caused the plaintiff to suffer "concrete" harm that is "actual or imminent." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-561 (1992). The BIA regulation causes DWA to suffer such concrete harm by directly and immediately preempting its charges as applied on leased lands on the Tribe's reservation. The Secretary of the Interior has interpreted the regulation in its Federal Register notice as preempting all state taxes and charges on Indian leased lands, which would include DWA's charges; the Federal Register notice states that "[t]he Federal statutes and regulations governing leasing on Indian lands . . . occupy and preempt the field of Indian leasing"; "[t]he Federal statutory scheme for Indian leasing is comprehensive, and accordingly precludes State taxation"; and "the Federal regulatory scheme is pervasive and leaves no room for State law." 77 Fed. Reg. 72447 (Addendum, Exh. 2). A federal regulation that, as here, preempts a state political subdivision's authority to apply its charges necessarily causes the political subdivision to suffer concrete harm, caused by

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regulation, in purportedly preempting DWA's charges, is invalid under federal law.

the fact that the regulation preempts and nullifies the political subdivision's authority to apply its charges. Thus, DWA has Article III standing.

The Eleventh Circuit has held that the BIA regulation, on its face and as interpreted by the Secretary of the Interior in the Federal Register notice, is intended to preempt all state taxes as applied on Indian leased lands. *Seminole Tribe v. Stranburg*, 799 F.3d 1324, 1337-1338 (11th Cir. 2015). Similarly, the Tribe, whose leased lands are the subject of DWA's charges, recently brought an action against Riverside County alleging that the BIA regulation preempts the County's possessory interest tax—which includes DWA's *ad valorem* tax—as applied on the Tribe's leased lands. *Agua Caliente Band of Cahuilla Indians v. Riverside County, et al.*, No. EDCV 14-00007 DMG(DTBx) (E.D. Cal. Jan. 2, 2014). The Eleventh Circuit's decision and the Tribe's action further indicate that the BIA regulation causes DWA to suffer concrete harm by preempting its charges as applied on the Tribe's leased lands.

The Supreme Court has held that there is "ordinarily little question" that the "object" of a federal regulation has Article III standing to challenge the regulation, because the "object" of the regulation necessarily suffers concrete harm. *Defenders of Wildlife*, 504 U.S. at 561-562. Since the BIA regulation preempts charges imposed by a "State or political subdivision of the State,"

DWA, which is a political subdivision of the State of California, is an "object" of the BIA regulation and has Article III standing.

The Supreme Court has held that a party has Article III standing to challenge a federal action or regulation "specifically directing it to take or refrain from taking action." *Horne v. Flores*, 557 U.S. 433, 446 (2009). Since the BIA regulation requires DWA to "refrain from taking action"—by ceasing to apply its charges on Indian leased lands—DWA has Article III standing.

DWA's Complaint alleges that the BIA regulation causes DWA to suffer concrete harm by making it more difficult for DWA to obtain revenues necessary to acquire water supplies that DWA provides to its customers, including non-Indian lessees on the Tribe's reservation. Since DWA's allegation must be taken as true at the pleading stage, *Defenders of Wildlife*, 504 U.S. at 561; *Parks School of Business, Inc. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995), DWA's allegation that the BIA regulation causes DWA to suffer such concrete harm must be taken as true here. DWA has Article III standing for this additional reason.

2. DWA's Action Is Constitutionally And Prudentially Ripe For Review.

In order to demonstrate constitutional and prudential ripeness, a plaintiff must demonstrate that its action is "fit" for review and that withholding review will cause "hardship" to the plaintiff. *National Park Hospitality Ass'n v. Department of the Interior*, 538 U.S. 803, 808 (1990). DWA's action meets the fitness and hardship factors and is ripe for the same reason that DWA has Article III standing, that is, because the BIA regulation—on its face and as interpreted by the Secretary of the Interior in the Federal Register notice, the Eleventh Circuit in *Seminole Tribe*, and the Tribe in its recent action against Riverside County—directly and immediately preempts DWA's charges as applied on leased lands on the Tribe's reservation. A federal regulation that, as here, directly and immediately preempts a political subdivision's authority to apply its charges is immediately ripe for review.

The Supreme Court has held that an action challenging a federal action that requires the plaintiff to "adjust his conduct immediately" is "ripe for review at once." *Lujan v. National Wildlife Federation*, 497 U.S. 871, 891 (1990). Since the BIA regulation requires DWA to "adjust [its] conduct immediately" by ceasing to apply its charges, DWA's action is "ripe for review at once" under *National Wildlife Federation*.

DWA's action raises predominantly if not wholly legal issues and is ripe for review for this additional reason.

3. The District Court Erroneously Held That DWA's Action Does Not Meet Standing and Ripeness Requirements.

The district court held that DWA's action does not meet standing and ripeness requirements because DWA has not shown that DWA has "articulated a concrete plan to violate the law in question" and that prosecuting authorities "have communicated a specific warning or threat to initiate proceedings." Although a private plaintiff may be required to show this kind of harm in order to meet standing and ripeness requirements, a political subdivision, such as DWA, whose charges have been preempted by a federal regulation is not required to show this same kind of harm, because a federal regulation that preempts a political subdivision's authority to apply its charges causes the political subdivision to suffer concrete and immediate harm, caused by the fact that the regulation preempts and nullifies the political subdivision's authority to apply its charges. Thus, the political subdivision meets standing and ripeness requirements under these circumstances regardless of whether it shows the same kind of harm suffered by a private plaintiff.

The district court held that DWA does not meet standing and ripeness requirements because the United States has not threatened action against DWA or upheld a lessee's refusal to pay charges, and because DWA has not changed its conduct by ceasing to apply its charges. DWA is not required to make these additional showings of harm in order to meet standing and ripeness requirements, because, again, the BIA regulation causes DWA to suffer concrete and immediate harm by directly and immediately preempting its charges as applied on Indian leased lands, and thus DWA meets standing and ripeness requirements.

STANDARD OF REVIEW

The district court dismissed DWA's Complaint under Rule 12(b)(1) of the FRCP, on grounds that the court did not have subject matter jurisdiction. ER 32, 34, 38. The question whether a district court has subject matter jurisdiction is reviewed *de novo*. *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th Cir. 2009); *Valle del Sol, Inc. v. Whiting, et al.*, 732 F.3d 1006, 1014 (9th Cir. 2013); *Porter v. Jones*, 319 F.3d 483, 489 (9th Cir. 2003). In reviewing the question, this Court must assume the correctness of the factual allegations in DWA's Complaint. *Faulkner v. ADT Sec. Servs., Inc.*, 706 F.3d 1017, 1019 (9th Cir. 2013) ("All well-pleaded allegations of material fact in the complaint are

accepted as true and are construed in the light most favorable to the non-moving party."); *Hydranautics v. Filmtec Corp.*, 70 F.3d 533, 535 (9th Cir. 1995).

ARGUMENT

I. DESERT WATER AGENCY HAS CONSTITUTIONAL STANDING.

A. The Constitutional Standing Requirement Requires a Showing of "Concrete" Harm That Is "Actual or Imminent" And Not "Conjectural" or "Hypothetical."

Under Article III of the Constitution, the plaintiff must demonstrate that it has standing to maintain its action, which requires a showing that (1) the plaintiff has suffered an "injury in fact," which is (a) "concrete and particularized" and (b) "actual or imminent, not conjectural or hypothetical"; (2) there is a "causal connection" between the injury and the defendant's conduct; and (3) the injury "likely" will be "redressed" by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-561 (1992); *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009); *Horne v. Flores*, 557 U.S. 433, 445 (2009); *Friends of the Earth v. Laidlaw Envtl. Services, Inc.*, 528 U.S. 167, 180-185 (2000). "At bottom, the gist of the question of standing is whether petitioners have such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the

court so largely depends for illumination." *Massachusetts v. EPA*, 549 U.S. 497, 517 (2007) (citations and internal quotation marks omitted).

Since this case is at the pleading stage—in that the district court granted the United States' motion to dismiss without the United States having filed an answer to DWA's Complaint—DWA bears a minimal burden in demonstrating standing. "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim." *Defenders of Wildlife*, 504 U.S. at 561 (citation and internal quotation marks omitted).

As we explain, DWA has Article III standing because the BIA regulation—on its face and as interpreted by the Secretary of the Interior, by the Eleventh Circuit, and by the Tribe in its action against Riverside County—preempts all taxes and charges imposed by a state and its political subdivisions on Indian leased lands, and thus preempts DWA's charges. A federal regulation that preempts a state political subdivision's charges necessarily causes the political subdivision to suffer concrete harm, and thus the political subdivision has Article III standing to challenge the regulation.

B. The BIA Regulation—On Its Face and As Interpreted By The Secretary of the Interior, the Eleventh Circuit, And the Tribe in Its Action Against Riverside County—Directly and Immediately Preempts DWA's Charges.

1. The BIA Regulation On Its Face Preempts DWA's Charges.

The BIA regulation provides that "the leasehold or possessory interest [on an Indian reservation] is not subject to *any* fee, tax, assessment, levy or other charge imposed by any State or political subdivision of a State." 25 C.F.R. § 162.017(c) (emphasis added) (Addendum, Exh. 1). DWA alleges in its Complaint that it is "a political subdivision of the State of California," ER 3; that its charges consist of a "fee, tax, assessment, levy or other charge" within the meaning of the regulation, ER 7-10; and that its charges are applied on the leasehold interests of non-Indian lessees on the Tribe's reservation. ER 9. Thus, the BIA regulation on its face, in preempting "any" such taxes and other charges, preempts DWA's charges as applied to the non-Indian lessees.

The BIA regulation's preemption of DWA's charges is direct and immediate, and not contingent on future events or actions. The regulation uses the present tense, by providing that the leasehold or possessory interest "*is* not subject to" state taxes, fees or other charges. 25 C.F.R. § 162.017(c) (emphasis added).

In applying its charges, DWA is acting pursuant to the mandate of the California Legislature, which, in enacting the Desert Water Agency Law that created DWA, required DWA to impose taxes and levies sufficient to pay its obligations. Desert Water Agency Law § 26 (Addendum, Exh. 4) (DWA Board of Directors "must provide for the levy and collection of a tax sufficient to raise the amount of money determined by such board of directors to be necessary for the purpose of paying" its obligations); *see* note 1, *supra*.

DWA's Complaint alleges that the BIA regulation is invalid in preempting DWA's charges, because DWA is authorized to apply its charges under two sources of federal law. First, DWA is authorized to apply its charges under the "*Bracker* balancing test," which necessitates a "particularized inquiry" into state, federal and tribal interests in determining whether state or local laws apply on Indian reservations. ER 11-12; *see White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 176 (1989); *Rice v. Rehner*, 4632 U.S. 713, 718 (1983). Second, DWA is authorized to apply its charges under a federal leasing statute, 25 U.S.C. § 398c, which provides that state and local agencies may apply "taxes" on "improvements, . . . or other rights, property, or assets of any lessees" of lands within executive order Indian reservations. ER 11, 13.

Under federal law, a federal regulation "must be promulgated pursuant to authority Congress has delegated to" the agency. *Gonzales v. Oregon*, 546 U.S. 243, 258 (2006). A federal agency has authority to preempt state law "only when and if it is acting within the scope of its congressionally delegated authority." *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). DWA's Complaint alleges that—since DWA is authorized to apply its charges under federal law—the BIA regulation, in preempting DWA's charges, exceeds the BIA's authority under federal law and is invalid. ER 15-17.[4]

[4] The opening phrase of the BIA regulation states that it is "[s]ubject only to applicable Federal law." 25 C.F.R. § 162.017(a), -(b), -(c). Because of this phrase, DWA's Complaint alleged in the alternative that (1) the BIA regulation does not preempt DWA's charges because DWA's charges are applicable under the *Bracker* balancing test and the federal leasing statute, 25 U.S.C. § 398c, ER 14-15 (First Claim for Relief), and (2), if the regulation preempts DWA's charges, the regulation exceeds the BIA's authority under federal law and is invalid because DWA's charges are applicable under the *Bracker* balancing test and the federal leasing statute. ER 15-17 (Second Claim for Relief). DWA's second claim for relief is for all practical purposes the operative claim in DWA's Complaint, because, as will be explained in the next part of this brief, the Secretary of the Interior has interpreted the BIA regulation as preempting all state taxes and charges as applied on Indian leased lands. (Also, the Eleventh Circuit recently held that the regulation, as interpreted by the Secretary, is intended to preempt all state taxes and charges on Indian leased lands. *Seminole Tribe v. Stranburg*, 799 F.3d 1324, 1337-1338 (11th Cir. 2015); *see* pages 24-26, *infra*.) DWA asserted its first claim only because the court might, hypothetically, sustain the BIA regulation on the theory that DWA's charges are valid under "applicable Federal law" within the meaning of the regulation, even though this theory is inconsistent with the Secretary's interpretation of the regulation.

2. The Secretary of the Interior, in the Federal Register Notice, Interpreted the BIA Regulation As Preempting All State Taxes and Other Charges on Indian Leased Lands, Which Would Include DWA's Charges.

The Secretary of the Interior, in the Federal Register notice, has interpreted the BIA regulation as preempting all state taxes and charges on Indian leased lands. 77 Fed. Reg. 72440 (Dec. 5, 2012) (Addendum, Exh. 2). According to the Secretary's Federal Register notice:

> With a backdrop of "traditional notions of Indian self-government," Federal courts apply a balancing test to determine whether State taxation of non-Indians engaging in activity or owning property on the reservation is preempted. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980). The *Bracker* balancing test requires a particularized examination of the relevant State, Federal, and tribal interests. In the case of leasing on Indian lands, the Federal and tribal interests are very strong. [¶] The Federal statutes and regulations governing leasing on Indian lands . . . *occupy and preempt* the field of Indian leasing. The Federal statutory scheme for Indian leasing is comprehensive, and accordingly *precludes State taxation*. In addition, the Federal regulatory scheme is pervasive and leaves *no room for State law*.

Id. at 72447 (Addendum, Exh. 2) (emphasis added). An agency's interpretation of its regulation is controlling unless it is "plainly erroneous or inconsistent with the regulation." *Auers v. Robbins*, 519 U.S. 452, 461 (1997); *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994). Therefore, the Secretary's interpretation of the BIA regulation in the Federal Register notice is controlling here.

The Secretary's Federal Register notice also described the policy reasons for the regulation's preemption of state taxes and charges on Indian leased lands, stating:

> Assessment of State and local taxes would obstruct Federal policies supporting tribal economic development, self-determination, and strong tribal governments. State and local taxation also threatens substantial tribal interests in effective tribal government, economic self-sufficiency, and territorial autonomy. . . . [¶] Another important aspect of tribal sovereignty and self-governance is taxation. Permanent improvements and activities on the leased premises and the leasehold interest itself may be subject to taxation by the Indian tribe with jurisdiction over the leased property. . . . State and local taxation of lessee-owned improvements, activities conducted by the lessee, and the leasehold interest also has the potential to increase project costs for the lessee and decrease the funds available to the lessee to make rental payments to the Indian landowner. Increased project costs can impede the Tribe's ability to attract non-Indian investment to Indian lands where such investment and participation are critical to the vitality of tribal economies. . . . [¶] In many cases, tribes contractually agree to reimburse the non-Indian lessee for the expense of the tax . . . ultimately being borne directly by the tribe. Accordingly, the very possibility of an additional State or local tax has a chilling effect on potential lessees as well as the tribe that as a result might refrain from exercising its own sovereign right to impose a tribal tax to support its infrastructure needs. Such dual taxation can make some projects less economically attractive, further discouraging development in Indian country.

77 Fed. Reg. 72447-72448 (Addendum, Exh. 2).

Earlier, on November 29, 2011, the Secretary published a Federal Register notice also stating that the proposed regulation preempts the field of

leasing of Indian lands, and thus preempts all state taxes on Indian leased lands. The earlier Federal Register notice stated:

> These regulations are *intended to preempt the field of leasing of Indian lands.* The Federal statutory and regulatory scheme for leasing, including the regulation of improvements, is so pervasive as to preclude the additional burden of State taxation.

76 Fed. Reg. 73784, 73785 (Nov. 29, 2011) (emphasis added) (Addendum, Exh. 3).

In sum, the Secretary of the Interior, interpreting the BIA regulation in the Federal Register notice, concluded that (1) the *Bracker* balancing test applies in determining whether state taxes and charges apply on Indian leased lands, and (2) the *Bracker* balancing test preempts all state taxes and charges as so applied. In concluding that the *Bracker* balancing test preempts state taxes and charges, the Secretary stated that federal statutes and regulations "occupy and preempt" the field of Indian leasing; the federal statutory scheme is "comprehensive" and "precludes State taxation"; and the federal regulatory scheme "leaves no room for State law." 77 Fed. Reg. 72447 (Addendum, Exh. 2). Since the Secretary, applying the *Bracker* balancing test, has interpreted the BIA regulation as preempting state taxes and charges as applied on Indian leased lands, the regulation, as interpreted by the Secretary, preempts DWA's charges as applied on the Tribe's leased lands.

3. The Eleventh Circuit Recently Interpreted the BIA Regulation As Preempting All State Taxes and Charges as Applied on Indian Leased Lands.

On August 26, 2015, the Eleventh Circuit Court of Appeals, applying the *Bracker* balancing test, held that federal law preempts Florida's rental tax but not its utility tax as applied to leased lands on an Indian reservation. *Seminole Tribe v. Stranburg*, 799 F.3d 1324 (11th Cir. 2015).[5] In discussing the BIA regulation, the Eleventh Circuit stated that the regulation, both on its face and as interpreted by the Secretary of the Interior in the Federal Register notice, is intended to preempt all state taxes and other charges on Indian leased lands. *Id.* at 1337-1338. Specifically, the court stated that the BIA regulation "expressly provides that 'activities under a lease conducted on the leased premises' are not subject to state taxation," and that "'the leasehold or possessory interest' is not subject to state taxation." *Id.* at 1337. The court stated that the Secretary of the Interior's Federal Register notice "outlined the *Bracker* balancing test and then applied it generally," *id.*, and that the Secretary, applying the *Bracker* balancing

[5] Although subject matter jurisdiction is determined "on the basis of the *facts* that existed at the time the action was filed," *Stock West Corp. v. Taylor*, 964 F.2d 912, 917 (9th Cir. 1992) (emphasis added), the Eleventh Circuit's decision, as well as the Tribe's action against Riverside County that will be discussed in the next part of this brief, do not relate to the "facts" that existed when DWA's action was filed, but rather further clarify the legal *harm* that the BIA regulation causes DWA to suffer by preempting its charges.

test, concluded that federal law "occup[ies] and preempt[s] the field of Indian leasing," *id.*; that federal policies and statutes have "left the State with no duties or responsibilities for such interest," *id.* at 1338; and that "state taxation undermines federal interests with respect to leases." *Id.* The Eleventh Circuit concluded that the Secretary reached the "conclusion that federal law preempts lease-related taxation" by the states. *Id.*

The Eleventh Circuit held, however, that—although the Secretary's interpretation of the regulation is entitled to "some weight"—deference to the Secretary's "ultimate conclusion" is "inappropriate" because the courts must independently balance federal, state and tribal interests under *Bracker*. *Id.* at 1338. The court independently applied the *Bracker* balancing test in determining that Florida's rental tax was preempted but Florida's utility tax was not preempted. *Id.* at 1338-1343, 1352-1353.

The Eleventh Circuit's decision is instructive not because of how it resolved the preemption issue under *Bracker*, but rather because it concluded that the BIA regulation, as interpreted by the Secretary of the Interior in the Federal Register notice, is intended to preempt all state taxes and charges as applied on Indian leased lands. The Eleventh Circuit's decision indicates that—since the BIA regulation is intended to preempt all state taxes and charges as

applied on Indian leased lands—the regulation is intended to preempt DWA's charges as applied on the Tribe's leased lands here.

4. The Tribe's Recent Action Against Riverside County Indicates That the BIA Regulation Preempts Taxes and Charges Imposed by State Political Subdivisions on Indian Leased Lands.

On January 2, 2014, the Tribe brought an action against Riverside County, currently pending, alleging that the BIA regulation preempts the County's possessory interest tax as applied to lessees on the Tribe's reservation. *Agua Caliente Band of Cahuilla Indians v. Riverside County, et al.*, No. EDCV 14-00007 DMG(DTBx) (E.D. Cal. Jan. 2, 2014).[6] The Tribe's complaint alleges that "[g]overning federal law, including 25 C.F.R. § 162.017, makes clear that federal interests related to surface leasing of Reservation trust lands preempts state or municipal taxation of possessory interests in Reservation trust lands and permanent improvements situated thereon, regardless of whom the tax is assessed against or collected from." Tribe Compl. ¶ 35. Since DWA's *ad valorem* tax is included in and collected as part of Riverside County's possessory interest tax, ER 9-10, DWA would be unable to impose its tax on the

[6] DWA has filed a motion requesting that this Court take judicial notice of the Tribe's complaint.

lessees if, as the Tribe's complaint alleges, the County cannot apply its possessory tax on the lessees.

The Tribe's complaint demonstrates that—in the view of the Tribe whose leased lands are the subject of DWA's charges—the BIA regulation preempts taxes and charges applied by a state political subdivision on the Tribe's leased lands, and thus preempts DWA's charges as applied here.

C. Since the BIA Regulation Directly and Immediately Preempts DWA's Charges, DWA Suffers "Concrete" Harm and Has Standing.

As we have explained, the BIA regulation—on its face, and as interpreted by the Secretary of the Interior, the Eleventh Circuit in *Seminole Tribe* and the Tribe's action against Riverside County—preempts DWA's charges as applied on the Tribe's leased lands. Since the BIA regulation preempts DWA's charges, DWA suffers "concrete and particularized" harm that is "actual or imminent" and not "conjectural or hypothetical." *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). A federal regulation that preempts a political subdivision's charges necessarily causes the political subdivision to suffer concrete and actual harm, caused by the fact that regulation nullifies the political subdivision's authority to apply its charges. Thus, DWA has Article III standing to challenge the BIA regulation.

Since DWA is a political subdivision whose charges have been preempted by a federal regulation, the harm suffered by DWA here is different than that of a private plaintiff challenging a federal regulation as applied to the plaintiff, where the plaintiff's alleged harm consists of, for example, an injury to the plaintiff's pecuniary interests or to an environmental resource in which the plaintiff has an interest. *E.g.*, *Summers v. Earth Island Inst.*, 555 U.S. 488, 492-497 (2009) (standing of environmental organization to challenge federal regulation affecting environment); *Environmental Defense Ctr., Inc. v. EPA*, 344 F.3d 832, 863 (9th Cir. 2003) (standing of industry trade association to challenge federal regulation affecting the association). In *Defenders of Wildlife*, for example, the Supreme Court considered whether the plaintiff, which represented environmental interests, had standing to challenge a federal regulation that allegedly caused harm to the Nile crocodile in Egypt, and the Court concluded that the plaintiff suffered no concrete harm and did not have standing. *Defenders of Wildlife*, 504 U.S. at 559-561. Unlike private plaintiffs in *Defenders of Wildlife* and other like cases, DWA suffers concrete harm caused by the fact that the BIA regulation preempts and nullifies DWA's charges.

The Supreme Court, the Ninth Circuit and other federal appellate courts have held in several cases that the states and their political subdivisions have standing to challenge federal rules that preempt or limit their authority to apply their laws. *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1197-1198 (9th Cir. 2004) (municipality has standing to challenge federal development plan in order to protect municipality's interest in municipal management and public safety); *Colorado River Indian Tribes v. Parker*, 776 F.2d 846, 848-849 (9th Cir. 1985) (municipality has standing to challenge Indian tribe's enforcement of ordinance regulating sale of liquor because of "possibility of actual injury to its ability to function as a municipality in regulating persons and property within its jurisdictional control"); *Clinton v. City of New York*, 524 U.S. 417, 431 (1998) (New York City has standing to challenge presidential veto because of negative impacts on the City's "borrowing power, financial strength, and fiscal planning"); *School Dist. v. Secretary of U.S. Department of Education*, 584 F.3d 253, 261 (6th Cir. 2009) (school districts have standing "based on their allegation that they must spend state and local funds" to comply with federal law); *Alaska v. U.S. Department of the Treasury*, 868 F.2d 441, 443 (D.C. Cir. 1989) (states have standing to challenge U.S. Department of Transportation rule preempting state consumer protection statutes because "[i]t is common ground

that States have an interest, as sovereigns, in exercising the power to create and enforce a legal code") (citations and internal quotation marks omitted); *Oklahoma v. United States Civil Service Comm'n*, 330 U.S. 127, 134 (1947) (allowing state to challenge order of federal Civil Service Commission that the state must discharge a state employee of a federally funded program, and to challenge constitutionality of statute on which the order was based).

Indeed, the Supreme Court has adjudicated the merits of numerous actions brought by states challenging federal statutes or regulations that preempted the states' laws or authority, without even considering whether the states met standing and ripeness requirements—for the obvious reason that a state manifestly meets these requirements in challenging a federal statute or regulation that preempts its laws or authority. *South Dakota v. Dole*, 483 U.S. 203 (1987) (action by South Dakota against U.S. Department of Transportation challenging federal regulation prohibiting federal highway funds to states authorizing motor vehicle use by persons under 21 years of age); *New York v. United States*, 505 U.S. 144 (1992) (action by New York against United States challenging congressional statute inducing states to accept low level radioactive waste); *Massachusetts v. United States*, 435 U.S. 444 (1977) (action by Massachusetts against United States challenging congressional statute requiring

Massachusetts to pay tax on state-owned aircraft utilizing air space); *Carcieri v. Salazar*, 555 U.S. 379 (2009) (action by Rhode Island governor against Secretary of the Interior challenging Secretary's decision to take Indian lands into trust); *Environmental Protection Agency v. California*, 426 U.S. 200 (1976) (action by California against Environmental Protection Agency challenging EPA rule exempting federal agencies from complying with California's permit requirements under Clean Water Act). The fact that the Supreme Court did not address whether the states met standing and ripeness requirements in these cases demonstrates that a state manifestly meets these requirements in challenging a federal action that preempts its laws.[7]

Just as the states in the foregoing cases obviously met standing and ripeness requirements because the federal statutes and regulations preempted their laws and authority, DWA meets standing and ripeness requirements here for the same reason, that is, because the BIA regulation preempts DWA's

[7] Even in cases where Congress has expressly authorized a state to challenge a federal action that preempts the state's laws or authority, the state must still meet Article III standing requirements, because Congress cannot authorize actions that fall short of Article III standards. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (Article III establishes an "irreducible constitutional minimum"); *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009) ("[[T]he requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute.").

charges as applied on the Tribe's leased lands. Also, as noted earlier, DWA is carrying out the California Legislature's mandate in imposing its charges, because the Legislature, in creating DWA, required DWA to impose taxes and levies sufficient to pay its obligations. Desert Water Agency Law § 26 (Addendum, Exh. 4); *see* page 19, *supra*.

The Supreme Court's recent decision in *City of Arlington v. FCC*, __U.S. __, 133 S.Ct. 1863 (2013), is instructive. There, the Federal Communications Commission (FCC) issued a declaratory ruling under the Telecommunications Act of 1996 that established time limits for local zoning agencies to process wireless facility siting applications. The City of Arlington, Texas, brought an action against the FCC challenging the declaratory ruling, arguing that the ruling, by preempting the City's authority to establish its own time limits to process applications, exceeded the FCC's statutory authority. The Supreme Court rejected the City's argument on the merits, holding that the FCC's declaratory ruling did not exceed its statutory authority. The Supreme Court did not, however, dismiss the City's action for lack of standing, or suggest that the City did not have standing. Just as the City of Arlington, a Texas political subdivision, obviously had constitutional standing to challenge a federal ruling that preempted its authority to establish time limits, DWA, a California political

subdivision, has constitutional standing to challenge the BIA regulation that preempts its charges as applied on the Tribe's leased lands.

D. DWA Suffers Concrete Harm And Has Standing Because DWA Is an "Object" of the BIA Regulation, and the Regulation Requires DWA to "Refrain From Taking Action."

In *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), the Supreme Court held that the "object" of a federal action "ordinarily" has standing to challenge the federal action. The Court stated:

> When the suit is one challenging the legality of government action or inaction, the nature and extent of facts that must be averred (at the summary judgment stage) or proved (at the trial stage) in order to establish standing depends considerably upon whether the plaintiff is himself an *object* of the action (or forgone action) at issue. If he is, there is *ordinarily little question* that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it.

Defenders of Wildlife, 504 U.S. at 561-562 (emphasis added); *see Summers v. Earth Island Inst.*, 555 U.S. 488, 493-494 (2009).[8] The states and their political subdivisions are the "object" of the BIA regulation, because the regulation prohibits "any State or political subdivision of a State" from applying its taxes and other charges on Indian leased lands. 25 C.F.R. § 162.017(c). The

[8] Since the instant action is at the pleading stage rather than the "summary judgment stage" or the "trial stage," DWA's burden is even more minimal than described in *Defenders of Wildlife*. At the pleading stage, the allegations of the complaint must be accepted as true and construed most favorably to the plaintiff. *Defenders of Wildlife*, 504 U.S. at 561.

regulation does not apply to or regulate the conduct of anyone else. Since *Defenders of Wildlife* held that there is "ordinarily little question" that the "object" of agency action has Article III standing, there is little question that DWA has standing here.

The Supreme Court has also held that a party has "standing to object to orders specifically directing it to take or refrain from taking action," and has labeled as "frivolous" the argument that such a party does not have standing. *Horne v. Flores*, 557 U.S. 433, 446 (2009), *citing United States v. Sweeney*, 914 F.2d 1260, 1263 (9th Cir. 1990). The BIA regulation requires DWA to "refrain from taking action"—by ceasing to apply its charges on Indian leased lands—which further demonstrates that DWA has standing to challenge the regulation.

E. DWA Also Suffers Concrete Harm And Has Standing Because the BIA Regulation Makes It More Difficult For DWA To Obtain Revenues Necessary To Obtain Water Supplies For Its Customers.

Even if DWA were required to show the same kind of harm that a private plaintiff must show in meeting the standing requirement, DWA has made this showing. DWA's Complaint alleges that its charges "compensate DWA for its costs and expenses" in obtaining water supplies from the California Department of Water Resources (DWR), which DWA provides to its customers, ER 7; that

the charges "are necessary for DWA to obtain the imported water supplies that it provides to such customers," ER 8; and that "[i]f DWA did not pay its share of DWR's fixed costs, DWA would violate its water supply contract with DWR and would be unable to obtain this imported water." ER 8. Thus, DWA has alleged that the BIA regulation causes DWA to suffer concrete harm by making it more difficult for DWA to obtain the revenues necessary to obtain water supplies for its customers, including lessees on the Tribe's reservation.

DWA's allegations concerning concrete harm must be accepted as true at the pleading stage. "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim." *Defenders of Wildlife*, 504 U.S. at 561 (citation and internal quotation marks omitted); *see Parks School of Business, Inc. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995) ("We take all allegations of material fact as true and construe them in the light most favorable to the nonmoving party."); *Hydranautics v. Filmtec Corp.*, 70 F.3d 533, 535-536 (9th Cir. 1995). Thus, even though DWA is not required to show the same kind of harm that private plaintiffs must show in order to meet the standing requirement, DWA has shown the same kind of harm.

II. DESERT WATER AGENCY'S ACTION IS CONSTITUTIONALLY AND PRUDENTIALLY RIPE FOR REVIEW.

A. Whether an Action is Ripe for Review Depends on Whether It Is "Fit" for Review and Whether Withholding Review Will Cause "Hardship."

Under Article III, the plaintiff must demonstrate not only that it has standing, but also that its claim is ripe for judicial review. *Lujan v. National Wildlife Federation,* 497 U.S. 871, 891 (1990); *National Park Hospitality Ass'n v. Department of the Interior*, 538 U.S. 803, 808 (2003); *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43, 58 (1993); *Abbott Laboratories v. Gardner,* 387 U.S. 136, 149 (1967). Whether an action is ripe for review depends on whether the action is "fit" for review and whether withholding review would result in "hardship." *National Park Hospitality,* 538 U.S. at 808; *Abbott Laboratories*, 387 U.S. at 149. The ripeness requirement has both constitutional and prudential dimensions, because it is based both on "Article III limitations on judicial power" and on "prudential reasons." *National Park Hospitality,* 538 U.S. at 808; *Reno,* 509 U.S. at 57 n. 18. Constitutional ripeness exists where a challenge "involve[s], at least in part, the existence of a live 'Case or Controversy.'" *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 81 (1978); *Coalition for Responsible Regulation, Inc. v. EPA,* 684 F.3d 102, 131 (D.C. Cir. 2012). Prudential ripeness relates to "the fitness of the issues for

judicial decision and the hardship to the parties of withholding court consideration." *Abbott Laboratories*, 387 U.S. at 149; *Coalition for Responsible Regulation*, 684 F.3d at 131. As we explain, DWA's claim is both constitutionally and prudentially ripe for review.

B. DWA's Claim Is Ripe Because the BIA Regulation Directly and Immediately Preempts DWA's Charges as Applied on the Tribe's Leased Lands.

DWA's action is ripe for review for the same reason that DWA has constitutional standing, that is, because the BIA regulation directly and immediately preempts DWA's charges as applied to non-Indian lessees on the Tribe's reservation. *See* pages 18-23, *supra*. The BIA regulation provides that "the leasehold or possessory interest" on Indian reservations "is not subject to *any* fee, tax, assessment, levy or other charge imposed by any State or political subdivision of a State." 25 C.F.R. § 162.017(c) (emphasis added). Since DWA is a "political subdivision" of California and its charges are among those listed in the BIA regulation, the regulation preempts DWA's charges as applied on Indian leased lands. The preemptive effect of the regulation is direct and immediate and not contingent on future actions or events, because the regulation uses the present tense in stating the leasehold interest "*is* not subject to" state taxes or other charges. *Id.* (emphasis added). Since the BIA regulation directly

and immediately preempts DWA's charges, DWA's action is immediately ripe for review.

As noted earlier, the Secretary of the Interior, interpreting the regulation in the Federal Register notice, stated that the *Bracker* balancing test applies in determining whether state taxes and charges apply on Indian reservations, and that, under the *Bracker* balancing test, state taxes and charges are preempted as applied on Indian leased lands. 77 Fed. Reg. 72447 (Addendum, Exh. 2); *see* pages 21-23, *supra*. According to the Secretary, "Federal statutes and regulations . . . occupy and preempt the field of Indian leasing," the "Federal statutory scheme" is "comprehensive" and "precludes State taxation," and the "Federal regulatory scheme" is "pervasive and leaves no room for State law." *Id.* Since the Secretary has interpreted the regulation as preempting state taxes and charges as applied on Indian leased lands, which includes DWA's charges here, DWA's action challenging the regulation is ripe for review.

As also noted earlier, the Eleventh Circuit recently concluded that the BIA regulation, both on its face and as interpreted by the Secretary of the Interior in the Federal Register notice, is intended to preempt all state taxes as applied to Indian leased lands. *Seminole Tribe v. Stranburg*, 799 F.3d 1324, 1337-1338 (11th Cir. 2015); *see* pages 24-26, *supra*. Similarly, the Tribe,

whose leased lands are the subject of DWA's charges, has brought an action against Riverside County, alleging that the County's possessory interest tax, which includes DWA's *ad valorem* tax, is invalid as applied on the Tribe's leased lands. *Agua Caliente Band of Cahuilla Indians v. Riverside County, et al.*, No. EDCV 14-00007 DMG(DTBx) (E.D. Cal. Jan. 2, 2014); *see* pages 26-27, *supra.* The Eleventh Circuit's decision and the Tribe's action further demonstrate that the BIA regulation directly and immediately preempts DWA's charges as applied here, and that DWA's action is immediately ripe for review.

The ripeness of DWA's action is also demonstrated by demand letters that the Tribe and the non-Indian lessees sent to Riverside County and DWA before the Tribe brought its action against the County. Before bringing its action, the Tribe sent a demand letter to Riverside County, asserting that under the BIA regulation the County's possessory interest tax—which as indicated above includes DWA's *ad valorem* tax—is unlawful as applied on the Tribe's leased lands, and demanding that the County cease applying its possessory interest tax on the lands. ER 61. Several non-Indian lessees on the Tribe's reservation also sent letters to Riverside County claiming that the County's possessory interest tax as applied to them is invalid under the BIA regulation, and demanding refunds for past payments of the tax. ER 79-80. A non-Indian lessee on the

Tribe's reservation sent a demand letter to DWA, demanding that DWA cease imposing its *ad valorem* tax on the lessee and provide a refund for past taxes on the ground that DWA's tax is preempted by the BIA regulation. ER 67-69. These demand letters further demonstrate the ripeness of DWA's action.

C. DWA's Action Is Ripe Because The BIA Regulation Requires DWA to "Adjust [Its] Conduct Immediately."

In *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990), the Supreme Court, describing the principles of ripeness, stated:

> [A] regulation is not ordinarily considered the type of agency action "ripe" for judicial review under the APA until the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him. (*The major exception, of course, is a substantive rule which as a practical matter requires the plaintiff to adjust his conduct immediately. Such agency action is "ripe" for review at once . . . .)*

National Wildlife Federation, 497 U.S. at 891 (citations omitted; emphasis added). In *National Park Hospitality Ass'n v. Department of the Interior*, 538 U.S. 803 (2003), the Supreme Court—quoting the above passage from *National Wildlife Federation*—stated that an action challenging a federal regulation that requires the plaintiff to "adjust his conduct immediately" meets "fitness" and "hardship" factors and thus is ripe for review. *National Park Hospitality*, 538 U.S. at 808.

The district court below quoted the first sentence of the *National Wildlife Federation* passage quoted above—as the quotation was repeated by the Ninth Circuit in *Colwell v. Department of Health and Human Services, Inc.*, 558 F.3d 1112, 1124 (9th Cir. 2009)—which describes the general rule of ripeness. ER 35. The district court did not, however, quote or mention the italicized second and third parenthetical sentences in the above passage from *National Wildlife Federation*, which describe the "major exception" to the general rule. The district court's omission is telling, because the "major exception" to the general rule applies here and demonstrates that DWA's action is ripe for review.

Specifically, since the BIA regulation preempts DWA's charges as applied on Indian leased lands, the regulation requires DWA to "adjust [its] conduct immediately"—by ceasing to impose its charges—and therefore DWA's action is "ripe for review at once" under the "major exception" described in *National Wildlife Federation*. Similarly, since *National Park Hospitality* held that an action challenging a federal regulation that requires the plaintiff to "adjust his conduct immediately" meets the "fitness" and "hardship" factors, *National Park Hospitality*, 538 U.S. at 808, DWA's action challenging the BIA regulation meets the fitness and hardship factors described in *National Park Hospitality* and is ripe for review.

This case, unlike *National Wildlife Federation* and similar cases, does not involve a facial challenge to a federal regulation that authorizes a federal agency to administer a regulatory program, and the plaintiff's facial challenge may not be ripe because the "factual components" of the controversy have not been "fleshed out" by the agency's action in administering the program. *National Wildlife Federation*, 497 U.S. at 891.[9] Here, the BIA regulation does not establish a regulatory program relating to the applicability of state taxes and charges on Indian leased lands, or authorize BIA to administer such a regulatory program. Rather, the BIA regulation directly and immediately preempts taxes

[9] In *National Wildlife Federation*, Congress established a comprehensive regulatory program authorizing the Secretary of the Interior to manage and regulate the public lands, which required the Secretary to conduct an inventory of all public lands and undertake a land use planning process. Under this planning process, the Secretary was required to (1) "classify" each public land to determine whether the land should be retained for multiple use management or restored to the public domain, and (2) determine whether to "modify or terminate" the classification for each such public land. *National Wildlife Federation*, 497 U.S. at 876-878. After the Secretary adopted regulations to implement the program, the plaintiff brought an action facially challenging the regulations (and not challenging the regulations as applied, as in the instant case). The Supreme Court held that the plaintiff's facial challenge was not ripe, and would not be ripe "until the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying the regulation to the claimant's situation." *Id.* at 891. Unlike *National Wildlife Federation*, the BIA regulation here directly and immediately preempts DWA's charges, and the preemptive effect is not contingent on "some concrete action applying the regulation to the claimant's situation."

and charges imposed by states and political subdivisions on Indian leased lands, by providing that the leasehold interest "is not subject to" such taxes and charges. 25 C.F.R. § 162.017(c). DWA does not facially challenge the regulation, but instead challenges the regulation as applied to DWA's charges. Since the regulation directly and immediately preempts DWA's charges, DWA's action challenging the regulation is immediately ripe for review.

The Supreme Court has held that—even in pre-enforcement actions brought by private plaintiffs challenging federal agency actions—such pre-enforcement actions meet fitness and hardship factors and are ripe for review if the federal actions require an immediate and significant change in the plaintiffs' conduct. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 151-156 (1967) (upholding pre-enforcement review of Food and Drug Administration regulation requiring drug manufacturers to include drug's established name in materials listing drug's trade name); *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 198 (1956) (upholding pre-enforcement review of Federal Communications Commission regulation precluding issuance of licenses to applicants already owning five licenses); *Frozen Food Express v. United States*, 351 U.S. 40, 44 (1956) (upholding pre-enforcement review of Interstate Commerce Commission order classifying commodities transported by vehicles

as "agricultural" commodities exempt from Commission's supervision); *Columbia Broadcasting System v. United States*, 316 U.S. 407, 418-419 (1942) (upholding pre-enforcement review of Federal Communications Commission regulation prohibiting certain contractual arrangements between chain broadcasters and local stations). Since the BIA regulation requires DWA to immediately and significantly change its conduct—by ceasing to impose its charges—DWA's action is ripe even as a pre-enforcement action.

As noted earlier, the Supreme Court and Ninth Circuit have held in numerous cases that the states and their political subdivisions met standing and ripeness requirements in challenging federal statutes or regulations that preempted their laws or authority. *E.g., City of Sausalito v. O'Neill*, 386 F.3d 1186, 1197-1198 (9th Cir. 2004); *Colorado River Indian Tribes v. Parker*, 776 F.2d 846, 848-849 (9th Cir. 1985); *see* pages 29-30, *supra.* Also, the Supreme Court has adjudicated the merits of numerous actions brought by the states and their political subdivisions challenging federal actions that preempted their laws or authority without even considering whether the states or political subdivisions met standing and ripeness requirements—for the obvious reason that a state or political subdivision manifestly meets such requirements in challenging a federal action that preempts its laws or authority. *E.g., City of*

Arlington v. FCC, __ U.S. __, 133 S.Ct. 1863 (2013); *South Dakota v. Dole*, 483 U.S. 203 (1987); *see* pages 30-33, *supra*. These decisions further indicate that DWA meets standing and ripeness requirements here.

D. DWA's Action Raises Predominantly If Not Wholly Legal Issues, Which Further Demonstrates That Its Action Is Ripe.

An action challenging an agency regulation is particularly "fit" and ripe for review if the challenge raises "purely legal" issues. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967). Since issues of federal preemption are predominantly legal, they are ripe for review. As the Ninth Circuit has stated, the question whether federal law preempts state or local laws "is predominantly a legal question, resolution of which would not be aided greatly by development of a more complete factual record." *Hotel Employees Int'l Union v. Nevada Gaming Comm'n*, 984 F.2d 1507, 1513 (9th Cir. 1993).

DWA's Complaint raises two preemption issues, both of which are predominantly if not wholly legal. The first preemption issue is whether DWA's charges are valid under the *Bracker* balancing test, which requires a "particularized inquiry" into state, federal and tribal interests to determine whether state laws apply on Indian reservations. ER 13, 16; *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980); *Cotton Petroleum Corp. v.*

New Mexico, 490 U.S. 163, 174-176 (1989); *Rice v. Rehner*, 463 U.S. 713, 720 (1983). This "particularized inquiry" primarily requires an analysis of federal statutes and regulations to determine whether they have a preemptive effect, such as by "occupying" the field of regulation. *E.g.*, *Bracker*, 448 U.S. at 145; *Cotton Petroleum*, 490 U.S. at 174-176. Thus, the *Bracker* balancing test issue is predominantly if not wholly legal. Any factual issues that may arise here, such as whether DWA applies its charges on Indian leased lands and whether DWA's charges compensate DWA for its costs in providing water supplies, are not in serious dispute. Other factual issues, such as whether DWA's charges are proportionate to services provided to non-Indian lessees and whether the charges may reduce revenues that the Tribe might otherwise obtain, are not relevant to the preemption issue. *Cotton Petroleum*, 490 U.S. at 174 (proportionality of charges); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 156-157 (1980) (reduction of tribal revenues).

The second preemption issue is whether DWA's charges are valid under the federal leasing statute, 25 U.S.C. § 398c, which provides that "[t]axes may be levied and collected by the State or local authority" upon "any lessee" of lands within an executive order Indian reservation. ER 12, 14-15. If DWA's

charges are valid under the leasing statute, then the BIA regulation is invalid in preempting DWA's charges. The question whether DWA's charges are valid under the leasing statute involves a purely legal interpretation of the statute.

III. THE DISTRICT COURT ERRED IN HOLDING THAT DESERT WATER AGENCY DOES NOT MEET STANDING AND RIPENESS REQUIREMENTS.

A. The District Court Erroneously Held That DWA's Action Is Not Ripe Under Ninth Circuit Decisions.

The district court held that DWA's action does not meet the ripeness requirement established by the Ninth Circuit in *Alaska Right to Life Political Action Comm'n v. Feldman*, 504 F.3d 840, 849 (9th Cir. 2007), and *California Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1094 (9th Cir. 2003), which, the district court stated, held that three factors apply in determining ripeness: (1) whether the plaintiff has "articulated a concrete plan to violate the law in question"; (2) whether the "prosecuting authorities have communicated a specific warning or threat to initiate proceedings"; and (3) "the history of past prosecution or enforcement under the challenged statute." ER 31-34. The district court held that DWA's action does not meet any of these factors and is not ripe. *Id.*

The factors mentioned by the Ninth Circuit in *Feldman* and *Getman* may apply, as in those cases, in actions by *private* plaintiffs challenging federal agency actions, in which no issues arise concerning whether the federal action has unlawfully preempted the plaintiff's laws. These factors do not apply, however, where, as here, a state political subdivision alleges that a federal regulation unlawfully preempts its authority to apply its charges. Since DWA alleges that the regulation unlawfully preempts its charges, DWA's action is ripe for review regardless of whether DWA meets the ripeness standards that applied to the private plaintiffs in *Feldman* and *Getman*, which required the plaintiffs to show that they have "articulated a concrete plan to violate the law" and have received "a specific warning or threat." The district court improperly put DWA—a California political subdivision that is authorized under California law to apply its charges on Indian leased lands, and that carries out the Legislature's mandate in doing so, *see* page 19, *supra*—in the same boat as private litigants who are not political subdivisions, and who do not have authority to impose taxes and charges under California law, much less whose authority has been preempted by a federal regulation.

Even in actions by private litigants, the Supreme Court and Ninth Circuit have held that the plaintiff is not required to show that a threatened injury has

actually occurred in order to establish ripeness. "It is well-established that, although a plaintiff 'must demonstrate a realistic danger of sustaining a direct injury as a result of a statute's operation or enforcement,' a plaintiff 'does not have to await the consummation of threatened injury to obtain preventive relief.'" *Valle del Sol, Inc. v. Whiting, et al.,* 732 F.3d 1006, 1015 (9th Cir. 2013*),* quoting *Babbitt v. United Farm Workers,* 442 U.S. 289, 298 (1979).

The district court's ripeness analysis relied heavily on the Ninth Circuit's decision in *Stormans, Inc. v. Selecky*, 586 F.3d 1109 (9th Cir. 2009). ER 32-34. *Stormans* undermines rather than supports the district court's ripeness analysis. There, a Washington state agency adopted a regulation requiring pharmacies either to deliver certain contraceptives to patients, or, if they have religious or moral objections, to timely refer patients to another pharmacy. Two pharmacists brought an action against their pharmacy employer who had effectively terminated their employment, or threatened to do so, because of their refusal to refer patients to another pharmacy. The Ninth Circuit held that the action was ripe for review because "the very existence of the new rules may cause an employer to terminate a pharmacist who objects to dispensing a medication," and also because one pharmacist had been "forced to leave her job" and the other was "in danger of termination." *Stormans,* 586 F.3d at 1123.

The district court here stated that, contrary to *Stormans*, "DWA has not articulated any harm arising from either third party claims or the BIA's enforcement actions." ER 33.

Stormans undermines the district court's ripeness analysis for several reasons. First, the Ninth Circuit in *Stormans*, unlike the district court here, interpreted the ripeness requirement broadly rather than narrowly, and held that the plaintiff's action was ripe for review. Second, and more importantly, *Stormans* did not involve a situation where, as here, a federal regulation preempts a state political subdivision's authority to apply its charges, and thus requires the political subdivision to immediately change its conduct by ceasing to apply its charges. The Supreme Court has held that where a federal regulation requires the plaintiff to "adjust [its] conduct immediately," the plaintiff's action challenging the regulation is "ripe for review at once." *Lujan v. National Wildlife Federation*, 497 U.S. 871, 891 (1990); *National Park Hospitality Ass'n v. Department of the Interior*, 538 U.S. 803, 808 (2003).

Third, *Stormans* held that the plaintiffs' action was ripe because "the *very existence* of the new rules *may* cause" an employer to terminate a pharmacist, 586 F.3d at 1123 (emphases added), thus indicating that the "very existence" of the rules was sufficient to establish ripeness regardless of whether an actual

termination had occurred. Here, the "very existence" of the BIA regulation not only "*may* cause" but in fact *does* cause DWA to suffer concrete and immediate harm by preempting its charges. Thus, DWA's action is ripe under *Stormans*.

B. The District Court Erroneously Held That DWA Does Not Meet Standing and Ripeness Requirements Because the Defendants Have Not Threatened Action Against DWA, And Because DWA Has Not Changed Its Conduct by Ceasing to Apply Its Charges.

The district court held that DWA's action does not meet standing and ripeness requirements because the defendants "have not threatened action of any kind against DWA," and there is no evidence that "BIA has upheld a lessee's refusal to pay charges to any state or local agency based on section 162.1017." ER 32. The district court also held that DWA's action does not meet the hardship factor and is not ripe because there is "no evidence that DWA has changed its conduct in response to section 162.017," ER 34, or that DWA has "ceased to impose its charges." ER 37.

On the contrary, DWA meets standing and ripeness requirements for all the reasons set forth in this brief, and thus it is immaterial whether the United States has threatened action against DWA or upheld a lessee's refusal to pay DWA's charges, or whether DWA has changed its conduct by ceasing to apply its charges. Specifically, the BIA regulation—on its face and as interpreted by

the Secretary of the Interior, the Eleventh Circuit in *Seminole Tribe*, and the Tribe in its recent action against Riverside County—directly and immediately preempts DWA's charges as applied on Indian leased lands. *See* pages 18-23, *supra*. The BIA regulation requires DWA to "adjust [its] conduct immediately"—by ceasing to impose its charges—and thus DWA's action is "ripe for review at once" under *Lujan v. National Wildlife Federation*, 497 U.S. 871, 891 (1990), and *National Park Hospitality Ass'n v. Department of the Interior*, 538 U.S. 803, 808 (2003). *See* pages 40-44, *supra*. DWA is an "object" of the BIA regulation, and thus has standing to challenge the regulation under *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561-562 (1992). *See* pages 30-34, *supra*. DWA's action raises predominantly if not wholly legal issues, and is ripe for this additional reason. *See* pages 45-47, *supra*. For all these reasons and others expressed above, DWA's action meets standing and ripeness requirements regardless of whether the United States has threatened action against DWA, or whether DWA has changed its conduct by ceasing to apply its charges.

The district court's conclusion that DWA's action is not ripe because DWA has not "changed its conduct," ER 34, is directly inconsistent with the Supreme Court's decisions in *National Wildlife Federation* and *National Park*

Hospitality. In those decisions, the Supreme Court held that the plaintiff's action is ripe if the federal agency action "*requires* the plaintiff to adjust his conduct immediately." *National Wildlife Federation*, 497 U.S. at 891; *National Park Hospitality*, 538 U.S. at 808 (emphasis added in both cases). Thus, the Supreme Court held that the plaintiff's action is ripe if the federal action "requires" the plaintiff to change its conduct, and did not suggest that the plaintiff's action is ripe only if the plaintiff has "changed its conduct," as the district court held. The BIA regulation *requires* DWA to change its conduct by ceasing to impose its charges, and thus DWA's action is ripe under *National Wildlife Federation* and *National Park Hospitality*.

The district court's decision that DWA's action is not ripe because DWA has not "changed its conduct" is also inconsistent with the Ninth Circuit's decision in *Valle del Sol*, which held that—although the plaintiff must demonstrate "a realistic danger of sustaining a direct injury as the result of a statute's operation or enforcement"—the plaintiff "does not have to await the consummation of threatened injury to obtain preventive relief." *Valle del Sol, Inc. v. Whiting, et al.*, 732 F.3d 1006, 1015 (9th Cir. 2013) (citation and internal quotation marks omitted).

C. The District Court Erroneously Held That DWA's Action Does Not Meet the "Hardship" Factor Applied in *National Park Hospitality* and *Toilet Goods*.

The district court held that DWA's action does not meet the hardship factor applied by the Supreme Court in *National Park Hospitality* and *Toilet Goods Ass'n, Inc. v. Gardner*, 387 U.S. 158 (1967), which held that the plaintiffs did not suffer hardship because the federal actions did not affect them in "conducting their day-to-day affairs" and because "no irremediably adverse consequences flowed from requiring a later challenge." ER 37-38; *National Park Hospitality*, 538 U.S. at 810; *Toilet Goods*, 387 U.S. at 164.

On the contrary, *National Park Hospitality* and *Toilet Goods* demonstrate the difference between the plaintiffs' lack of hardship in those cases and DWA's hardship here. In *National Park Hospitality*, the Supreme Court held that the plaintiff did not suffer hardship because the federal regulation caused the plaintiff to suffer "no practical harm"; "[a]ll the regulation does is announce the position NPS [National Park Service] will take with respect to disputes arising out of concession contracts," and the regulation "leaves a concessioner free to conduct its business as it sees fit." *National Park Hospitality*, 538 U.S. at 810. In *Toilet Goods*, the Supreme Court held that the plaintiff did not suffer hardship because the regulation, as characterized by the Court, "serves notice

only that the Commissioner *may* under certain circumstances order inspection of certain facilities and data, and that further certification of additives *may* be refused to those who decline to permit a duly authorized inspection until they have complied in that regard"; "[a]t this juncture we have no idea whether or when such an inspection will be ordered and what reasons the Commissioner will give to justify his order." *Toilet Goods*, 387 U.S. at 163 (original emphasis).

Thus, *National Park Hospitality* held that the plaintiff suffered "no practical harm" because the federal regulation did not affect how the plaintiff conducted its business and instead left the plaintiff "free to conduct its business as it sees fit," and *Toilet Goods* held that the federal regulation provided only that the federal agency "may"—but not necessarily will—take some future action that may affect the plaintiff's business in the future, and the Court had "no idea whether or when" such future action will be taken. Here, by contrast, the BIA regulation causes DWA to suffer "practical harm" by directly and immediately preempting DWA's charges as applied on Indian leased lands, and the preemption is not something that "may" occur in the future. Thus, DWA suffers direct and immediate harm, unlike the plaintiffs in *National Park*

Hospitality and *Toilet Goods*. Neither decision supports the district court's conclusion that DWA's action is not ripe.

In fact, *National Park Hospitality*, citing *National Wildlife Federation*, 497 U.S. at 891, held that an action challenging a federal rule meets the "fitness" and "hardship" factors and is ripe for review if the federal rule "requires the plaintiff to adjust his conduct immediately." *National Park Hospitality*, 538 U.S. at 808. Since the BIA regulation requires DWA to "adjust [its] conduct immediately" by ceasing to apply its charges, DWA's action meets the hardship and fitness factors described in *National Park Hospitality*, contrary to the district court's analysis.

The district court, again citing *National Park Hospitality*, 538 U.S. at 811, stated that "mere uncertainty" concerning the validity of a federal rule does not satisfy the ripeness requirement, and therefore DWA does not meet the ripeness requirement simply because of the uncertainty concerning the validity of its charges. ER 38. In fact, *National Park Hospitality* held that—since the plaintiff suffered "no practical harm" because the federal regulation "leaves a concessioner free to conduct its business as it sees fit"—the "mere uncertainty" concerning the regulation's effect was insufficient to establish ripeness under those circumstances. *National Park Hospitality*, 538 U.S. at 810-811. Here, by

contrast, DWA suffers "practical harm" because the BIA regulation directly and immediately preempts its charges as applied on Indian leased lands, and thus DWA is not "free to conduct its business as it sees fit." Thus, DWA is entitled to a declaratory judgment under the Declaratory Judgment Act, 28 U.S. § 2201, to determine whether the BIA regulation, in preempting DWA's charges, is valid under federal law.

D. The District Court Erroneously Held That DWA Does Not Meet Standing and Ripeness Requirements Because the United States Did Not Take a Position on the Preemption Issue in Its Dismissal Motion.

The district court stated that DWA does not meet standing and ripeness requirements because the United States, in its dismissal motion, "take[s] no position as to whether DWA's charges are preempted under existing law," ER 30, and thus there is "no indication that the BIA interprets 162.017 to prohibit the charges that DWA currently collects." ER 32.

Since the United States filed a dismissal motion rather than an answer to DWA's Complaint, the United States was not required to respond to the allegations in DWA's Complaint that the BIA regulation preempts DWA's charges.[10] Therefore, the United States' failure to take a position on the

[10] DWA's Complaint alleged that "[s]ince DWA's charges are authorized under

preemption issue in its dismissal motion has no bearing on the standing and ripeness issues. Notably, the United States did *not* assert in its dismissal motion that the BIA regulation does *not* preempt DWA's charges.

More importantly, the Secretary of the Interior, in the Federal Register notice, has interpreted the BIA regulation as preempting all state taxes and charges as applied on Indian leased lands. 77 Fed. Reg. 72447 (Addendum, Exh. 2); *see* pages 21-23, *supra.* According to the Secretary's Federal Register notice, federal law "occup[ies] and preempt[s] the field of Indian leasing" and thus "precludes State taxation" and "leaves no room for State law." *Id.* Since the Secretary has interpreted the regulation as preempting all state taxes and charges as applied on Indian leased lands, which includes DWA's charges here, the United States' failure to take a position on the preemption issue in its dismissal motion is irrelevant for this additional reason.[11]

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25 U.S.C. § 398c, the federal regulation, in prohibiting DWA's charges, exceeds the defendants' authority under federal law, and is unlawful," ER 15-16 (Compl. ¶ 36); that "[s]ince DWA's charges are authorized under the 'particularized inquiry' test, the federal regulation, in prohibiting DWA's charges, exceeds the defendants' authority under federal law, and is unlawful," ER 16 (Compl. ¶ 37); and that "[t]here is an actual dispute between the plaintiff and the defendants concerning whether the federal regulation, 25 C.F.R. § 162.017, exceeds the defendants' authority under federal law and is unlawful." ER 17 (Compl. ¶ 39).

[11] Even where federal courts defer to federal agency interpretations of law under

If the United States were to unequivocally concede that the BIA regulation does not preempt DWA's charges, either in its answer to DWA's Complaint or by way of a motion for summary judgment supported by appropriate declarations from Department of the Interior officials, the United States' assertion that DWA's Complaint must be dismissed on standing and ripeness grounds would have more merit. The United States, however, made no such concession in its dismissal motion. It is unlikely that the United States would make such a concession, because such a concession would be inconsistent with the Secretary of the Interior's interpretation of the BIA regulation in the Federal Register notice, in which the Secretary concluded that federal law preempts all state taxes and charges as applied on Indian leased lands.

E. The "Grandfather" Clause of the BIA Regulations Does Not Support the District Court's Conclusion That DWA's Action Is Not Ripe.

The district court held that DWA's action is not ripe because the BIA regulations contain a "grandfather" clause, 25 C.F.R. § 162.008, which provides

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the *Chevron* doctrine, *see Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842-844 (1984), deference is not accorded to an agency's "litigating positions that are wholly unsupported by regulations, rulings, or administrative practice." *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 212 (1988).

that if the provisions of a lease document "conflict" with the regulations, "the provisions of the lease govern." ER 36-37. The district court stated that it is "possible" and "conceivable" that some lease agreements may specify that the lessee must pay DWA's charges and thus such leases would be subject to the "grandfather" clause, and that other lease agreements may not so specify and would not be subject to the "grandfather" clause. ER 37. Because of the "grandfather" provision, the district court stated, "it is not clear at this juncture" whether the BIA regulation "will affect DWA's ability to collect its charges," and the court "cannot render an advisory opinion based upon a theoretical set of circumstances." *Id.*

The district court's analysis was misplaced for several reasons. First, since DWA's claim is ripe for all the reasons described in this brief, *see* pages 37-47, *supra*, DWA's claim does not cease to be ripe because of the district court's speculation that it is "possible" and "conceivable" that some lease agreements may require the lessees to pay DWA's charges under the "grandfather" clause. Assuming *arguendo* that the district court's speculation is correct—that some lease agreements require the lessees to pay DWA's charges, which is an unlikely hypothesis—this means only that DWA's charges are valid as applied to the lessees, not that DWA's allegation that its charges apply to the

lessees is not ripe. In effect, the district court held that DWA's claim is not ripe because of the court's own speculation that some lessees may be required to pay DWA's charges under the "grandfather" clause. Such reasoning is not only speculative but also a *non sequitur*.

The United States raised the "grandfather" clause argument in its reply brief, after DWA had no opportunity to respond. ER 142-143, & n. 1. Since the United States has custody of the lease agreements, the United States had an opportunity to produce any lease agreements that it believed may be subject to the "grandfather" clause and thus may "conflict" with the regulation. The United States failed to produce any lease agreements, however, which creates an inference that no such "conflicting" lease agreements exist. If any such "conflicting" lease agreements exist, DWA is entitled to discover them through the discovery process. The district court, by dismissing DWA's claim based on its own speculation that there may be some "conflicting" lease agreements, prevented DWA from discovering any such "conflicting" lease agreements through the discovery process. The district court placed the burden of its speculation not where it belonged—on the United States, which raised the issue in its reply brief and has custody of the lease agreements—but instead on DWA, which has no access to the agreements. The district court improperly required

DWA to prove a negative based on documents that are in the custody of the United States rather than DWA.

By dismissing DWA's complaint based on its speculation concerning the lease agreements, the district court failed to follow the rule that in a dismissal motion "[a]ll allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party," and that "[a] complaint should not be dismissed unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Hydranautics v. Filmtec Corp.*, 70 F.3d 533, 535-536 (9th Cir. 1995); *see Faulkner v. ADT Security Services, Inc.*, 706 F.3d 1017, 1019 (9th Cir. 2013); *Parks School of Business, Inc. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995). Rather than accepting the truth of DWA's facts as pled, as the district court was required to do, the district court instead speculated that the facts as pled "conceivably" may not be true and therefore the case is not ripe.

CONCLUSION

For the foregoing reasons, the district court decision should be reversed and the matter remanded to the district court for further proceedings.

Respectfully submitted,

/S/Roderick E. Walston
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CERTIFICATE OF COMPLIANCE

In accordance with Rule 32 of the Federal Rules of Appellate Procedure, which establishes the form of appellate briefs, I hereby certify that the foregoing brief was produced on a computer, is proportionately spaced, has a typeface 14 points or more, and, according to the word count function on the word processing program used, contains 13,970 words.

I declare under penalty of perjury that the foregoing is true and correct, and that this certificate is executed on November 16, 2015.

/S/*Roderick E. Walston*
Roderick E. Walston

STATEMENT OF RELATED CASE

There are no related cases pending before this Court.

PROOF OF SERVICE

I, Irene Islas, declare:

I am a citizen of the United States and employed in Contra Costa County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 2001 N. Main Street, Suite 390, Walnut Creek, California 94596. On November 16, 2015, I served a copy of the within document(s):

BRIEF FOR APPELLANT DESERT WATER AGENCY

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on November 16, 2015, at Walnut Creek, California.

/S/Irene Islas

Irene Islas

No. 14-55461

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DESERT WATER AGENCY,

Appellant and Plaintiff,,

vs.

UNITED STATES DEPARTMENT OF THE INTERIOR, *ET AL.*,

Appellees and Defendants.

On Appeal From the United States District Court
for the Central District of California
Hon. Dolly M. Gee, Department 7
(213) 894-5452
Case No. 5:13-CV-00606-DMG-OP

ADDENDUM OF CITED DOCUMENTS IN SUPPORT OF APPELLANT DESERT WATER AGENCY'S OPENING BRIEF

[APPELLANT'S COUNSEL LISTED ON FOLLOWING PAGE]

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Appellant Desert Water Agency ("DWA") submits this Addendum of Cited Documents in Support of its Opening Brief. The following documents are attached and incorporated by reference in Appellant Desert Water Agency's Opening Brief.

TAB	DOCUMENT DESCRIPTION
1.	25 C.F.R. §162.017
2.	77 Fed. Reg. 72447 (Dec. 5, 2012)
3.	76 Fed. Reg. 73785 (Nov. 29, 2011)
4.	Desert Water Law

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1 of 1 DOCUMENT

LEXISNEXIS' CODE OF FEDERAL REGULATIONS
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*** This document is current through the Oct. 14, 2015, with the exception of the amendment affecting Title 19 appearing at 80 FR 61278, Oct. 13, 2015 ***
*** issue of the Federal Register ***

TITLE 25 -- INDIANS
CHAPTER I -- BUREAU OF INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR
SUBCHAPTER H -- LAND AND WATER
PART 162 -- LEASES AND PERMITS
SUBPART A -- GENERAL PROVISIONS
LEASE ADMINISTRATION

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25 CFR 162.017

§ 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.

HISTORY: *[77 FR 72440, 72467,* Dec. 5, 2012]

AUTHORITY: AUTHORITY NOTE APPLICABLE TO ENTIRE PART:
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.

NOTES: [EFFECTIVE DATE NOTE: *77 FR 72440, 72467,* Dec. 5, 2012, revised Subpart A, effective Jan. 4, 2013.]
NOTES APPLICABLE TO ENTIRE TITLE:
CROSS REFERENCES: Regulations pertaining to migratory birds, applicable to Indians living on reservations: See Wildlife and Fisheries, 50 CFR chapter I.
Bureau of Land Management regulations pertaining to Indians: See Bureau of Land Management, 43 CFR part 2530.
Public Health regulations pertaining to contracts and health: See Public Health, 42 CFR chapter I.
Other regulations issued by the Department of the Interior appear in title 30, chapters II, III, IV, VI, VII; title 36, chapter I; title 41, chapter 114; title 48, chapter 14; title 43; and title 50, chapters I and IV, Code of Federal Regulations.

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FEDERAL REGISTER

Vol. 77 Wednesday,
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Part II

Department of the Interior

Bureau of Indian Affairs

25 CFR Part 162
Residential, Business, and Wind and Solar Resource Leases on Indian Land; Final Rule

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

25 CFR Part 162

[Docket ID BIA–2011–0001]

RIN 1076–AE73

Residential, Business, and Wind and Solar Resource Leases on Indian Land

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Final rule.

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

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

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

SUPPLEMENTARY INFORMATION:

I. Executive Summary

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

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

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

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

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

II. Summary of Substantive Revisions

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

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

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

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

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

Subpart E, WEELs and WSR Leases, establishes procedures for obtaining BIA review and approval of WEELs and WSR leases. For wind energy, this rule establishes a two-part process whereby developers may obtain BIA approval of a short-term lease for possession of Indian land for the purposes of installation and maintenance of wind evaluation equipment, such as meteorological towers. The WEEL may provide the developer with an option to lease the Indian land for wind energy development purposes. The environmental reviews conducted for the short-term lease, which would evaluate only the impacts of the evaluation equipment, not the full development of the wind project, may be incorporated by reference, as appropriate, into environmental reviews conducted for a lease for full development of the wind project. This two-part process is not necessary for solar resource development because solar resource evaluation does not require possession of the land. The regulations provide for a 20-day time frame within which BIA must issue a decision on a complete WEEL and a 60-day time frame within which BIA must issue a decision on a complete WSR lease application.

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

General Provisions

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

BIA Approval Process

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

Compensation and Valuations

- Providing that BIA will defer to the tribe's negotiated value for a lease of tribal land and will not require valuations of tribal land
- Automatically waiving valuation for leases of individually owned land if the individual landowners provide 100 percent consent
- Allowing for BIA waiver of compensation and valuation for residential leases of individually owned land under certain circumstances if the lessee is a co-owner that has been living on the tract for the past 7 years without objection
- Allowing for BIA waiver of valuation for leases where the lessee or tribe will provide infrastructure improvements to the leased premises and BIA determines it is in the best interest of the landowners
- Allowing short-term leases for wind resource evaluation purposes at the value negotiated by the Indian landowners (whether tribal or individual Indians)
- Providing that BIA will defer to the tribe's determination that allowing alternative forms of rental (other than monetary) compensation for tribal land is in its best interest
- Allowing alternative forms of rental (other than monetary) compensation for individually owned Indian land if the if BIA determines it is in the best interest of the Indian landowners
- Allowing market analysis, competitive bidding, and other appropriate types of valuation, in addition to appraisals
- For tribal land, requiring BIA to defer to the tribe's determination that rental reviews and adjustments are not necessary
- For individually owned land, allowing for automatic rental adjustments and restricting the need for reviews of the lease compensation (to determine if an adjustment is needed) to certain circumstances

Improvements

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

Direct Pay

- Allowing for direct pay (i.e., to the Indian landowners, rather than to BIA) for residential, business, and wind and solar resource leasing only where there are 10 or fewer landowners, and all landowners consent to direct pay
- Continuing direct pay unless and until 100 percent of the owners agree to discontinue direct pay, but suspending direct pay under certain circumstances

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

III. Responses to Comments on the Proposed Rule

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

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

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

A. Overview

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

While tribes supported the proposed rule overall, they had suggestions for improvement, which are summarized below. A tribal organization stated, broadly, that the regulations should better reflect an updated concept of trust responsibility that defers to tribes in financial matters. We have reviewed the regulation to ensure that the final rule requires BIA to defer to tribes in all possible cases, consistent with our trust responsibility.

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

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

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

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

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

B. Format of Regulations

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

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

C. Subpart A—General Provisions

We received the following comments on sections within subpart A.

162.002—How the Part Is Subdivided

- Clarify the provision in 162.002 stating that Subpart F (Special Requirements for Certain Reservations) is subject to subparts A and G. In response, we added a sentence to 162.002 to clarify which provisions apply if there is a conflict between Subpart F (or any act of Congress under which a Subpart F lease is made) and Subparts A through G. Note that Subpart F is merely a redesignation of what was Subpart E.
- Explain the effect of deleting the former subpart addressing non-agricultural leases on tribal regulations modeled after that subpart. There will be no effect; the tribal regulations stand independent of Federal regulations.

162.003—Definitions

- ''Amendment''—Define this term to include any changes to the terms of a lease approved by BIA under part 162 that are not contemplated by or provided for in the lease during its initial or renewal period. We did not add this definition because it is self-evident.
- ''Business day''—Include tribally recognized holidays out of respect for tribal sovereignty and to provide consistency for individuals and businesses dealing with tribes. We determined not to include tribally recognized holidays because the wide variation in tribally recognized holidays would make administration of the Federal regulations unworkable.
- ''Court of competent jurisdiction''—Add that nothing in the definition alters preexisting allocations of jurisdiction over any matter as among State, Federal,

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

• ''Fee interest''—Clarify this definition to state when restrictions on alienation attach, if at all, to tribally acquired fee land. We determined that this request is outside the scope of this rulemaking.

• ''Government lands''—Clarify that this definition does not include tribal lands. We incorporated this change.

• ''Housing for public purposes''—Clarify that this term includes programs administered or substantially financed by any entity (not just not-for-profit entities) organized for the purpose of developing or improving low income housing using tax credits. We incorporated this change.

• ''Immediate family''—Leave this definition to tribes' discretion. We incorporated this change by providing that the definition will apply only in the absence of a tribal law definition.

• ''Indian landowner''—Include tribal corporations organized under 25 U.S.C. 477 (''section 17 corporations'') in this definition, to the extent they have the authorization to lease Indian land to third parties. We did not incorporate this change because section 17 corporations are exempt from the requirement to obtain BIA approval of leases under part 162. A few commenters also suggested defining ''individual Indian landowner'' and ''tribal landowner'' to emphasize their differences. We determined that these definitions were unnecessary.

• ''Inherent Federal function''—See discussion of 162.018, below.

• ''Lease''—Add that a lessee's right to possession will limit the landowner's right only to the extent provided in the lease to avoid any possible argument that common law definitions requiring exclusive right of possession be applied to part 162. We incorporated the suggested change.

• ''Lease''—Expand the definitions of ''lease'' and ''lessee'' to include subleases and assignments from sublessees and assignees. We did not incorporate this change because it would expand the application of the regulations beyond what is intended.

• ''Lease document''—Add a definition for this term (the proposed rule used this term without a definition) to expressly include a lease, amendment, assignment, sublease, and leasehold mortgage. We added this definition.

• ''LTRO''—Revise to clarify that a tribe contracting or compacting LTRO functions may be included in this definition. We did not make this change because these tribes are already included in the definition, as part of ''BIA.''

• ''Notice of violation''—Revise to account for situations in which a notice of violation is issued against the Indian landowner/lessor. We did not incorporate this change because BIA's obligation is to the Indian landowner, not to enforce the lease on behalf of the lessee.

• ''Orphaned minor''—Revise because the proposed rule's definition inaccurately suggests that every minor without a court-appointed guardian is orphaned. We revised the definition to match the common understanding of this term.

• ''Permit''—Revise to clarify that this term does not include tribal grazing permits. Because grazing permits are governed by another CFR part, 25 CFR part 166, this definition does not apply to them; therefore, we determined that no change to this definition is necessary.

• ''Single family residence''—Restrict this term to one dwelling unit. We did not revise the definition, but the definition allows tribes to define the term differently. This definition is consistent with the scope of financing available under section 184 of the Housing and Community Development Act of 1992 (12 U.S.C. 1715z–13a). We also added this term to the definition of ''housing for public purposes'' to clarify that this housing may include a single family residence, rather than just developments. We incorporated a tribal housing authority's suggestion that we add ''or other tribal law'' to allow tribal law beyond just zoning law to define this term.

• ''Sublease''—Revise to indicate that the interest held by the sublessee should be ''no greater than'' that of the lessee, since the sublessee may hold the same rights as the lessee. We incorporated this change.

• ''Tribal law''—Revise to add that the body of non-Federal law is ''defined by each tribe.'' We did not incorporate this change because it would be redundant, given that the definition clearly establishes that the tribe defines its own body of law.

• ''TDHE'' (tribally designated housing entity)—Expand to include tribally sponsored or tribally sanctioned not-for-profit entities. We incorporated this requested change. Expand to include a tribal council or other tribal departments fulfilling TDHE services. We did not incorporate this change because a tribal council or tribal department that fulfills the function of a TDHE, but is not separate from the tribe, does not have to obtain a lease of tribal land (the tribe cannot lease to itself) while entities separate from the tribe must obtain a lease of tribal land.

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

• Clarify how BIA addresses leases of life estates where the land is fractionated. We revised this section to clarify the difference between a life estate that includes all of the interests in a tract, and a life estate of a fractional interest in a tract—including clarifying whose consent is required for the life tenant to lease in each case, and whether BIA approval of the lease is required in each case. Where the life estate covers only a fractional interest in a tract, the life tenant must obtain the consent of the co-owners and BIA approval.

• Restrict BIA services in collecting rents on behalf of a life tenant so that they do not exceed services provided to trust beneficiaries. In response, BIA is not responsible for collecting the rents on behalf of the life tenant, but may where the life tenant's whereabouts are unknown. In these situations, the Trust Fund Accounting System (TFAS) will distribute rent to an account for the life tenant.

• Do not assume that all life estates are held by non-Indians, because tribes use life estates as a form of estate planning for tribal members. The revised regulations clarify that BIA treats life estates the same whether they are held by Indians or non-Indians; BIA's trust responsibility is to the remaindermen.

• Delete provisions requiring lessees to pay life tenants directly, because that requirement exposes the life tenant's rental income to State court judgments; whereas if BIA collected rent on behalf of the life tenant, the rental income would be protected from these judgments by an individual Indian money (IIM) account. While we note this point, the rule allows life tenants to enter into leases without BIA approval, and BIA does not administer such leases on behalf of life tenants. The requirement that lessees pay life tenants directly is consistent with the rights and responsibilities afforded to life tenants in the rule. As stated above, this rule treats life estates the same whether they are held by Indians or non-Indians.

• Reflect Congress's intent to extend BIA's trust responsibility to protect Indian descendants who are life tenants, without removing property from trust. BIA will protect the trust asset, but does not agree that Congress expressed its

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intent to extend the fiduciary duty to life tenants.

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

162.005 (PR 162.008)—When Lease Is Needed

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

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

• Clarify how 162.005(a)(2), which states that co-owners may agree to allow one co-owner to use the tract without a lease, will work and when a lease, rather than an informal agreement, is required. While a lease documenting the agreement is preferable, the rule provides for maximum flexibility by allowing for informal agreements. A lease is required if all the co-owners cannot agree to an informal agreement. Section 162.005(a)(2) is consistent with existing regulations, allowing for owners' use when 100 percent of the landowners agree. If not all 100 percent agree, then a lease is required. The informal agreement may continue throughout the lives of the landowners, or for whatever period they agreed to, until they no longer agree.

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

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

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

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

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

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

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

• Add that tribal laws and customs must be deferred to in determining whether a use is ''temporary'' under a ''tribal land assignment.'' We addressed this comment by deleting the word ''temporary,'' because a tribal land assignment may be for any appropriate period of time under tribal law.

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

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

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

162.007 (PR 162.004)—Permits

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

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

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

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

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

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

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

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

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

• Limit tribes' ability to establish compensation and conditions to prevent permitting from being a separate revenue opportunity for tribes beyond leases and rights-of-way. BIA did not incorporate this change because tribal landowners have the right to receive compensation for granting access through a permit, and tribal landowners may establish whatever compensation they like.

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

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

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

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

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

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

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

• Address the rule's applicability to leases that a tribe or tribal corporation is obligated to issue upon exercise of a legally binding option to lease on the effective date of the new rules. The fact that a party is obligated to issue a lease will not change the applicability of the regulations.

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

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

162.010 (PR 162.009)—How To Obtain a Lease

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

162.011 (PR 162.010)—Identifying and Contacting Indian Landowners

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

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

162.013 (PR 162.012)—Consent

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

In addition, we received the following comments:

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

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

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

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

• Limit the parties' ability to allow for ''deemed consent'' in a lease to individual landowners. The regulations limit deemed consent lease provisions to individual Indian landowners only. One tribe requested adding tribes to allow for tribes to be deemed to have consented. We did not incorporate this change out of respect for tribal sovereignty and because other comments requested that it be limited to individual Indian landowners.

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

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

162.014 (PR 162.013)—What Laws Apply to Leases

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

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

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

• Add provisions that require BIA to recognize and acknowledge tribal laws regulating activities on land under a lease, including land use, environmental protection, and historic preservation, as in the 2004 draft regulations. The additional language in 162.016 regarding the applicability of tribal law covers this.

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

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

162.016 (PR 162.014)—BIA Compliance With Tribal Laws

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

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

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

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

With a backdrop of ''traditional notions of Indian self-government,'' Federal courts apply a balancing test to determine whether State taxation of non-Indians engaging in activity or owning property on the reservation is preempted. *White Mountain Apache Tribe* v. *Bracker,* 448 U.S. 136, 143 (1980). The *Bracker* balancing test requires a particularized examination of the relevant State, Federal, and tribal interests. In the case of leasing on Indian lands, the Federal and tribal interests are very strong.

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

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

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

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

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

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

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

162.017(b). Subject only to applicable Federal law, activities conducted under a lease of trust or restricted land that occur on the leased premises are not taxable by States or localities, regardless of who conducts the activities. An example of this principle is in the trading business where the courts have held that taxation of such activities is preempted by the Indian Trader Statutes, *see* 25 U.S.C. 261, and the all-inclusive regulations under them, *see* 25 CFR 140.1–.26. Federal statutes and regulations are ''sufficient to show that Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for State laws imposing additional burdens upon traders.'' *Warren Trading Post Co.* v. *Arizona State Tax Comm'n,* 38 U.S. 685, 690 (1995) (precluding imposition of State sales taxes); *Central Machinery Co.* v. *Arizona State Tax Comm'n,* 448 U.S. 160 (1980) (preemption applies even if vendor is not licensed as long as goods or services are traded to a tribe or its members in a transaction occurring predominately on the reservation). As a general matter, myriad activities on leased lands related to economic development, infrastructure building, and governmental operations provide important revenue and services to the tribal economy and the generation of economic activity on leased land is an essential component of tribal self-sufficiency. State and local taxation undermines that important objective of federal regulation of the leasing of Indian lands. This subsection, like 162.017(a), is intended to achieve the dual purposes of supporting tribal economic development and promoting tribal self-government. The additional burden of State and local taxation on lease activities would significantly affect the marketability of Indian land for economic development, as noted above in the introductory paragraphs. In addition, tribes, as sovereigns, have inherent authority to regulate zoning and land use on Indian trust and restricted land, and the regulations require BIA to comply with tribal laws relating to land use. *See* 162.016. Such regulation is undermined by State and local taxation.

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

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

In addition, we received the following comments:

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

appropriate in the preamble than in the regulatory text.

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

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

162.018 (PR 162.015)—Tribal Administration of Part 162

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

162.019 (PR 162.016)—Access to Leased Premises

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

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

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

162.020 (PR 162.017)—Unitized Leases

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

162.021 (PR 162.018)—BIA Responsibilities in Approving Leases

• Add ''and applicable tribal law'' to recognize the need to comply with tribal law. We accepted this change.

162.022 (PR 162.019)—BIA Responsibilities in Enforcing Leases

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

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

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

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

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

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

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

162.023 (PR 162.020)—Trespass

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

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

162.024 (PR 162.021)—Emergency Action

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

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

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

162.025 (PR 162.022)—Appeals

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

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

162.026 (PR 162.023)—Contact for Questions

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

162.027 (PR 162.024)—NEPA & Records

- Expressly include the Department of Housing and Urban Development (HUD) in paragraph (b), which states that BIA will adopt environmental assessments and environmental impact statements of other Federal agencies, etc. We incorporated this change by including documents prepared under NAHASDA (25 U.S.C. 4115).
- Allow BIA to accept NEPA documentation from tribes, in addition to other Federal agencies. We added this requested language.
- Allow the use of pre-existing NEPA documentation, when appropriate. BIA encourages the use of pre-existing NEPA documentation, when appropriate, but we did not explicitly add this to 162.027(b) since the statement allowing the use of NEPA documentation from other entities addresses this.
- State that environmental review for an amendment will be required only if the amendment adds lands to the leased premises. We did not incorporate this change because an amendment may trigger the need for environmental review even if it does not add land (e.g., change in use).
- Restrict the WEEL phase of environmental review to study only the actual site locations used to install facilities and equipment, which is a fraction of the land studied at the WSR lease phase. BIA agrees this may be the case, depending on the circumstances, but encourages the parties to discuss each lease's scope with the BIA, as early as possible, to ensure the environmental review process is as focused as possible.
- Streamline the environmental review process to allow for expedited review under NEPA, the National Historic Preservation Act (NHPA), the Endangered Species Act, and other Federal laws. While we are bound by statutory requirements, BIA will use categorical exclusions where applicable, and has proposed a categorical exclusion for leasing and funding for single family homesites on Indian land, including associated improvements and easements, that encompass five acres or less of contiguous land. See 77 FR 26314 (May 3, 2012).
- Instead of stating in this section that all approved leases must include disclosure provisions, move the disclosure provisions to the sections in each subpart listing mandated lease terms. We incorporated this change.
- Add language requiring BIA to return documents once a lease is approved. Under the Federal Records Act, once a Federal agency is provided documents, the agency must archive and retain them in accordance with the Federal records schedule, although certain originals may be returned (e.g., BIA will return the deed of trust for recording in the county land titles and records office). For this reason, we could not accept this requested change.
- Define documents submitted to BIA in a way that they would fall under a Freedom of Information Act (FOIA) exemption from disclosure, to ensure that they are kept confidential. We did not incorporate this change. Even if we define the category of documents as ''confidential'' in part 162, it will not guarantee their exemption from disclosure because the final rule cannot override the FOIA statute; rather, we encourage each party submitting documents to clearly indicate whether they fall under a FOIA exemption.
- Provide a mechanism for BIA review that would not place the documents into BIA custody. Because BIA needs a record of the documents on which it makes its decision, generally, BIA will need custody of the documents.
- Add a cross-reference to FOIA rules (43 CFR part 2) to clarify that tribes and tribal entities will be given advance notice and opportunity to challenge any disclosure of their documents. We incorporated this suggested change in paragraph (c).
- Require a reasonable nexus between a BIA request for disclosure and an opportunity to consult if the lessee or tribe objects, to alleviate any negative impacts on project financing, constructability, and operational issues from the language that documents marked confidential propriety are protected from disclosure ''to the extent allowed by law.'' The FOIA rules require BIA to consult with the tribes before disclosure. Much of the information may be subject to the fourth FOIA exemption covering trade secrets or commercial or financial information. *See, Utah* v. *U.S. Department of the Interior,* 256 F.3d 967 (10th Cir. 2001).
- Make it mandatory for BIA to exempt confidential information to the extent allowed by law. The regulation states that BIA will exempt confidential information to the extent allowed by law.

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

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

D. Residential Leases

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

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

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

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

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

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

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

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

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

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

The tribe that was the biggest opponent of the residential leasing subpart also requested that BIA approve and record consent lists from before 2003; date them the year the home was constructed; and provide the lessees with a 50-year lease with renewal. Ultimately, this tribe's concern was the practical obstacle posed by requiring all landowners to consent to waiving the requirement for a valuation. Because it is sometimes impossible to obtain consent of all the landowners, the proposed rule would have required that the lessee/homeowner obtain a valuation and pay fair market rental to all the nonconsenting landowners, which the tribe argued was beyond what the lessee/homeowner could afford.

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

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

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

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

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

• Clarify the applicability of the leasing regulations to tribal housing entities. We added a new 162.303 to address this. A number of housing authorities noted that if a public housing program is part of a tribal government (rather than a separate TDHE), each lease with an individual lessee must be approved by BIA. We note that this is the case, but we are statutorily required to review and approve leases of Indian land. One tribal housing authority asked what happens to tribal leases with a TDHE if the tribe abolishes the TDHE. The tribal documentation creating the TDHE would govern what happens with the leases and whether they merge with the tribal ownership and terminate by law.

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

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

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

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

NAHASDA requires that the tribe approve the lease.

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

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

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

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

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

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

• Require BIA to defer to applicable tribal law regarding landlord-tenant relations and due process in 162.366 (PR 162.363). BIA will first look to whether the lease allows tribal proceedings to address violations under 162.365(e) (PR 162.362), and whether these proceedings are occurring or have occurred. If there are no such proceedings, or if it is not appropriate for BIA to defer to the proceedings, then BIA will take action to address the violation. We clarified this process in 162.366 (PR 162.363).

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

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

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

E. Business Leases

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

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

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

• Amend business leasing requirements for telecommunications facilities on tribal lands to better serve tribal people. The intent of these regulations is to streamline and clarify business leasing procedures for all intended uses to better serve tribes and individual Indian landowners.

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

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

F. WEELs

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

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

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

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

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

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

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

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

• Limit the scope of environmental and archeological reports required by 162.528(f) to only the actual testing and monitoring locations and access routes for WEELs. We agree with this comment, but determined that no change to the regulation is necessary.

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

G. WSR Leases

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

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

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

One commenter requested that BIA issue a policy statement exempting agreements with carbon offset sales from part 162. Whether an agreement is subject to part 162 depends upon whether the specific terms of the agreement meet the requirements for a lease in this part. This commenter also requested that BIA take a clear position on whether State rules apply to tribes seeking to sell carbon credits generated on Indian lands. We are not taking a position on these issues at this time.

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

In addition, we received the following comments:

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

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

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

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

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

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

H. Cross-Cutting Comments

1. Lease Term

- Specifically allow a month-to-month term for residential leases authorized by NAHASDA. In response to these comments, we clarified the term of NAHASDA leases (leases approved under 25 U.S.C. 4211) versus the term of leases approved under 25 U.S.C. 415(a). Note also that many of these month-to-month arrangements are actually occupancy agreements not requiring BIA approval because they are essentially tribal land assignments.
- Remove the restriction to one renewal for tribes with authority to lease lands up to 99 years because this one-size-fits-all approach does not work for many lease situations. We revised this provision to allow for flexibility in the number of renewals where authorized by statute.
- Remove the two-year term restriction where the owners of trust and restricted interests are deceased and their heirs and devisees have not yet been determined. We deleted this provision as unnecessary.
- Allow parties the flexibility to negotiate holdover provisions for residential leases. We added this flexibility by adding that the prohibition on holdovers applies only if the residential lease does not provide otherwise.
- Clarify whether a lease amendment that extends the term of the lease is limited to a 25-year term and whether this amendment could include an option term. An amendment can amend the lease and include an option term, as long as the term meets statutory constraints.
- Restrict long lease terms because they may result in more permanent uses by non-Indian lessees that threaten preservation of tribal culture and society. There are statutory limitations to lease terms, but to the maximum extent possible, BIA will defer to the Indian landowners' decision that a lease is in their best interest.

2. Option To Renew

- Add to the requirement for providing BIA with a confirmation of a renewal the phrase ''unless the lease provides for automatic renewal.'' We accepted this language.
- Clarify the proposed rule's provision requiring a lease with an option to renew to state that ''any change in the terms of the lease will be considered an amendment,'' including whether this means that BIA must approve of payments due upon exercise of a renewal option. We deleted this provision as unnecessary.

3. Mandatory Lease Provisions

- Delete the provision requiring the lease to cite the authority under which BIA is approving the lease under because BIA, rather than the parties to the lease, should know the citation. We deleted this provision because we agree that it is BIA's responsibility to know its authority.
- Delete the mandatory lease provision stating that nothing would prevent termination of the Federal trust responsibility because there is no statutory requirement that this provision be included in leases and it reflects an offensive and outdated approach to tribal relations. In response, we deleted this provision.
- Clarify that wind energy projects shall not be deemed a ''nuisance'' for the purposes of BIA's review. While this statement is true, we did not add it to the mandatory lease provisions. These regulations anticipate and encourage the development of wind energy projects; BIA does not deem wind energy projects to be a nuisance.
- Restrict the mandatory provision stating that BIA has the right to enter the leased premises upon reasonable notice to allow BIA to enter only when it is consistent with notice requirements under applicable tribal law and lease requirements. We incorporated this language.
- Delete the mandatory provision stating that the lease is not a lease of fee interests because it places responsibility on the lessee to pay fee owners. Although this is the case, we deleted this provision from the mandatory provisions as unnecessary to include in the lease.
- Regarding the mandatory provisions requiring lessee to indemnify and hold harmless the Indian landowners and the United States:
  - Make it discretionary whether to include them in a lease because their inclusion could be contrary to law in certain contexts. We did not make inclusion of these provisions discretionary, but we moved these provisions to a new paragraph to clarify that they are not required where prohibited by law.
  - Make it discretionary whether to include the provision related to hazardous materials where there is no evidence that hazardous materials are present on the land. We retained this as a mandatory lease provision to account for any instances in which hazardous materials are discovered after the lease is signed or the lessee or other party introduces hazardous materials onto the leased premises during the term of the lease.
  - Delete the provision requiring lessees to indemnify the United States and Indian landowners for loss, liability, and damages because many lessees are not willing to assume liability for a tribe's simple negligence, and the indemnity provision requires the lessee to assume liability except in cases of gross negligence by the tribe. We narrowed the indemnification provision, in response.
  - Exempt leases for housing for public purposes from having to include these provisions because a tribal member seeking affordable housing may hesitate to enter into a lease with this requirement. We did not add an exemption because this provision is necessary to protect trust assets, the Indian landowners, and the United States.
  - Loosen these provisions because they are too restrictive and should be subject to negotiation. We retained the indemnification provisions, as revised, to protect the trust assets, the Indian landowners, and the United States.
- Delete the provision stating that BIA may treat any lease provision that violates Federal law as a violation of the lease, and instead provide that the parties may elect to terminate the lease or agree that Federal law will replace the superseded provisions. We did not incorporate this suggested change. We cannot approve a lease that violates Federal law and, during the cure period, the parties may agree to address the provision; and if, after the fact, we discover that a lease provision violates Federal law, we need the ability to correct the problem. Using the lease violation regulations (e.g., 162.366 and 162.367) affords the parties notice and an opportunity to either cure or dispute the violation. As part of this process, the parties are free to agree that Federal law will replace the offending lease provision.

4. Improvements

- Delete the requirement for the lease to generally describe the location of the improvements to be constructed. We require this information because it is necessary for NEPA and NHPA review and we are statutorily required to review, among other things, the relationship of the use of neighboring lands, the height, quality, and safety of any structures or other facilities to be constructed on these lands. See 25 U.S.C. 415(a).
- Allow lessees the right to make improvements on their houses without having to get the consent of other

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

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

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

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

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

5. Due Diligence

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

• Allow more flexibility in the construction schedule, including allowing a way for the construction schedule to be modified at later phases, as the parties may not be able to identify all improvements to be constructed over the course of a phased development and a construction schedule may lock them into an uneconomic schedule. We incorporated this suggestion at 162.417, by clarifying that the schedule may be a separate document from the business lease, and that the parties must agree to a process for modifying the schedule. For WSR leases, the resource development plan sets out the schedule for improvements. We revised 162.543 (PR 162.540) to provide that parties may make changes to the resource development plan, and they merely have to provide BIA with a copy if the changes affect certain items (rather than having to wait for BIA approval of the changes). Through these revisions, we added flexibility by allowing for a separate construction schedule and allow a process for obtaining the landowners' consent to changes in the schedule.

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

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

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

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

6. Legal Description—Surveys

• Allow the use of survey grade global positioning system (GPS) for land descriptions. We revised the regulations to allow this because the Land Title and Records Office (LTRO) is now capable of accepting these descriptions.

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

7. Compatible Uses

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

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

8. Rental/Payment Requirements—Tribal Land

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

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

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

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

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

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

9. Rental/Payment Requirements—Individually Owned Indian Land

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

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

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

• Balance the risk of exploitation by unscrupulous developers against increased flexibility when allowing less than fair market rental for business leases of individually owned Indian land. We did not make any change to the regulations in response to this comment because the best interest determination of whether to waive fair market rental allows BIA to balance this risk on a case-by-case basis. The risk of exploitation is higher for business leases; therefore, we explicitly require the balancing test in 162.421, while for residential leases we automatically waive fair market rental if all landowners request the waiver.

10. Rental/Payment Requirements—Valuations

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

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

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

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

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

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

11. Rental/Payment Requirements—When Payment Is Due

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

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

12. Rental/Payment Requirements—Direct Pay

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

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

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

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

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

13. Rental/Payment Requirements—Payment Methods

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

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

14. Rental/Payment Requirements—Types of Compensation

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

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

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

15. Rental/Payment Reviews and Adjustments

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

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

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

- Change the phrase ''at least every fifth year'' to ''no less frequently than every fifth year.'' We did not incorporate this change because these phrases are equally clear.
- Add a requirement for a landowner to consent to a waiver of rental adjustments in the lease, because when the lease is for housing for public purposes, the amount of rent affects the amount investors are willing to invest. We did not add this requirement because the landowner may refuse to waive rental adjustments as part of their lease negotiations.
- Revise the factors in 162.428(b)(3) and parallel WSR provisions (factors for determining that waiving the Federal review of the adequacy of compensation is in the landowners' best interest) to add a factor that reflects the needs of large investments that may only be recouped over a period of many years. We added a factor to account for these situations where ''the lease provides for graduated rent or non-monetary or various types of compensation.''
- Delete or limit 162.424(b)(4), which allows the lease to provide for payment to parties other than the Indian landowners. We retained this provision to allow the parties maximum flexibility in negotiating lease terms, but note that the parties may include limits on who receives payments in the lease. Other tribes requested that we revise this provision to add the phrase ''unless otherwise provided by these regulations.'' We did not incorporate this change because the regulations do not restrict to whom rental payments may be made.

16. Bonding & Insurance

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

- Clarify that a tribe may waive the insurance requirement upon certifying that a waiver is in its best interest. We added that BIA will defer to the tribe's determination that a waiver is in its best interest.
- Add alternative forms (other than performance bonds) of securing payment for lessee obligations, in order to avoid placing Indian lands at a disadvantage, to allow tribes to retain their sovereign immunity (some bonding companies require tribes to provide broad waivers of sovereign immunity for a bond), and to provide maximum flexibility. We incorporated this change by allowing for alternative forms of security.
- Revise business leasing provisions to state that any bond may be made payable to the tribe and that BIA may adjust the bond only based on consultation with the tribe. We incorporated these revisions at 162.434(b) by allowing a lease to include these requirements.
- Revise the process for waiving the bonding requirement, because BIA's decision to waive is based on its determination as to the best interest of the landowners, which introduces uncertainty and delay. To address this comment, the final rule provides that BIA will defer to the tribe, for tribal land, that the waiver is in its best interest, to the maximum extent possible.
- Allow cash as a form of security. We did not incorporate this change because the lockbox cannot accept cash, but clarified that it is not an acceptable form of security in the regulations. This commenter also stated that any interest earned on a security posted as a bond shall be payable to the lessee. We did not incorporate this change because the parties may negotiate this point.
- Revise 162.559(c) because allowing BIA to adjust security or bonding requirements at any time creates too much unpredictability. We revised this provision and the parallel provision in the business leasing subpart at 162.434(c) to state that the lease must specify conditions under which BIA may adjust security or bonding requirements, including consultation with the tribe for tribal land before making adjustments.

17. Approvals—Documents Required

The final rule defines with as much certainty as possible exactly what documents BIA will require. We reviewed each category and provided as much specificity as possible while attempting to be flexible enough to account for all types of leases.

- Revise the requirement for a statement from the appropriate tribal authority that the proposed use is in compliance with tribal law because some tribes do not currently examine proposed leases to determine whether the lease complies with land use regulations and, further, do not consider such examination to be within the scope of their responsibility. To accommodate situations where the tribe may not require such a statement, we added the qualifier ''if required by the tribe.''
- Delete the requirement for environmental and archeological reports because this requirement causes lessees to expend resources before even knowing if a lease will be approved. One tribal corporation also stated that the documents required may cause a potential lessee to spend several months conducting due diligence and negotiating a lease, with no certainty of BIA approval. We did not delete this requirement because environmental and archeological assessments are required by statute. To help provide some guidance in the BIA approval process, we added an ''acknowledgment process'' whereby the parties may submit to BIA a proposed lease while still preparing NEPA documentation or obtaining a valuation. BIA will respond within 10 days identifying any provisions that may justify BIA's disapproval of a lease. Although this provision does not preclude BIA from identifying other issues at a later time in exceptional circumstances or disapproving the lease, it does provide some measure of certainty that the lease would be acceptable if NEPA, valuation, and any other issues BIA identifies are adequately addressed).
- Requiring a restoration and reclamation plan:
  - Revise this requirement because this plan may not be appropriate, depending on the land use. We added that a restoration and reclamation plan is required only ''if appropriate.''
  - Require only a preliminary plan. We did not incorporate this change because the plan will form the basis for setting the reclamation bond amount, if appropriate.
- A tribe stated that the requirements for a restoration and reclamation plan, bonding, and a survey may be overwhelming to a new entrepreneur and may cause delays, making it difficult to establish sustainable small Indian-owned businesses on tribal land. BIA requires plans and bonding, where

appropriate, to protect the Indian land and the interests of the Indian landowner. We have replaced the requirement for a survey with a requirement for a legal description of the land.

- Delete the requirement for providing documentation of the lessee's history with similar projects because many commercial lessees are single-project companies formed specifically for that project, with no previous development history, and, in the WSR context, many renewable energy companies are new and do not have such a history. We addressed this comment by replacing ''history in'' with ''ability to.''
- Explain BIA's authority to question a lessee's technical capability, especially given that the landowner investigates these factors in choosing a lessee. BIA will examine the technical capability only to determine if there is a compelling reason not to approve the lease, and will defer, to the maximum extent possible, to the Indian landowners' determination that the lease is in its best interest.
- Explain whether an aliquot part description based on a BLM survey will be acceptable without providing an additional survey. An aliquot part description will be acceptable; however, we have added flexibility to allow for other methods of obtaining a legal description.
- Delete the requirement for a preliminary plan of development because such a plan may be premature when a tribe or TDHE is working with lending institutions to arrange financing for housing for public purposes. We removed this requirement in those cases in which the tribe certifies the lease is for housing for public purposes.
- Delete the provision allowing BIA to request ''any additional documentation * * * reasonably necessary for approval'' or require BIA to provide a compelling reason for the additional documentation. We deleted this provision in an effort to better define what a complete lease proposal package includes.
- Allow tribes to waive the mandatory provisions where inappropriate. Tribes can seek a waiver of one or more of these provisions under 25 CFR 1.2.
- Revise the mandatory provisions to require compliance with all tribal business licensing, land use, permitting, and zoning laws. Compliance with these tribal laws is already required by section 162.014 (PR 162.013).
- Allow the lessee and tribe the option to develop a cultural mitigation plan in case archeological resources are encountered. Tribes have the option of developing this plan under the NHPA. We did not revise the regulations to include this as it is outside the scope of this rulemaking.

18. Approval Process & Timelines

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

- Require BIA to provide notice to the landowner of the date it received the complete lease proposal package. We incorporated this change and now require BIA to notify the parties of the date of receipt, so all are aware of when the timeline for approval begins. The timeline will still begin upon BIA's receipt of the complete lease proposal package.
- Clarify that the timelines do not begin to run until BIA has received all supporting documents, and address the fact that it could take BIA years to determine that it has received all the documents. This comment is correct that the timelines do not begin to run until BIA has received all supporting documents. To provide certainty as to the timeline, BIA will provide the parties with the date on which the timeline begins to run. Also, the final rule establishes a limited list of documents that must be submitted in support of a lease. The final rule also includes new sections (see 162.339, e.g.) to allow for BIA review of a lease pending completion of any required NEPA and valuation documentation. The intent of this new provision is to provide some guidance as to whether there are any red flags that would prevent BIA approval of the lease.
- Clarify how BIA will meet its timelines for approval when it may take much longer to obtain landowner consent. The timeline for BIA approval begins when BIA receives the lease and all supporting documents, including the required consents.
- Require BIA to show good cause for extending its review of a residential lease beyond 30 days because residential leases are generally not voluminous or complex; alternatively, delete the second review period or decrease both the initial and second review period. We addressed these comments by deleting the extra 30 days for residential lease review. We also deleted the extra 30-day review time for subleases and amendments to residential leases.
- Shorten the 60-day timeline to approve a residential lease plus the 30-day timeline for review of leasehold mortgages because it is too long, considering that the lessee may only submit a leasehold mortgage for approval after the lease has been approved. As stated earlier, we decreased the total time period for review of a residential lease to 30 days. In response to this comment, we also decreased the time period for leasehold mortgage approval for residential leases to 20 days.
- Shorten the timelines for review of business leases (BIA has an initial 60-day period in which to issue a decision, plus 30 days if it exercises its option for additional time) because this time may cost the landowner almost 3 months of revenue while waiting for a BIA decision and may not be commercially feasible. Because these timelines are intended to be the outer bounds of the time it will take for BIA review of business leases and are intended to cover all business leases, from the simplest to the most complex, we did not make any changes to the timeline in response to these comments.
- Define the additional period for review as beginning either from the day BIA sends the notification that it needs more time, or from the end of the initial 60-day period, whichever is earlier. Because BIA is required to send its notification during the initial 60-day period, the date BIA sends its notification will always be earlier than the end of the initial 60-day period. For this reason, we did not incorporate this change.
- Delete provisions allowing BIA to unilaterally decide it has an additional 30 days to issue a decision. We deleted this option for residential leasing and WEELs, but have retained it for business and WSR leases because we believe this option is necessary to account for particularly complex leases.

19. How BIA Decides To Approve Lease Documents

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

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

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

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

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

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

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

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

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

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

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

• Delete the factors of what BIA will consider in determining whether there is a compelling reason to disapprove a lease document to protect the best interest of the Indian landowners. We did not delete these factors because others had requested clarification of the ''compelling reason'' standard.

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

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

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

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

20. Effective Date of Leases

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

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

21. Recording

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

22. Appeal Bonds

- Delete the proposed rule's requirement that the lessee post an appeal bond for residential leasing as unnecessary. We deleted this requirement.
- Revise appeal bond requirements for business leases to state that an appeal bond will not be required for an appeal of a decision on a leasehold mortgage or if the tribe is a party to the appeal and the tribe requests a waiver. We incorporated these changes and also simplified the definition of ''appeal bond'' and provisions regarding appeal bonds to refer to 25 CFR part 2.

23. Amendments

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

24. Assignments

- Authorize assignments without further BIA approval or landowner consent if the lease is for housing for public purposes and the assignee is a TDHE or other tribal entity. We incorporated this change at 162.349 (PR 162.347).
- Delete the provision at 162.352(c) (PR 162.350) requiring the assignee to pay fair market rental to the landowner where the assignee is not a member of the landowner's immediate family, because it would limit assignments in the housing for public purposes context. The final rule provides that assignments of leases for housing for public purposes do not require BIA approval, so this restriction will not affect assignments of leases for housing for public purposes.
- Delete provisions allowing assignments to subsidiaries without consent or BIA approval because they circumvent due diligence to ensure the assignee is suitable and capable of performing; alternatively, limit these provisions to only those of lessee's subsidiaries that are solvent and in good standing in the State where the corporation is registered. We did not make any changes to this section because the regulations provide that assignments do not need consent or approval in these circumstances only if the lease so provides; the parties have the opportunity to negotiate this.
- Clarify that a lessee may assign the lease as collateral for any financing or refinancing of the project. We did not incorporate this change because a lease may be assigned for any reason.
- Add a process by which a financing party can obtain acknowledgment from the tribe that the assignment provisions are valid. Because this is a matter between the tribe, lessee, and mortgagee, we did not incorporate this change.
- Allow a lease to provide for assignments without BIA approval or landowner consent to any number of distinct legal entities identified in the lease. We rejected this change to keep BIA review of the original lease manageable, but increased the number of distinct legal entities that may be identified from two to three.
- Treat assignments of residential, business and WSR leases the same. We reorganized the provisions related to assignments of residential leases to address this comment.

25. Subleases

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

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

permissible means of exempting these leases.

In addition, we received the following comments:

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

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

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

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

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

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

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

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

26. Leasehold Mortgages

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

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

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

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

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

27. Appeal From Inaction

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

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

28. Compliance and Enforcement

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

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

proceedings to close and defer to the outcome.

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

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

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

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

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

• Allow the tribe, rather than BIA, to establish fees. The fees referred to in 162.368 (PR 162.365) and parallel provisions are those due to the United States under the Debt Collection Act. This section does not affect whether tribes may impose their own fees. Another tribe stated that if a lessee doesn't have the resources to pay rent on time, they won't have the resources to pay the fees. These fees are required under the Debt Collection Act. The parties to a lease may agree not to charge late payment charges or other fees under the lease.

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

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

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

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

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

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

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

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

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

29. Miscellaneous

• Carefully consider the implication of the Helping Expedite and Advance Responsible Tribal Home Ownership Act of 2012 (HEARTH Act) on implementation of these regulations, to avoid two conflicting systems. These regulations would allow for two independent, consistent processes, if a tribe develops its own leasing regulations under the HEARTH Act. One tribe suggested that instead of promulgating leasing regulations, BIA should incorporate the essence of the HEARTH Act. BIA is statutorily required to approve leases; the HEARTH Act removes that requirement under certain conditions (e.g., the tribe develops its own leasing regulations). To the extent we can do so within the current statutory framework, we have attempted to remove BIA as a barrier to fostering business opportunities and economic development through leasing on Indian land.

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

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

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

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

IV. Procedural Requirements

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

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

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

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

B. Regulatory Flexibility Act

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

C. Small Business Regulatory Enforcement Fairness Act

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

D. Unfunded Mandates Reform Act

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

E. Takings (E.O. 12630)

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

F. Federalism (E.O. 13132)

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

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

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

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

In accordance with the President's memorandum of April 29, 1994, ''Government-to-Government Relations with Native American Tribal Governments,'' Executive Order 13175 (59 FR 22951, November 6, 2000), and 512 DM 2, we have evaluated the potential effects on federally recognized Indian tribes and Indian trust assets. During development of the proposed rule, the Department discussed the rule with tribal representatives at several consultation sessions. We distributed a preliminary draft of the rule to tribes in February 2011 and held three consultation sessions: Thursday, March 17, 2011 at the Reservation Economic Summit (RES) 2011 in Las Vegas; March 31, 2011 in Minnesota; and April 6, 2011, in Albuquerque, New Mexico. We requested that tribes submit written comments by April 18, 2011. We received written and oral comments from over 70 Indian tribes during tribal consultation. We reviewed each comment in depth and revised the rule accordingly. The proposed rule incorporated those revisions. We also compiled a summary of tribal comments received and our responses to those comments and are making that document available to tribes at *http://www.bia.gov/WhoWeAre/AS-IA/Consultation/index.htm.* We notified tribes of the publication of the proposed rule on November 28, 2011, provided them with a Web site link to responses to tribal comments and other materials, and announced additional consultation sessions. Following publication of the proposed rule, we held additional tribal consultation sessions on January 10, 2012, in Seattle, Washington; January 12, 2012, in Palm Springs, California; and January 18, 2012, in Rapid City, South Dakota. We received written and oral comments from approximately 50 tribes, and several tribal organizations and tribal members and took them into consideration in formulating this final rule, as described above.

I. Paperwork Reduction Act

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

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

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

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

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

Current CFR cite	New CFR cite	Information collection requirement	Explanation of change
162.109, 162.204, 162.205	162.109, 162.204, 162.205, 162.338(e), 162.438(e), 162.528(d), 162.570(e).	Provide notice of tribal leasing laws, regulations, exemptions.	No change. Previously required, but now listed in specific subparts.
	162.320, 162.420, 162,549	Request for fair market rental/valuation on tribal land.	New.
	162.321, 162.421, 162.550	Request for waiver of fair market rental/valuation for individually owned land.	New.
	162.324, 162.424, 162.553	Agreement to suspend direct pay	New.
	162.371, 162.471, 162.596	Notification of good faith negotiations with holdover.	New.
162.207, 162.242–244, 162.604(a), 162.610.	162.009, 162.207, 162.242–244, 162.347, 351, 355, 359, 162.447, 451, 455, 459, 162.529, 534, 565, 572, 576, 580, 584.	Submit lease, assignment, amendment, leasehold mortgage for approval.	No change. Previously required, but now listed in separate subparts.
162.213, 162.604(a)	162.024 162.213, 162.338, 162.438, 162.528, 162.563.	Provide supporting documentation	No change. Previously required, but now listed in separate subparts.
	162.007	Submit permits to BIA for file	Permits must now be submitted to BIA for file.
162.217, 162.246	162.217, 162.246, 162.343, 162.443, 162.568.	Submit lease for recording	No change. Previously required, but now listed in separate subparts.
162.234, 162.604(c)	162.234, 162.434, 162.525, 162.559.	Provide a bond	No change. Previously required, but now listed in separate subparts.
162.237, 162.604(d)	162.237, 162.437, 162.527, 162.562.	Provide information for acceptable insurance.	No change. Previously required, but now listed in separate subparts.
162.241	162.241	Administrative fees	No change.
162.247, 162.613	162.247, 162.325, 329, 162.425, 429, 162.523, 551.	Pay rent	No change. Previously required, but now listed in separate subparts.
162.248, 162.616	162.248, 162.368, 162.468, 162.593.	Pay penalties for late payment	No change. Previously required, but now listed in separate subparts.
162.212, 162.606	162.009, 162.212	Bidding on advertised lease	No change. Previously required, but now listed in separate subparts.
162.603	162.005(b)(2)	Use of minor's land	No change. Previously required, but now listed in separate subparts.
162.251, 162.618	162.251, 162.366, 162.466, 162.591.	Provide notice of curing violation	No change. Previously required, but now listed in separate subparts.
162.256, 162.623	162.256, 162.371, 162.471, 162.596.	Respond to notice of trespass	No change. Previously required, but now listed in separate subparts.
162.113	162.025, 162.113	Appealing decisions	No change. Previously required, but now listed in separate subparts.

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

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CFR cite	Description	Respondent type	Number respondents	Annual responses	Burden hours per response	Total annual burden hours
162.109, 162.204, 162.205, 162.338(e) 162.438(e), 162.528(d), 162.570(e).	Provide notice of tribal leasing laws, regulations, exemptions.	Tribal	500	500	0.5	250
162.320, 162.420, 162,549.	Request for fair market rental/valuation on tribal land.	Tribal	50	50	0.5	25
162.321, 162.421, 162.550.	Request for waiver of fair market rental/valuation for individually-owned land.	Individuals	5,000	5,000	0.5	2,500
162.324, 162.424 162.553	Agreement to suspend direct pay.	Individuals	20	20	0.5	10
162.371, 162.471, 162.596.	Notification of good faith negotiations with holdover.	Tribal	100	100	0.5	50
		Individuals	500	500	0.5	250
162.009, 162.207, 242–244, 162, 347, 351, 355, 359, 162.447, 451, 455, 459, 162.529, 534, 565, 572, 576, 580, 584.	Submit lease, assignment, amendment, leasehold mortgage for approval.	Individuals	10,000	10,000	1	10,000
		Businesses	2,500	2,500	1	2,500
		Tribal	2,000	2,000	1	2,000
162.024, 162.213, 162.338, 162.438, 162.528, 162.563.	Provide supporting documentation.	Individuals	5,000	5,000	0.25	1,250
		Businesses	2,000	2,000	0.25	500
		Tribal	250	250	0.25	62.5
162.007	Submit permits to BIA for file.	Individuals	100	100	0.25	25
		Businesses	100	100	0.25	25
		Tribal	100	100	0.25	25
162.217, 162.246, 162.343, 162.443, 162.568.	Submit lease for recording	Individuals	10,000	10,000	0.5	5,000
		Businesses	2,500	2,500	0.5	1,250
		Tribal	2,000	2,000	0.5	1,000
162.234, 162.434, 162.525, 162.559.	Provide a bond	Individuals	10,000	10,000	0.5	5,000
		Businesses	2,500	2,500	0.5	1,250
		Tribal	2,000	2,000	0.5	1,000
162.237, 162.437, 162.527, 162.562.	Provide information for acceptable insurance.	Individuals	10,000	10,000	0.25	2,500
		Businesses	2,500	2,500	0.25	625
		Tribal	2,000	2,000	0.25	500
162.241	Administrative fees	Individuals	10,000	10,000	2	20,000
		Businesses	2,500	2,500	2	5,000
		Tribal	2,000	2,000	2	4,000
162.247, 162.325, 329, 162.425, 429, 162.523, 551.	Pay rent	Individuals	10,000	10,000	0.25	2,500
		Businesses	2,500	2,500	0.25	625
		Tribal	2,000	2,000	0.25	500
162.248, 162.368, 162.468, 162.593.	Pay penalties for late payment.	Individuals	3,000	3,000	0.25	750
		Businesses	600	600	0.25	150
		Tribal	25	25	0.25	6
162.009, 162.212	Bidding on advertised lease.	Individuals	10,000	10,000	1	10,000
		Businesses	2,500	2,500	1	2,500
		Tribal	2,000	2,000	1	2,000
162.005(b)(2)	Use of a minor's land	All	7,250	7,250	3	21,750
162.251, 162.366, 162.466, 162.591.	Provide notice of curing violation.	Individuals	100	100	0.5	50
		Businesses	45	45	0.5	23
162.256, 162.371, 162.471, 162.596.	Respond to notice of trespass.	Individuals	100	100	0.5	50
		Businesses	45	45	0.5	23
162.025, 162.113	Appealing decisions	Individuals	400	400	2	800
		Businesses	225	225	2	450
		Tribal	100	100	2	200

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

J. National Environmental Policy Act

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

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

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

List of Subjects in 25 CFR Part 162

Indians—lands.

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

PART 162—LEASES AND PERMITS

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

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

§ 162.100 [Removed]

■ 2. Remove § 162.100.

§§ 162.101 through 162.113 [Transferred to Subpart B]

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

■ 4. Revise subpart A to read as follows:

Subpart A—General Provisions

Purpose, Definitions, and Scope

Sec.

When To Get a Lease

How To Get a Lease

Lease Administration

Subpart A—General Provisions

Purpose, Definitions, and Scope

§ 162.001 What is the purpose of this part?

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

(b) This part specifies:

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

(2) How to obtain leases;

(3) Terms and conditions required in leases;

(4) How we administer and enforce leases; and

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

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

§ 162.002 How is this part subdivided?

(a) This part includes multiple subparts relating to:

(1) General Provisions (Subpart A);

(2) Agricultural Leases (Subpart B);

(3) Residential Leases (Subpart C);

(4) Business Leases (Subpart D);

(5) Wind Energy Evaluation, Wind Resource, and Solar Resource Leases (Subpart E);

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

(7) Records (Subpart G).

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

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

§ 162.003 What key terms do I need to know?

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

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

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

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

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

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

Cancellation means BIA action to end a lease.

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

Constructive notice means notice:

(1) Posted at the tribal government office, tribal community building, and/or the United States Post Office; and

(2) Published in the local newspaper(s) nearest to the affected land and/or announced on a local radio station(s).

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

Day means a calendar day, unless otherwise specified.

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

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

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

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

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

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

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

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

(1) Administered by a tribe or tribally designated housing entity (TDHE); or

(2) Substantially financed using a tribal, Federal, or State housing assistance program or TDHE.

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

Indian means:

(1) Any person who is a member of any Indian tribe, is eligible to become a member of any Indian tribe, or is an owner as of October 27, 2004, of a trust or restricted interest in land;

(2) Any person meeting the definition of Indian under the Indian Reorganization Act (25 U.S.C. 479) and the regulations promulgated thereunder; and

(3) With respect to the inheritance and ownership of trust or restricted land in the State of California under 25 U.S.C. 2206, any person described in paragraph (1) or (2) of this definition or any person who owns a trust or restricted interest in a parcel of such land in that State.

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

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

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

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

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

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

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

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

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

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

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

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

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

Mortgagee means the holder of a leasehold mortgage.

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

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

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

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

Orphaned minor means a minor whose parents are deceased.

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

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

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

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

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

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

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

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

Secretary means the Secretary of the Interior.

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

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

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

Surety means one who guarantees the performance of another.

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

Termination means action by Indian landowners to end a lease.

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

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

Tribal land means any tract, or interest therein, in which the surface estate is owned by one or more tribes in trust or restricted status, and includes such lands reserved for BIA administrative purposes. The term also includes the surface estate of lands held by the United States in trust for an Indian corporation chartered under section 17 of the Act of June 18, 1934 (48 Stat. 988; 25 U.S.C. 477).

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

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

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

Trust or restricted status means:

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

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

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

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

Us/we/our means the BIA.

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

§ 162.004 To what land does this part apply?

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

(1) We will not take any action on a lease of fee interests or collect rent on behalf of fee interest owners. We will not condition our approval of a lease of the trust and restricted interests on your having obtained a lease from the owners of any fee interests. The lessee will be responsible for accounting to the owners of any fee interests that may exist in the property being leased.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

When to Get a Lease

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

(a) You need a lease under this part to possess Indian land if you meet one of the criteria in the following table, unless you are authorized to possess or use the Indian land by a land use agreement not subject to this part under § 162.006(b) or by a permit.

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

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

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

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

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

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

(a) This part applies to leases of Indian land entered into under 25 U.S.C. 380, 25 U.S.C. 415(a), and 25 U.S.C. 4211, and other tribe-specific statutes authorizing surface leases of Indian land with our approval.

(b) This part does not apply to:

(1) Land use agreements entered into under other statutory authority, such as the following:

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

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

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

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

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

§ 162.007 To what permits does this part apply?

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

(1) Ensure that permitted activities comply with all applicable environmental and cultural resource laws; and

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

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

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

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

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

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

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

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

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

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

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

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

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

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

How to Get a Lease

§ 162.010 How do I obtain a lease?

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

(1) Prospective lessees must:

(i) Directly negotiate with Indian landowners for a lease; and

(ii) For fractionated tracts, notify all Indian landowners and obtain the consent of the Indian landowners of the applicable percentage of interests, under § 162.012; and

(2) Prospective lessees and Indian landowners must:

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

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

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

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

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

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

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

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

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

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

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

§ 162.012 What are the consent requirements for a lease?

(a) For fractionated tracts:

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

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

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

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

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

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

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

(5) We will determine the number of owners of, and undivided interests in, a fractionated tract of Indian land, for the purposes of calculating the percentages in paragraph (a)(1) of this section based on our records on the date on which the lease is submitted to us for approval.

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

§ 162.013 Who is authorized to consent to a lease?

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

including undivided interests in fractionated tracts.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Lease Administration

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(a) Upon written notification from an Indian landowner that the lessee has failed to comply with the terms and conditions of the lease, we will promptly take appropriate action, as specified in §§ 162.364, 162.464, and 162.589. Nothing in this part prevents an Indian landowner from exercising remedies available to the Indian landowners under the lease or applicable law.

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

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

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

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

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

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

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

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

§ 162.025 May decisions under this part be appealed?

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

§ 162.026 Who can answer questions about leasing?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Subpart B—Agricultural Leases

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

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

For the purposes of this subpart:

* * * * *

§§ 162.102 through 162.104 [Removed]

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

§ 162.105 [Amended]

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

§ 162.106 [Amended]

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

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

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

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

* * * * *

§ 162.108 [Amended]

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

§ 162.109 [Amended]

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

§ 162.110 [Amended]

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

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

§ 162.111 Who owns the records associated with this subpart?

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

* * * * *

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

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

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

* * * * *

§ 162.113 [Amended]

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

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

Subpart C—Residential Leases

Residential Leasing General Provisions

Sec.

Lease Requirements

Rental Requirements

Bonding and Insurance

Approval

Amendments

Assignments

Subpart C—Residential Leases

Residential Leasing General Provisions

§ 162.301 What types of leases does this subpart cover?

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

(1) A single-family residence; and

(2) Housing for public purposes, which may include office space necessary to administer programs for housing for public purposes.

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

§ 162.302 Is there a model residential lease form?

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

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

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

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

Lease Requirements

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

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

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

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

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

(1) Purpose of the lease;

(2) Type of financing; and

(3) Level of investment.

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

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

(a) If the lease provides for an option to renew, the lease must specify:

(1) The time and manner in which the option must be exercised or is automatically effective;

(2) That confirmation of the renewal will be submitted to us, unless the lease provides for automatic renewal;

(3) Whether Indian landowner consent to the renewal is required;

(4) That the lessee must provide notice of the renewal to the Indian landowners and any mortgagees;

(5) The additional consideration, if any, that will be due upon the exercise of the option to renew or the start of the renewal term; and

(6) Any other conditions for renewal (e.g., that the lessee not be in violation of the lease at the time of renewal).

(b) We will record any renewal of a lease in the LTRO.

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

(a) All residential leases must identify:

(1) The tract or parcel of land being leased;

(2) The purpose of the lease and authorized uses of the leased premises;

(3) The parties to the lease;

(4) The term of the lease;

(5) The ownership of permanent improvements and the responsibility for constructing, operating, maintaining, and managing permanent improvements under § 162.315; and

(6) Payment requirements and late payment charges, including interest.

(b) Where a representative executes a lease on behalf of an Indian landowner or lessee, the lease must identify the landowner or lessee being represented and the authority under which the action is taken.

(c) All residential leases must include the following provisions:

(1) The obligations of the lessee to the Indian landowners are also enforceable by the United States, so long as the land remains in trust or restricted status;

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

(3) The lessee must comply with all applicable laws, ordinances, rules, regulations, and other legal requirements under § 162.014;

(4) If historic properties, archeological resources, human remains, or other cultural items not previously reported are encountered during the course of any activity associated with this lease, all activity in the immediate vicinity of the properties, resources, remains, or items will cease and the lessee will contact BIA and the tribe with jurisdiction to determine how to proceed and appropriate disposition;

(5) BIA has the right, at any reasonable time during the term of the lease and upon reasonable notice in accordance with § 162.364, to enter the leased premises for inspection and to ensure compliance; and

(6) BIA may, at its discretion, treat as a lease violation any failure by the lessee to cooperate with a BIA request to make appropriate records, reports, or information available for BIA inspection and duplication.

(d) Unless the lessee would be prohibited by law from doing so, the lease must also contain the following provisions:

(1) The lessee holds the United States and the Indian landowners harmless from any loss, liability, or damages resulting from the lessee's use or occupation of the leased premises; and

(2) The lessee indemnifies the United States and the Indian landowners against all liabilities or costs relating to use, handling, treatment, removal, storage, transportation, or disposal of hazardous materials, or release or discharge of any hazardous material from the leased premises that occurs during the lease term, regardless of fault, with the exception that the lessee is not required to indemnify the Indian landowners for liability or cost arising from the Indian landowners' negligence or willful misconduct.

(e) We may treat any provision of a lease document that violates Federal law as a violation of the lease.

§ 162.314 May permanent improvements be made under a residential lease?

(a) The lessee may construct permanent improvements under a residential lease if the residential lease authorizes the construction and generally describes the type and location of the permanent improvements to be constructed during the lease term.

(b) The lessee must provide reasonable notice to the Indian landowners of the construction of any permanent improvements not generally described in the lease.

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

(a) A residential lease must specify who will own any permanent improvements the lessee constructs during the lease term. In addition, the lease must indicate whether each specific permanent improvement the lessee constructs will:

(1) Remain on the leased premises upon expiration, termination, or cancellation of the lease, in a condition satisfactory to the Indian landowners and become the property of the Indian landowners;

(2) Be removed within a time period specified in the lease, at the lessee's expense, with the leased premises to be restored as closely as possible to their condition before construction of the permanent improvements; or

(3) Be disposed of by other specified means.

(b) A lease that requires the lessee to remove the permanent improvements must also provide the Indian landowners with an option to take possession of and title to the permanent improvements if the improvements are not removed within the specified time period.

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

We may take appropriate enforcement action to ensure removal of the permanent improvements and restoration of the premises at the lessee's expense:

(a) In consultation with the tribe for tribal land or, where feasible, with Indian landowners for individually owned Indian land; and

(b) Before or after expiration, termination, or cancellation of the lease.

§ 162.317 How must a residential lease describe the land?

(a) A residential lease must describe the leased premises by reference to a public or private survey, if possible. If the land cannot be so described, the lease must include one or more of the following:

(1) A legal description;

(2) A survey-grade global positioning system description; or

(3) Another description prepared by a registered land surveyor that is sufficient to identify the leased premises.

(b) If the tract is fractionated, we will identify the undivided trust or restricted interests in the leased premises.

Rental Requirements

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

(a) A residential lease of tribal land may allow for any payment amount negotiated by the tribe, and we will defer to the tribe and not require a valuation, if:

(1) The lease is for housing for public purposes; or

(2) The tribe submits a signed certification or tribal authorization stating that it has determined the negotiated amount to be in its best interest.

(b) The tribe may request, in writing, that we determine fair market rental, in which case we will use a valuation in accordance with § 162.322. After providing the tribe with the fair market rental, we will defer to a tribe's decision to allow for any payment amount negotiated by the tribe.

(c) If the conditions in paragraph (a) or (b) of this section are not met, we will require that the lease provide for fair market rental based on a valuation in accordance with § 162.322.

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

(a) A residential lease of individually owned Indian land must require payment of not less than fair market rental except that we may approve a lease of individually owned Indian land that provides for the payment of nominal rent, or less than a fair market rental, if:

(1) One hundred percent of the Indian landowners execute a written waiver of the right to receive fair market rental; or

(2) We waive the requirement under paragraph (c) of this section.

(b) We will require a valuation in accordance with § 162.322, unless:

(1) One hundred percent of the Indian landowners submit to us a written request to waive the valuation requirement; or

(2) We waive the requirement under paragraph (c) of this section.

(c) If the owners of the applicable percentage of interests under § 162.012 consent to a residential lease on behalf of all the Indian landowners of a fractionated tract, the lease must provide that the non-consenting Indian landowners (and those on whose behalf we have consented) receive fair market rental, as determined by a valuation, unless we waive the requirement because:

(1) The lessee is a co-owner who, as of January 4, 2013, has been residing on the tract for at least 7 years, and no other co-owner raises an objection to BIA by July 3, 2013 to the lessee's continued possession of the tract; or

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

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

(a) We will use a market analysis, appraisal, or other appropriate valuation method to determine the fair market rental for residential leases of individually owned Indian land. We will also do this, at the request of the tribe, for tribal land.

(b) We will either:

(1) Prepare, or have prepared, a market analysis, appraisal, or other appropriate valuation method; or

(2) Use an approved market analysis, appraisal, or other appropriate valuation method from the Indian landowners or lessee.

(c) We will use or approve a market analysis, appraisal, or other appropriate valuation method for use only if it:

(1) Has been prepared in accordance with USPAP or a valuation method developed by the Secretary under 25 U.S.C. 2214; and

(2) Complies with Department policies regarding appraisals, including third-party appraisals.

§ 162.323 When are rental payments due under a residential lease?

(a) A residential lease must specify the dates on which payments are due.

(b) Unless the lease provides otherwise, payments may not be made or accepted more than one year in advance of the due date.

(c) Payments are due at the time specified in the lease, regardless of whether the lessee receives an advance billing or other notice that a payment is due.

§ 162.324 Must a residential lease specify who receives rental payments?

(a) A residential lease must specify whether the lessee will make payments directly to the Indian landowners (direct pay) or to us on their behalf.

(b) The lessee may make payments directly to the Indian landowners if:

(1) The Indian landowners' trust accounts are unencumbered;

(2) There are 10 or fewer beneficial owners; and

(3) One hundred percent of the beneficial owners (including those on whose behalf we have consented) agree to receive payment directly from the lessee at the start of the lease.

(c) If the lease provides that the lessee will directly pay the Indian landowners, then:

(1) The lease must include provisions for proof of payment upon our request.

(2) When we consent on behalf of an Indian landowner, the lessee must make payment to us on behalf of that landowner.

(3) The lessee must send direct payments to the parties and addresses specified in the lease, unless the lessee receives notice of a change of ownership or address.

(4) Unless the lease provides otherwise, payments may not be made payable directly to anyone other than the Indian landowners.

(5) Direct payments must continue through the duration of the lease, except that:

(i) The lessee must make all Indian landowners' payments to us if 100 percent of the Indian landowners agree to suspend direct pay and provide us with documentation of their agreement; and

(ii) The lessee must make an individual Indian landowner's payment to us if that individual Indian landowner who dies, is declared non compos mentis, owes a debt resulting in a trust account encumbrance, or his or her whereabouts become unknown.

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

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

(b) When payments are made to us, our preferred method of payment is electronic funds transfer payments. We will also accept:

(1) Money orders;

(2) Personal checks;

(3) Certified checks; or

(4) Cashier's checks.

(c) We will not accept cash or foreign currency.

(d) We will accept third-party checks only from financial institutions or Federal agencies.

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

(a) A lease may provide for the following, subject to the conditions in paragraphs (b) and (c) of this section:

(1) Alternative forms of rental, including, but not limited to in-kind consideration; or

(2) Varying types of compensation at specific stages during the life of the lease.

(b) For tribal land, we will defer to the tribe's determination that the compensation under paragraph (a) of this section is in its best interest, if either:

(1) The lease is for housing for public purposes; or

(2) The tribe submits a signed certification or tribal authorization stating that it has determined the compensation under paragraph (a) of this section to be in its best interest.

(c) For individually owned Indian land, we may approve a lease that provides for compensation under paragraph (a) of this section if we determine that it is in the best interest of the Indian landowners.

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

Upon request of the Indian landowners, we may issue invoices to a lessee in advance of the dates on which payments are due under a residential lease. The lessee's obligation to make these payments in a timely manner will not be excused if invoices are not issued, delivered, or received.

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

(a) For a residential lease of tribal land, unless the lease provides otherwise, no periodic review of the adequacy of rent or rental adjustment is required if:

(1) The tribe states in a tribal certification or authorization that it has determined that not having rental reviews and/or adjustments is in its best interest; or

(2) The lease is for housing for public purposes.

(b) For a residential lease of individually Indian owned land, unless the lease provides otherwise, no periodic review of the adequacy of rent or rental adjustment is required if:

(1) The lease is for housing for public purposes;

(2) The term of the lease is 5 years or less;

(3) The lease provides for automatic rental adjustments; or

(4) We determine it is in the best interest of the Indian landowners not to require a review or automatic adjustment based on circumstances including, but not limited to, the following:

(i) The lease provides for payment of less than fair market rental; or

(ii) The lease provides for most or all rent to be paid during the first 5 years of the lease term or before the date the review would be conducted.

(c) If the conditions in paragraph (a) or (b) of this section are not met, a review of the adequacy of rent must occur at least every fifth year, in the manner specified in the lease. The lease must specify:

(1) When adjustments take effect;

(2) Who can make adjustments;

(3) What the adjustments are based on; and

(4) How to resolve disputes arising from the adjustments.

(d) When a review results in the need for adjustment of rent, the Indian landowners must consent to the adjustment in accordance with § 162.012, unless the lease provides otherwise.

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

(a) The lessee may be required to pay additional fees, taxes, and assessments associated with the use of the land, as determined by entities having jurisdiction, except as provided in § 162.017. The lessee must pay these amounts to the appropriate office.

(b) If the leased premises are within an Indian irrigation project or drainage district, except as otherwise provided in part 171 of this chapter, the lessee must pay all operation and maintenance charges that accrue during the lease term. The lessee must pay these amounts to the appropriate office in charge of the irrigation project or drainage district. We will treat failure to make these payments as a violation of the lease.

Bonding and Insurance

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

We will not require a lessee or assignee to provide a performance bond or alternative form of security for a residential lease document.

§ 162.335 Is insurance required for a residential lease document?

We will not require a lessee or assignee to provide insurance for a residential lease document.

§ 162.336 [Reserved]

§ 162.337 [Reserved]

Approval

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

A lessee or the Indian landowners must submit the following documents to us to obtain BIA approval of a residential lease:

(a) A lease executed by the Indian landowners and the lessee that meets the requirements of this part;

(b) For tribal land, a tribal authorization for the lease and, if applicable, meeting the requirements of §§ 162.320(a), 162.326(b), and 162.328(a), or a separate signed certification meeting the requirements of §§ 162.320(a), 162.326(b), and 162.328(a);

(c) A valuation, if required under § 162.320 or § 162.321;

(d) A statement from the appropriate tribal authority that the proposed use is in conformance with applicable tribal law, if required by the tribe;

(e) Reports, surveys, and site assessments as needed to facilitate compliance with applicable Federal and tribal environmental and land use requirements, including any documentation prepared under § 162.027(b);

(f) A preliminary site plan identifying the proposed location of residential development, roads, and utilities, if applicable, unless the lease is for housing for public purposes;

(g) A legal description of the land under § 162.317;

(h) If the lease is being approved under 25 U.S.C. 415, information to assist us in our evaluation of the factors in 25 U.S.C. 415(a); and

(i) If the lessee is a corporation, limited liability company, partnership, joint venture, or other legal entity, except a tribal entity, information such as organizational documents, certificates, filing records, and resolutions, that demonstrates that:

(1) The representative has authority to execute a lease;

(2) The lease will be enforceable against the lessee; and

(3) The legal entity is in good standing and authorized to conduct business in the jurisdiction where the land is located.

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

Upon request of the Indian landowners, we will review the proposed residential lease after negotiation by the parties, before or during preparation of the NEPA review documentation and any valuation. Within 10 days of receiving the proposed lease, we will provide an acknowledgement of the terms of the lease and identify any provisions that, based on this acknowledgment review, would justify disapproval of the lease, pending results of the NEPA review and any valuation.

§ 162.340 What is the approval process for a residential lease?

(a) Before we approve a residential lease, we must determine that the lease is in the best interest of the Indian landowners. In making that determination, we will:

(1) Review the lease and supporting documents;

(2) Ensure compliance with applicable laws and ordinances;

(3) If the lease is being approved under 25 U.S.C. 415, assure ourselves that adequate consideration has been given to the factors in 25 U.S.C. 415(a); and

(4) Require any lease modifications or mitigation measures necessary to satisfy any requirements including any other Federal or tribal land use requirements.

(b) Upon receiving a residential lease package, we will promptly notify the parties whether the package is or is not complete. A complete package includes all the information and supporting documents required under this subpart, including but not limited to, NEPA review documentation and valuation documentation, where applicable.

(1) If the residential lease package is not complete, our letter will identify the missing information or documents required for a complete package. If we do not respond to the submission of a residential lease package, the parties may take action under § 162.363.

(2) If the residential lease package is complete, we will notify the parties of the date of receipt. Within 30 days of the receipt date, we will approve or disapprove the lease or return the package for revision.

(c) If we do not meet the deadlines in this section, then the parties may take action under § 162.363.

(d) We will provide any lease approval or disapproval and the basis for the determination, along with notification of any appeal rights under part 2 of this chapter, in writing to the parties to the lease.

(e) Any residential lease issued under the authority of the Native American Housing Assistance and Self-Determination Act, 25 U.S.C 4211(a), whether on tribal land or on individually owned Indian land, must be approved by us and by the affected tribe.

(f) We will provide approved residential leases on tribal land to the lessee and provide a copy to the tribe. We will provide approved residential leases on individually owned Indian land to the lessee, and make copies available to the Indian landowners upon written request.

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

(a) We will approve a residential lease unless:

(1) The required consents have not been obtained from the parties to the lease;

(2) The requirements of this subpart have not been met; or

(3) We find a compelling reason to withhold our approval in order to protect the best interests of the Indian landowners.

(b) We will defer, to the maximum extent possible, to the Indian landowners' determination that the residential lease is in their best interest.

(c) We may not unreasonably withhold approval of a lease.

§ 162.342 When will a residential lease be effective?

(a) A residential lease will be effective on the date that we approve the lease, even if an appeal is filed under part 2 of this chapter.

(b) The lease may specify a date on which the obligations between the parties to a residential lease are triggered. Such date may be before or after the approval date under paragraph (a) of this section.

§ 162.343 Must a residential lease document be recorded?

(a) Any residential lease, amendment, assignment, or leasehold mortgage must be recorded in the LTRO with jurisdiction over the leased land. A residential sublease need not be recorded.

(1) We will record the lease or other document immediately following our approval.

(2) When our approval of an assignment is not required, the parties must record the assignment in the LTRO with jurisdiction over the leased land.

(b) The tribe must record lease documents for the following types of leases in the LTRO with jurisdiction over the leased lands, even though BIA approval is not required:

(1) Leases of tribal land that a corporate entity leases to a third party under 25 U.S.C. 477; and

(2) Leases of tribal land under a special act of Congress authorizing leases without our approval under certain conditions.

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

BIA will not require an appeal bond for an appeal of a decision on a residential lease document.

Amendments

§ 162.345 May the parties amend a residential lease?

The parties may amend a residential lease by obtaining:

(a) The lessee's signature;

(b) The Indian landowners' consent under the requirements in § 162.346; and

(c) BIA approval of the amendment under §§ 162.347 and 162.348.

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

(a) Unless the lease provides otherwise, the lessee must notify all Indian landowners of the proposed amendment.

(b) The Indian landowners, or their representatives under § 162.013, must consent to an amendment of a residential lease in the same percentages and manner as a new residential lease under § 162.012, unless the lease:

(1) Provides that individual Indian landowners are deemed to have consented if they do not object in writing to the amendment within a specified period of time following Indian landowners' receipt of the amendment and the lease meets the requirements of paragraph (c) of this section;

(2) Authorizes one or more representatives to consent to an amendment on behalf of all Indian landowners; or

(3) Designates us as the Indian landowners' representative for the purposes of consent to an amendment.

(c) If the lease provides for deemed consent under paragraph (b)(1) of this section, it must require the parties to submit to us:

(1) A copy of the executed amendment or other documentation of any Indian landowners' actual consent;

(2) Proof of mailing of the amendment to any Indian landowners who are deemed to have consented; and

(3) Any other pertinent information for review.

(d) Unless specifically authorized in the lease, a written power of attorney, or a court document, Indian landowners may not be deemed to have consented to, and an Indian landowner's designated representative may not negotiate or consent to, an amendment that would:

(1) Reduce the payment obligations to the Indian landowners;

(2) Increase or decrease the lease area; or

(3) Terminate or change the term of the lease.

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

(a) When we receive an amendment that meets the requirements of this subpart, we will notify the parties of the date we receive it. We have 30 days from receipt of the executed amendment, proof of required consents, and required documentation to approve or disapprove the amendment. Our determination whether to approve the amendment will be in writing and will state the basis for our approval or disapproval.

(b) If we do not send a determination within 30 days from receipt of the required documents, the amendment is deemed approved to the extent consistent with Federal law. Unless the lease provides otherwise, provisions of the amendment that are inconsistent with Federal law will be severed and unenforceable; all other provisions of the amendment will remain in force.

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

(a) We may disapprove a residential lease amendment only if at least one of the following is true:

(1) The Indian landowners have not consented and their consent is required;

(2) The lessee's mortgagees have not consented;

(3) The lessee is in violation of the lease;

(4) The requirements of this subpart have not been met; or

(5) We find a compelling reason to withhold our approval in order to protect the best interests of the Indian landowners.

(b) We will defer, to the maximum extent possible, to the Indian landowners' determination that the amendment is in their best interest.

(c) We may not unreasonably withhold approval of an amendment.

Assignments

§ 162.349 May a lessee assign a residential lease?

(a) A lessee may assign a residential lease by meeting the consent requirements in § 162.350 and obtaining our approval of the assignment under §§ 162.351 and 162.352 or by meeting the conditions in paragraph (b) of this section.

(b) The lessee may assign the lease without our approval or meeting consent requirements if:

(1) The lease is for housing for public purposes, or the assignee is a leasehold mortgagee or its designee, acquiring the lease either through foreclosure or by conveyance;

(2) The assignee agrees in writing to assume all of the obligations and conditions of the lease; and

(3) The assignee agrees in writing that any transfer of the lease will be in accordance with applicable law under § 162.014.

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

(a) Unless the lease provides otherwise, the lessee must notify all Indian landowners of the proposed assignment.

(b) The Indian landowners, or their representatives under § 162.013, must consent to an assignment of a residential lease in the same percentages and manner as a new residential lease under § 162.012, unless the lease:

(1) Provides for assignments without further consent of the Indian landowners or with consent in specified percentages and manner;

(2) Provides that individual Indian landowners are deemed to have consented where they do not object in writing to the assignment within a specified period of time following the landowners' receipt of the assignment and the lease meets the requirements of paragraph (c) of this section;

(3) Authorizes one or more of the Indian landowners to consent on behalf of all Indian landowners; or

(4) Designates us as the Indian landowners' representative for the purposes of consenting to an assignment.

(c) If the lease provides for deemed consent under paragraph (b)(2) of this section, it must require the parties to submit to us:

(1) A copy of the executed assignment or other documentation of any Indian landowners' actual consent;

(2) Proof of mailing of the assignment to any Indian landowners who are deemed to have consented; and

(3) Any other pertinent information for us to review.

(d) The lessee must obtain the consent of the holders of any mortgages.

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

(a) When we receive an assignment that meets the requirements of this subpart, we will notify the parties of the date we receive it. If our approval is required, we have 30 days from receipt of the executed assignment, proof of required consents, and required documentation to approve or disapprove the assignment. Our determination whether to approve the assignment will be in writing and will state the basis for our approval or disapproval.

(b) If we do not meet the deadline in this section, the lessee or Indian landowners may take appropriate action under § 162.363.

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

(a) We may disapprove an assignment of a residential lease only if at least one of the following is true:

(1) The Indian landowners have not consented, and their consent is required;

(2) The lessee's mortgagees have not consented;

(3) The lessee is in violation of the lease;

(4) The assignee does not agree to be bound by the terms of the lease;

(5) The requirements of this subpart have not been met; or

(6) We find a compelling reason to withhold our approval in order to protect the best interests of the Indian landowners.

(b) In making the finding required by paragraph (a)(6) of this section, we may consider whether the value of any part of the leased premises not covered by the assignment would be adversely affected.

(c) We will defer, to the maximum extent possible, to the Indian landowners' determination that the assignment is in their best interest.

(d) We may not unreasonably withhold approval of an assignment.

Subleases

§ 162.353 May a lessee sublease a residential lease?

(a) A lessee may sublease a residential lease by meeting the consent requirements in § 162.354 and obtaining our approval of the sublease under §§ 162.355 and 162.356, or by meeting the conditions in paragraph (b) of this section.

(b) The lessee may sublease without meeting consent requirements or obtaining BIA approval of the sublease, if:

(1) The lease provides for subleasing without meeting consent requirements or obtaining BIA approval; and

(2) The sublease does not relieve the lessee/sublessor of any liability.

§ 162.354 What are the consent requirements for a sublease of a residential lease?

(a) Unless the lease provides otherwise, the lessee must notify all Indian landowners of the proposed sublease.

(b) The Indian landowners must consent to a sublease of a residential lease in the same percentages and manner as a new residential lease under § 162.012, unless the lease:

(1) Provides that individual Indian landowners are deemed to have consented where they do not object in writing to the sublease within a specified period of time following the landowners' receipt of the sublease and the lease meets the requirements of paragraph (c) of this section;

(2) Authorizes one or more of the Indian landowners to consent on behalf of all Indian landowners; or

(3) Designates us as the Indian landowners' representative for the purposes of consenting to a sublease.

(c) If the lease provides for deemed consent under paragraph (b)(1) of this section, it must require the parties to submit to us:

(1) A copy of the executed sublease or other documentation of any landowner's actual consent;

(2) Proof of mailing of the sublease to any Indian landowners who are deemed to have consented; and

(3) Any other pertinent information for us to review.

(d) The lessee must obtain the consent of any mortgagees.

§ 162.355 What is the approval process for a sublease of a residential lease?

(a) When we receive a sublease that meets the requirements of this subpart, we will notify the parties of the date we receive it. If our approval is required, we have 30 days from receipt of the executed sublease, proof of required consents, and required documentation to approve or disapprove the sublease.

(b) If we do not send a determination within 30 days from receipt of required documents, the sublease is deemed approved to the extent consistent with Federal law. Unless the lease provides otherwise, provisions of the sublease that are inconsistent with Federal law will be severed and unenforceable; all other provisions of the sublease will remain in force.

§ 162.356 How will BIA decide whether to approve a sublease of a residential lease?

(a) We may disapprove a sublease of a residential lease only if at least one of the following is true:

(1) The Indian landowners have not consented, and their consent is required;

(2) The lessee's mortgagees have not consented;

(3) The lessee is in violation of the lease;

(4) The lessee will not remain liable under the lease;

(5) The requirements of this subpart have not been met; or

(6) We find a compelling reason to withhold our approval in order to protect the best interests of the Indian landowners.

(b) In making the finding required by paragraph (a)(6) of this section, we may consider whether the value of any part of the leased premises not covered by the sublease would be adversely affected.

(c) We will defer, to the maximum extent possible, to the Indian landowners' determination that the sublease is in their best interest.

(d) We may not unreasonably withhold approval of a sublease.

Leasehold Mortgages

§ 162.357 May a lessee mortgage a residential lease?

(a) A lessee may mortgage a residential lease by meeting the consent requirements in § 162.358 and obtaining BIA approval of the leasehold mortgage under in §§ 162.359 and 162.360.

(b) Refer to § 162.349(b) for information on what happens if a sale or foreclosure under an approved mortgage of the leasehold interest occurs.

§ 162.358 What are the consent requirements for a leasehold mortgage of a residential lease?

(a) Unless the lease provides otherwise, the lessee must notify all Indian landowners of the proposed leasehold mortgage.

(b) The Indian landowners, or their representatives under § 162.013, must consent to a leasehold mortgage of a residential lease in the same percentages and manner as a new residential lease under § 162.012, unless the lease:

(1) States that landowner consent is not required for a leasehold mortgage and identifies what law would apply in case of foreclosure;

(2) Provides that individual Indian landowners are deemed to have consented where they do not object in writing to the leasehold mortgage within a specified period of time following the landowners' receipt of the leasehold mortgage and the lease meets the requirements of paragraph (c) of this section;

(3) Authorizes one or more representatives to consent to a leasehold mortgage on behalf of all Indian landowners; or

(4) Designates us as the Indian landowners' representative for the purposes of consenting to a leasehold mortgage.

(c) If the lease provides for deemed consent under paragraph (b)(2) of this section, it must require the parties to submit to us:

(1) A copy of the executed leasehold mortgage or other documentation of any Indian landowners' actual consent;

(2) Proof of mailing of the leasehold mortgage to any Indian landowners who are deemed to have consented; and

(3) Any other pertinent information for us to review.

§ 162.359 What is the approval process for a leasehold mortgage of a residential lease?

(a) When we receive leasehold mortgage that meets the requirements of this subpart, we will notify the parties of the date we receive it. We have 20 days from receipt of the executed leasehold mortgage, proof of required consents, and required documentation to approve or disapprove the leasehold mortgage. Our determination whether to approve the leasehold mortgage will be in writing and will state the basis for our approval or disapproval.

(b) If we do not meet the deadline in this section, the lessee may take appropriate action under § 162.363.

§ 162.360 How will BIA decide whether to approve a leasehold mortgage of a residential lease?

(a) We may disapprove a leasehold mortgage of a residential lease only if at least one of the following is true:

(1) The Indian landowners have not consented, and their consent is required;

(2) The requirements of this subpart have not been met; or

(3) We find a compelling reason to withhold our approval in order to protect the best interests of the Indian landowners.

(b) In making the finding required by paragraph (a)(3) of this section, we may consider whether:

(1) The leasehold mortgage proceeds would be used for purposes unrelated to the leased premises; and

(2) The leasehold mortgage is limited to the leasehold.

(c) We will defer, to the maximum extent possible, to the Indian landowners' determination that the leasehold mortgage is in their best interest.

(d) We may not unreasonably withhold approval of a leasehold mortgage.

Effectiveness, Compliance, and Enforcement

§ 162.361 When will an amendment, assignment, sublease, or leasehold mortgage of a residential lease be effective?

(a) An amendment, assignment, sublease, or leasehold mortgage of a residential lease will be effective when approved, even if an appeal is filed under part 2 of this chapter, except:

(1) If the amendment or sublease was deemed approved under § 162.347(b) or § 162.355(b), the amendment or sublease becomes effective 45 days from the date the parties mailed or delivered the document to us for our review; and

(2) An assignment that does not require our approval under § 162.349(b) or a sublease that does not require our approval under § 162.353(b) becomes effective on the effective date specified in the assignment or sublease. If the assignment or sublease does not specify the effective date, it becomes effective upon execution by the parties.

(b) We will provide copies of approved documents to the party requesting approval, to the tribe for tribal land, and upon request, to other parties to the lease document.

§ 162.362 What happens if BIA disapproves an amendment, assignment, sublease, or leasehold mortgage?

If we disapprove an amendment, assignment, sublease, or leasehold mortgage of a residential lease, we will notify the parties immediately and advise the landowners of their right to appeal the decision under part 2 of this chapter.

§ 162.363 What happens if BIA does not meet a deadline for issuing a decision on a lease document?

(a) If a Superintendent does not meet a deadline for issuing a decision on a lease, assignment, or leasehold mortgage, the parties may file a written notice to compel action with the appropriate Regional Director.

(b) The Regional Director has 15 days from receiving the notice to:

(1) Issue a decision; or

(2) Order the Superintendent to issue a decision within the time set out in the order.

(c) The parties may file a written notice to compel action with the BIA Director if:

(1) The Regional Director does not meet the deadline in paragraph (b) of this section;

(2) The Superintendent does not issue a decision within the time set by the Regional Director under paragraph (b)(2) of this section; or

(3) The initial decision on the lease, assignment, or leasehold mortgage is with the Regional Director, and he or she does not meet the deadline for such decision.

(d) The BIA Director has 15 days from receiving the notice to:

(1) Issue a decision; or

(2) Order the Regional Director or Superintendent to issue a decision within the time set out in the order.

(e) If the Regional Director or Superintendent does not issue a decision within the time set out in the order under paragraph (d)(2) of this section, then the BIA Director must issue a decision within 15 days from the expiration of the time set out in the order.

(f) The parties may file an appeal from our inaction to the Interior Board of Indian Appeals if the Director does not meet the deadline in paragraph (d) or (e) of this section.

(g) The provisions of 25 CFR 2.8 do not apply to the inaction of BIA officials with respect to a decision on a lease, amendment, assignment, sublease, or leasehold mortgage under this subpart.

§ 162.364 May BIA investigate compliance with a residential lease?

(a) We may enter the leased premises at any reasonable time, upon reasonable notice, and consistent with any notice requirements under applicable tribal law and applicable lease documents, to protect the interests of the Indian landowners and ensure that the lessee is in compliance with the requirements of the lease.

(b) If an Indian landowner notifies us that a specific lease violation has occurred, we will promptly initiate an appropriate investigation.

§ 162.365 May a residential lease provide for negotiated remedies if there is a violation?

(a) A residential lease of tribal land may provide either or both parties with negotiated remedies in the event of a lease violation, including, but not limited to, the power to terminate the lease. If the lease provides one or both parties with the power to terminate the lease:

(1) BIA approval of the termination is not required;

(2) The termination is effective without BIA cancellation; and

(3) The Indian landowners must notify us of the termination so that we may record it in the 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 non-payment from the Indian landowners, if the lease provides for payment directly to the Indian landowners.

(2) We will send a copy of the notice of violation to the tribe for tribal land, or provide constructive notice to Indian landowners for individually owned Indian land.

(3) The notice of violation will require the lessee to provide adequate proof of payment.

(d) The lessee will continue to be responsible for the obligations in the lease until the lease expires or is terminated or cancelled.

§ 162.367 What will BIA do if the lessee does not cure a violation of a residential lease on time?

(a) If the lessee does not cure a violation of a residential lease within the required time period, or provide adequate proof of payment as required in the notice of violation, we will consult with the tribe for tribal land or, where feasible, with Indian landowners for individually owned Indian land, and determine whether:

(1) We should cancel the lease;

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

(3) We should invoke other remedies available under the lease or applicable law, including collection on any available performance bond or, for failure to pay rent, referral of the debt to the Department of the Treasury for collection; or

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

(b) Following consultation with the tribe for tribal land or, where feasible, with Indian landowners for individually owned Indian land, we may take action to recover unpaid rent and any associated late payment charges.

(1) We do not have to cancel the lease or give any further notice to the lessee before taking action to recover unpaid rent.

(2) We may still take action to recover any unpaid rent if we cancel the lease.

(c) If we decide to cancel the lease, we will send the lessee and any mortgagee a cancellation letter by certified mail, return receipt requested within 5 business days of our decision. We will send a copy of the cancellation letter to the tribe for tribal land, and will provide Indian landowners for individually owned Indian land with actual or constructive notice of the cancellation. The cancellation letter will:

(1) Explain the grounds for cancellation;

(2) If applicable, notify the lessee of the amount of any unpaid rent or late payment charges due under the lease;

(3) Notify the lessee of the lessee's right to appeal under part 2 of this chapter;

(4) Order the lessee to vacate the property within 31 days of the date of receipt of the cancellation letter, if an appeal is not filed by that time; and

(5) Order the lessee to take any other action BIA deems necessary to protect the Indian landowners.

(d) We may invoke any other remedies available to us under the lease, including collecting on any available performance bond, and the Indian landowners may pursue any available remedies under tribal law.

(e) We will ensure that any action we take is consistent with 25 U.S.C. 4137, as applicable.

§ 162.368 Will late payment charges or special fees apply to delinquent payments due under a residential lease?

(a) Late payment charges will apply as specified in the lease. The failure to pay these amounts will be treated as a lease violation.

(b) We may assess the following special fees to cover administrative costs incurred by the United States in the collection of the debt, if rent is not paid in the time and manner required, in addition to late payment charges that must be paid to the Indian landowners under the lease:

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The lessee will pay . . .	For . . .
(1) $50.00	Any dishonored check.
(2) $15.00	Processing of each notice or demand letter.
(3) 18 percent of balance due	Treasury processing following referral for collection of delinquent debt.

§ 162.369 How will payment rights relating to a residential lease be allocated?

The residential lease may allocate rights to payment for insurance proceeds, trespass damages, condemnation awards, settlement funds, and other payments between the Indian landowners and the lessee. If not specified in the lease, insurance policy, order, award, judgment, or other document, the Indian landowners will be entitled to receive these payments.

§ 162.370 When will a cancellation of a residential lease be effective?

(a) A cancellation involving a residential lease will not be effective until 31 days after the lessee receives a cancellation letter from us, or 41 days from the date we mailed the letter, whichever is earlier.

(b) The cancellation decision will not be effective if an appeal is filed unless the cancellation is made immediately effective under part 2 of this chapter. While a cancellation decision is ineffective, the lessee must continue to pay rent and comply with the other terms of the lease.

§ 162.371 What will BIA do if a lessee remains in possession after a residential lease expires or is terminated or cancelled?

If a lessee remains in possession after the expiration, termination, or cancellation of a residential lease, we may treat the unauthorized possession as a trespass under applicable law in consultation with the Indian landowners. Unless the Indian landowners of the applicable percentage of interests under § 162.012 have notified us in writing that they are engaged in good faith negotiations with the holdover lessee to obtain a new lease, we may take action to recover possession on behalf of the Indian landowners, and pursue any additional remedies available under applicable law, such as a forcible entry and detainer action.

§ 162.372 Will BIA appeal bond regulations apply to cancellation decisions involving residential leases?

(a) Except as provided in paragraph (b) of this section, the appeal bond provisions in part 2 of this chapter will apply to appeals from lease cancellation decisions.

(b) The lessee may not appeal the appeal bond decision. The lessee may, however, request that the official to whom the appeal is made reconsider the appeal bond decision, based on extraordinary circumstances. Any reconsideration decision is final for the Department.

§ 162.373 When will BIA issue a decision on an appeal from a residential leasing decision?

BIA will issue a decision on an appeal from a leasing decision within 30 days of receipt of all pleadings.

§ 162.374 What happens if the lessee abandons the leased premises?

If a lessee abandons the leased premises, we will treat the abandonment as a violation of the lease. The lease may specify a period of non-use after which the lease premises will be considered abandoned.

Subpart D—Business Leases

Business Leasing General Provisions

§ 162.401 What types of leases does this subpart cover?

(a) This subpart covers both ground leases (undeveloped land) and leases of developed land (together with the permanent improvements thereon) on Indian land that are not covered in another subpart of this part, including:

(1) Leases for residential purposes that are not covered in subpart C;

(2) Leases for business purposes that are not covered in subpart E;

(3) Leases for religious, educational, recreational, cultural, or other public purposes; and

(4) Commercial or industrial leases for retail, office, manufacturing, storage, biomass, waste-to-energy, or other business purposes.

(b) Leases covered by this subpart may authorize the construction of single-purpose or mixed-use projects designed for use by any number of lessees or occupants.

§ 162.402 Is there a model business lease form?

There is no model business lease form because of the need for flexibility in negotiating and writing business leases; however, we may:

(a) Provide other guidance, such as checklists and sample lease provisions, to assist in the lease negotiation process; and

(b) Assist the Indian landowners, upon their request, in developing appropriate lease provisions or in using tribal lease forms that conform to the requirements of this part.

Lease Requirements

§ 162.411 How long may the term of a business lease run?

(a) A business lease must provide for a definite term, state if there is an option to renew, and if so, provide for a definite term for the renewal period. The maximum term of a lease approved under 25 U.S.C. 415(a) may not exceed 50 years (consisting of an initial term not to exceed 25 years and one renewal not to exceed 25 years), unless a Federal statute provides for a longer maximum term (e.g., 25 U.S.C. 415(a) allows for a maximum term of 99 years for certain tribes), a different initial term, renewal term, or number of renewals.

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

(1) Purpose of the lease;

(2) Type of financing; and

(3) Level of investment.

(c) The lease may not be extended by holdover.

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

(a) If the lease provides for an option to renew, the lease must specify:

(1) The time and manner in which the option must be exercised or is automatically effective;

(2) That confirmation of the renewal will be submitted to us, unless the lease provides for automatic renewal;

(3) Whether Indian landowner consent to the renewal is required;

(4) That the lessee must provide notice of the renewal to the Indian landowners and any sureties and mortgagees;

(5) The additional consideration, if any, that will be due upon the exercise of the option to renew or the start of the renewal term; and

(6) Any other conditions for renewal (e.g., that the lessee not be in violation of the lease at the time of renewal).

(b) We will record any renewal of a lease in the LTRO.

§ 162.413 Are there mandatory provisions that a business lease must contain?

(a) All business leases must identify:

(1) The tract or parcel of land being leased;
(2) The purpose of the lease and authorized uses of the leased premises;
(3) The parties to the lease;
(4) The term of the lease;
(5) The ownership of permanent improvements and the responsibility for constructing, operating, maintaining, and managing permanent improvements under § 162.415;
(6) Payment requirements and late payment charges, including interest;
(7) Due diligence requirements under § 162.417 (unless the lease is for religious, educational, recreational, cultural, or other public purposes);
(8) Insurance requirements under § 162.437; and
(9) Bonding requirements under § 162.434. If a performance bond is required, the lease must state that the lessee must obtain the consent of the surety for any legal instrument that directly affects their obligations and liabilities.
(b) Where a representative executes a lease on behalf of an Indian landowner or lessee, the lease must identify the landowner or lessee being represented and the authority under which the action is taken.
(c) All business leases must include the following provisions:
(1) The obligations of the lessee and its sureties to the Indian landowners are also enforceable by the United States, so long as the land remains in trust or restricted status;
(2) There must not be any unlawful conduct, creation of a nuisance, illegal activity, or negligent use or waste of the leased premises;
(3) The lessee must comply with all applicable laws, ordinances, rules, regulations, and other legal requirements under § 162.014;
(4) If historic properties, archeological resources, human remains, or other cultural items not previously reported are encountered during the course of any activity associated with this lease, all activity in the immediate vicinity of the properties, resources, remains, or items will cease and the lessee will contact BIA and the tribe with jurisdiction over the land to determine how to proceed and appropriate disposition;
(5) BIA has the right, at any reasonable time during the term of the lease and upon reasonable notice, in accordance with § 162.464, to enter the leased premises for inspection and to ensure compliance; and
(6) BIA may, at its discretion, treat as a lease violation any failure by the lessee to cooperate with a BIA request to make appropriate records, reports, or information available for BIA inspection and duplication.
(d) Unless the lessee would be prohibited by law from doing so, the lease must also contain the following provisions:
(1) The lessee holds the United States and the Indian landowners harmless from any loss, liability, or damages resulting from the lessee's use or occupation of the leased premises; and
(2) The lessee indemnifies the United States and the Indian landowners against all liabilities or costs relating to the use, handling, treatment, removal, storage, transportation, or disposal of hazardous materials, or the release or discharge of any hazardous material from the leased premises that occurs during the lease term, regardless of fault, with the exception that the lessee is not required to indemnify the Indian landowners for liability or cost arising from the Indian landowners' negligence or willful misconduct.
(e) We may treat any provision of a lease document that violates Federal law as a violation of the lease.

§ 162.414 May permanent improvements be made under a business lease?

The lessee may construct permanent improvements under a business lease if the business lease specifies, or provides for the development of:
(a) A plan that describes the type and location of any permanent improvements to be constructed by the lessee; and
(b) A general schedule for construction of the permanent improvements, including dates for commencement and completion of construction.

§ 162.415 How must a business lease address ownership of permanent improvements?

(a) A business lease must specify who will own any permanent improvements the lessee constructs during the lease term and may specify under what conditions, if any, permanent improvements the lessee constructs may be conveyed to the Indian landowners during the lease term. In addition, the lease must indicate whether each specific permanent improvement the lessee constructs will:
(1) Remain on the leased premises, upon the expiration, cancellation, or termination of the lease, in a condition satisfactory to the Indian landowners, and become the property of the Indian landowners;
(2) Be removed within a time period specified in the lease, at the lessee's expense, with the leased premises to be restored as closely as possible to their condition before construction of the permanent improvements; or
(3) Be disposed of by other specified means.
(b) A lease that requires the lessee to remove the permanent improvements must also provide the Indian landowners with an option to take possession of and title to the permanent improvements if the improvements are not removed within the specified time period.

§ 162.416 How will BIA enforce removal requirements in a business lease?

(a) We may take appropriate enforcement action to ensure removal of the permanent improvements and restoration of the premises at the lessee's expense:
(1) In consultation with the tribe, for tribal land or, where feasible, with Indian landowners for individually owned Indian land; and
(2) Before or after expiration, termination, or cancellation of the lease.
(b) We may collect and hold the performance bond or alternative form of security until removal and restoration are completed.

§ 162.417 What requirements for due diligence must a business lease include?

(a) If permanent improvements are to be constructed, the business lease must include due diligence requirements that require the lessee to complete construction of any permanent improvements within the schedule specified in the lease or general schedule of construction, and a process for changing the schedule by mutual consent of the parties. If construction does not occur, or is not expected to be completed, within the time period specified in the lease, the lessee must provide the Indian landowners and BIA with an explanation of good cause as to the nature of any delay, the anticipated date of construction of facilities, and evidence of progress toward commencement of construction.
(b) Failure of the lessee to comply with the due diligence requirements of the lease is a violation of the lease and may lead to cancellation of the lease under § 162.467.
(c) BIA may waive the requirements in this section if such waiver is in the best interest of the Indian landowners.
(d) The requirements of this section do not apply to leases for religious, educational, recreational, cultural, or other public purposes.

§ 162.418 How must a business lease describe the land?

(a) A business lease must describe the leased premises by reference to an official or certified survey, if possible. If

the land cannot be so described, the lease must include one or more of the following:

(1) A legal description;

(2) A survey-grade global positioning system description; or

(3) Another description prepared by a registered land surveyor that is sufficient to identify the leased premises.

(b) If the tract is fractionated we will identify the undivided trust or restricted interests in the leased premises.

§ 162.419 May a business lease allow compatible uses?

A business lease may provide for the Indian landowners to use, or authorize others to use, the leased premises for other uses compatible with the purpose of the business lease and consistent with the terms of the business lease. Any such use or authorization by the Indian landowners will not reduce or offset the monetary compensation for the business lease.

Monetary Compensation Requirements

§ 162.420 How much monetary compensation must be paid under a business lease of tribal land?

(a) A business lease of tribal land may allow for any payment amount negotiated by the tribe, and we will defer to the tribe and not require a valuation if the tribe submits a tribal authorization expressly stating that it:

(1) Has negotiated compensation satisfactory to the tribe;

(2) Waives valuation; and

(3) Has determined that accepting such negotiated compensation and waiving valuation is in its best interest.

(b) The tribe may request, in writing, that we determine fair market rental, in which case we will use a valuation in accordance with § 162.422. After providing the tribe with the fair market rental, we will defer to a tribe's decision to allow for any payment amount negotiated by the tribe.

(c) If the conditions in paragraph (a) or (b) of this section are not met, we will require that the lease provide for fair market rental based on a valuation in accordance with § 162.422.

§ 162.421 How much monetary compensation must be paid under a business lease of individually owned Indian land?

(a) A business lease of individually owned Indian land must require payment of not less than fair market rental before any adjustments, based on a fixed amount, a percentage of the projected income, or some other method, unless paragraphs (b) or (c) of this section permit a lesser amount. The lease must establish how the fixed amount, percentage, or combination will be calculated and the frequency at which the payments will be made.

(b) We may approve a lease of individually owned Indian land that provides for the payment of nominal compensation, or less than a fair market rental, if:

(1) The Indian landowners execute a written waiver of the right to receive fair market rental; and

(2) We determine it is in the Indian landowners' best interest, based on factors including, but not limited to:

(i) The lessee is a member of the immediate family, as defined in § 162.003, of an individual Indian landowner;

(ii) The lessee is a co-owner in the leased tract;

(iii) A special relationship or circumstances exist that we believe warrant approval of the lease;

(iv) The lease is for religious, educational, recreational, cultural, or other public purposes;

(v) We have waived the requirement for a valuation under paragraph (e) of this section.

(c) We may approve a lease that provides for payment of less than a fair market rental during the pre-development or construction periods, if we determine it is in the Indian landowners' best interest. The lease must specify the amount of the compensation and the applicable periods.

(d) We will require a valuation in accordance with § 162.422, unless:

(1) 100 percent of the Indian landowners submit to us a written request to waive the valuation requirement; or

(2) We waive the requirement under paragraph (e) of this section.

(e) If the owners of the applicable percentage of interests under § 162.012 of this part execute a business lease on behalf of all of the Indian landowners of a fractionated tract, the lease must provide that the non-consenting Indian landowners, and those on whose behalf we have consented, receive a fair market rental, as determined by a valuation, unless we waive the requirement because the tribe or lessee will construct infrastructure improvements on, or serving, the leased premises, and we determine it is in the best interest of all the landowners.

§ 162.422 How will BIA determine fair market rental for a business lease?

(a) We will use a market analysis, appraisal, or other appropriate valuation method to determine the fair market rental before we approve a business lease of individually owned Indian land or, at the request of the tribe, for tribal land.

(b) We will either:

(1) Prepare, or have prepared, a market analysis, appraisal, or other appropriate valuation method; or

(2) Use an approved market analysis, appraisal, or other appropriate valuation method from the Indian landowners or lessee.

(c) We will use or approve use of a market analysis, appraisal, or other appropriate valuation method only if it:

(1) Has been prepared in accordance with USPAP or a valuation method developed by the Secretary under 25 U.S.C. 2214; and

(2) Complies with Departmental policies regarding appraisals, including third-party appraisals.

(d) Indian landowners may use competitive bidding as a valuation method.

§ 162.423 When are monetary compensation payments due under a business lease?

(a) A business lease must specify the dates on which all payments are due.

(b) Unless the lease provides otherwise, payments may not be made or accepted more than one year in advance of the due date.

(c) Payments are due at the time specified in the lease, regardless of whether the lessee receives an advance billing or other notice that a payment is due.

§ 162.424 Must a business lease specify who receives monetary compensation payments?

(a) A business lease must specify whether the lessee will make payments directly to the Indian landowners (direct pay) or to us on their behalf.

(b) The lessee may make payments directly to the Indian landowners if:

(1) The Indian landowners' trust accounts are unencumbered;

(2) There are 10 or fewer beneficial owners; and

(3) One hundred percent of the beneficial owners (including those on whose behalf we have consented) agree to receive payment directly from the lessee at the start of the lease.

(c) If the lease provides that the lessee will directly pay the Indian landowners, then:

(1) The lease must include provisions for proof of payment upon our request.

(2) When we consent on behalf of an Indian landowner, the lessee must make payment to us on behalf of that landowner.

(3) The lessee must send direct payments to the parties and addresses

specified in the lease, unless the lessee receives notice of a change of ownership or address.

(4) Unless the lease provides otherwise, compensation payments may not be made payable directly to anyone other than the Indian landowners.

(5) Direct payments must continue through the duration of the lease, except that:

(i) The lessee must make all Indian landowners' payments to us if 100 percent of the Indian landowners agree to suspend direct pay and provide us with documentation of their agreement; and

(ii) The lessee must make that individual Indian landowner's payment to us if any individual Indian landowner who dies, is declared non compos mentis, owes a debt resulting in a trust account encumbrance, or his or her whereabouts become unknown.

§ 162.425 What form of monetary compensation payment is acceptable under a business lease?

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

(b) When payments are made to us, our preferred method of payment is electronic funds transfer payments. We will also accept:

(1) Money orders;

(2) Personal checks;

(3) Certified checks; or

(4) Cashier's checks.

(c) We will not accept cash or foreign currency.

(d) We will accept third-party checks only from financial institutions or Federal agencies.

§ 162.426 May the business lease provide for non-monetary or varying types of compensation?

(a) A lease may provide for the following, subject to the conditions in paragraphs (b) and (c) of this section:

(1) Alternative forms of compensation, including but not limited to, in-kind consideration and payments based on percentage of income; or

(2) Varying types of compensation at specific stages during the life of the lease, including but not limited to fixed annual payments during construction, payments based on income during an operational period, and bonuses.

(b) For tribal land, we will defer to the tribe's determination that the compensation under paragraph (a) of this section is in its best interest, if the tribe submits a signed certification or tribal authorization stating that it has determined the compensation under paragraph (a) of this section to be in its best interest.

(c) For individually owned land, we may approve a lease that provides for compensation under paragraph (a) of this section if we determine that it is in the best interest of the Indian landowners.

§ 162.427 Will BIA notify a lessee when a payment is due under a business lease?

Upon request of the Indian landowners, we may issue invoices to a lessee in advance of the dates on which payments are due under a business lease. The lessee's obligation to make these payments in a timely manner will not be excused if invoices are not issued, delivered, or received.

§ 162.428 Must a business lease provide for compensation reviews or adjustments?

(a) For a business lease of tribal land, unless the lease provides otherwise, no periodic review of the adequacy of compensation or adjustment is required if the tribe states in its tribal certification or authorization that it has determined that not having compensation reviews and/or adjustments is in its best interest.

(b) For a business lease of individually owned Indian land, unless the lease provides otherwise, no periodic review of the adequacy of compensation or adjustment is required if:

(1) If the term of the lease is 5 years or less;

(2) The lease provides for automatic adjustments; or

(3) We determine it is in the best interest of the Indian landowners not to require a review or automatic adjustment based on circumstances including, but not limited to, the following:

(i) The lease provides for payment of less than fair market rental;

(ii) The lease is for religious, educational, recreational, cultural, or other public purposes;

(iii) The lease provides for most or all of the compensation to be paid during the first 5 years of the lease term or before the date the review would be conducted; or

(iv) The lease provides for graduated rent or non-monetary or various types of compensation.

(c) If the conditions in paragraph (a) or (b) of this section are not met, a review of the adequacy of compensation must occur at least every fifth year, in the manner specified in the lease. The lease must specify:

(1) When adjustments take effect;

(2) Who can make adjustments;

(3) What the adjustments are based on; and

(4) How to resolve disputes arising from the adjustments.

(d) When a review results in the need for adjustment of compensation, the Indian landowners must consent to the adjustment in accordance with § 162.012, unless the lease provides otherwise.

§ 162.429 What other types of payments are required under a business lease?

(a) The lessee may be required to pay additional fees, taxes, and assessments associated with the use of the land, as determined by entities having jurisdiction, except as provided in § 162.017. The lessee must pay these amounts to the appropriate office.

(b) If the leased premises are within an Indian irrigation project or drainage district, except as otherwise provided in part 171 of this chapter, the lessee must pay all operation and maintenance charges that accrue during the lease term. The lessee must pay these amounts to the appropriate office in charge of the irrigation project or drainage district. We will treat failure to make these payments as a violation of the lease.

(c) Where the property is subject to at least one other lease for another compatible use, the lessees may agree among themselves how to allocate payment of the Indian irrigation operation and maintenance charges.

Bonding and Insurance

§ 162.434 Must a lessee provide a performance bond for a business lease?

The lessee must provide a performance bond or alternative form of security, except as provided in paragraph (f) of this section.

(a) The performance bond or alternative form of security must be in an amount sufficient to secure the contractual obligations including:

(1) No less than:

(i) The highest annual rental specified in the lease, if compensation is paid annually; or

(ii) If the compensation is not paid annually, another amount established by BIA in consultation with the tribe for tribal land or, where feasible, with Indian landowners for individually owned Indian land;

(2) The construction of any required permanent improvements;

(3) The operation and maintenance charges for any land located within an irrigation project; and

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

(b) The performance bond or other security:

(1) Must be deposited with us and made payable only to us, and may not

be modified without our approval, except as provided in paragraph (b)(2) of this section; and

(2) For tribal land, if the lease so provides, may be deposited with the tribe and made payable to the tribe, and may not be modified without the approval of the tribe.

(c) The lease must specify the conditions under which we may adjust security or performance bond requirements to reflect changing conditions, including consultation with the tribal landowner for tribal land before the adjustment.

(d) We may require that the surety provide any supporting documents needed to show that the performance bond or alternative forms of security will be enforceable, and that the surety will be able to perform the guaranteed obligations.

(e) The performance bond or other security instrument must require the surety to provide notice to us at least 60 days before canceling a performance bond or other security. This will allow us to notify the lessee of its obligation to provide a substitute performance bond or other security and require collection of the bond or security before the cancellation date. Failure to provide a substitute performance bond or security is a violation of the lease.

(f) We may waive the requirement for a performance bond or alternative form of security if either:

(1) The lease is for religious, educational, recreational, cultural, or other public purposes; or

(2) The Indian landowners request it and we determine a waiver is in the Indian landowners' best interest.

(g) For tribal land, we will defer, to the maximum extent possible, to the tribe's determination that a waiver of a performance bond or alternative form of security is in its best interest.

§ 162.435 What forms of security are acceptable under a business lease?

(a) We will accept a performance bond only in one of the following forms:

(1) Certificates of deposit issued by a federally insured financial institution authorized to do business in the United States;

(2) Irrevocable letters of credit issued by a federally insured financial institution authorized to do business in the United States;

(3) Negotiable Treasury securities; or

(4) Surety bonds issued by a company approved by the U.S. Department of the Treasury.

(b) We may accept an alternative form of security approved by us that provides adequate protection for the Indian landowners and us, including but not limited to an escrow agreement and assigned savings account.

(c) All forms of performance bonds or alternative security must, if applicable:

(1) Indicate on their face that BIA approval is required for redemption;

(2) Be accompanied by a statement granting full authority to BIA to make an immediate claim upon or sell them if the lessee violates the lease;

(3) Be irrevocable during the term of the performance bond or alternative security; and

(4) Be automatically renewable during the term of the lease.

(d) We will not accept cash bonds.

§ 162.436 What is the release process for a performance bond or alternative form of security under a business lease?

(a) Upon expiration, termination, or cancellation of the lease, the lessee may ask BIA in writing to release the performance bond or alternative form of security.

(b) Upon receiving a request under paragraph (a) of this section, BIA will:

(1) Confirm with the tribe, for tribal land or, where feasible, with the Indian landowners for individually owned Indian land, that the lessee has complied with all lease obligations; and

(2) Release the performance bond or alternative form of security to the lessee, unless we determine that the bond or security must be redeemed to fulfill the contractual obligations.

§ 162.437 Must a lessee provide insurance for a business lease?

Except as provided in paragraph (c) of this section, a lessee must provide insurance necessary to protect the interests of the Indian landowners and in the amount sufficient to protect all insurable permanent improvements on the premises.

(a) The insurance may include property, crop, liability, and casualty insurance, depending on the Indian landowners' interests to be protected.

(b) Both the Indian landowners and the United States must be identified as additional insured parties.

(c) We may waive the requirement for insurance upon the request of the Indian landowner, if a waiver is in the best interest of the Indian landowner, including if the lease is for less than fair market rental or nominal compensation. For tribal land, we will defer, to the maximum extent possible, to the tribe's determination that a waiver is in its best interest.

Approval

§ 162.438 What documents are required for BIA approval of a business lease?

A lessee or the Indian landowners must submit the following documents to us to obtain BIA approval of a business lease:

(a) A lease executed by the Indian landowners and the lessee that meets the requirements of this part;

(b) For tribal land, a tribal authorization for the lease and, if applicable, meeting the requirements of §§ 162.420(a), 162.426(b), and 162.428(a), or a separate signed certification meeting the requirements of §§ 162.426(b) and 162.428(a));

(c) A valuation, if required under § 162.420 or § 162.421;

(d) Proof of insurance, if required under § 162.437;

(e) A performance bond or other security, if required under § 162.434;

(f) Statement from the appropriate tribal authority that the proposed use is in conformance with applicable tribal law, if required by the tribe;

(g) Environmental and archeological reports, surveys, and site assessments as needed to facilitate compliance with applicable Federal and tribal environmental and land use requirements, including any documentation prepared under § 162.027(b);

(h) A restoration and reclamation plan (and any subsequent modifications to the plan), if appropriate;

(i) Where the lessee is not an entity owned and operated by the tribe, documents that demonstrate the technical capability of the lessee or lessee's agent to construct, operate, maintain, and terminate the proposed project and the lessee's ability to successfully design, construct, or obtain the funding for a project similar to the proposed project, if appropriate;

(j) A preliminary plan of development that describes the type and location of any permanent improvements the lessee plans to construct and a schedule showing the tentative commencement and completion dates for those improvements, if appropriate;

(k) A legal description of the land under § 162.418;

(l) If the lease is being approved under 25 U.S.C. 415, information to assist us in our evaluation of the factors in 25 U.S.C. 415(a); and

(m) If the lessee is a corporation, limited liability company, partnership, joint venture, or other legal entity, except a tribal entity, information such as organizational documents, certificates, filing records, and resolutions, that demonstrates that:

(1) The representative has authority to execute a lease;

(2) The lease will be enforceable against the lessee; and

(3) The legal entity is in good standing and authorized to conduct business in

the jurisdiction where the land is located.

§ 162.439 Will BIA review a proposed business lease before or during preparation of the NEPA review documentation?

Upon request of the Indian landowners, we will review the proposed business lease after negotiation by the parties, before or during preparation of the NEPA review documentation and any valuation. Within 60 days of receiving the proposed lease, we will provide an acknowledgement of the terms of the lease and identify any provisions that, based on this acknowledgment review, would justify disapproval of the lease, pending results of the NEPA review and any valuation.

§ 162.440 What is the approval process for a business lease?

(a) Before we approve a business lease, we must determine that the lease is in the best interest of the Indian landowners. In making that determination, we will:

(1) Review the lease and supporting documents;

(2) Identify potential environmental impacts and ensure compliance with all applicable environmental laws, land use laws, and ordinances;

(3) If the lease is being approved under 25 U.S.C. 415, assure ourselves that adequate consideration has been given to the factors in 25 U.S.C. 415(a); and

(4) Require any lease modifications or mitigation measures necessary to satisfy any requirements including any other Federal or tribal land use requirements.

(b) Upon receiving a business lease package, we will promptly notify the parties whether the package is or is not complete. A complete package includes all the information and supporting documents required under this subpart, including but not limited to, NEPA review documentation and valuation documentation, where applicable.

(1) If the business lease package is not complete, our letter will identify the missing information or documents required for a complete package. If we do not respond to the submission of a business lease package, the parties may take action under § 162.463.

(2) If the business lease package is complete, we will notify the parties of the date of our receipt. Within 60 days of the receipt date, we will approve or disapprove the lease, return the package for revision, or inform the parties in writing that we need additional review time. If we inform the parties in writing that we need additional time, then:

(i) Our letter informing the parties that we need additional review time must identify our initial concerns and invite the parties to respond within 15 days of the date of the letter; and

(ii) We have 30 days from sending the letter informing the parties that we need additional time to approve or disapprove the lease.

(c) If we do not meet the deadlines in this section, then the parties may take appropriate action under § 162.463.

(d) We will provide any lease approval or disapproval and the basis for the determination, along with notification of any appeal rights under part 2 of this chapter, in writing to the parties to the lease.

(e) We will provide approved business leases on tribal land to the lessee and provide a copy to the tribe. We will provide approved business leases on individually owned Indian land to the lessee, and make copies available to the Indian landowners upon written request.

§ 162.441 How will BIA decide whether to approve a business lease?

(a) We will approve a business lease unless:

(1) The required consents have not been obtained from the parties to the lease;

(2) The requirements of this subpart have not been met; or

(3) We find a compelling reason to withhold our approval in order to protect the best interests of the Indian landowners.

(b) We will defer, to the maximum extent possible, to the Indian landowners' determination that the lease is in their best interest.

(c) We may not unreasonably withhold approval of a lease.

§ 162.442 When will a business lease be effective?

(a) A business lease will be effective on the date that we approve the lease, even if an appeal is filed under part 2 of this chapter.

(b) The lease may specify a date on which the obligations between the parties to the business lease are triggered. Such date may be before or after the approval date under paragraph (a) of this section.

§ 162.443 Must a business lease document be recorded?

(a) Any business lease document must be recorded in our LTRO with jurisdiction over the leased land.

(1) We will record the lease document immediately following our approval.

(2) If our approval of an assignment or sublease is not required, the parties must record the assignment or sublease in the LTRO with jurisdiction over the leased land.

(b) The tribe must record lease documents for the following types of leases in the LTRO with jurisdiction over the leased lands, even though BIA approval is not required:

(1) Leases of tribal land a corporate entity leases to a third party under 25 U.S.C. 477; and

(2) Leases of tribal land under a special act of Congress authorizing leases without our approval under certain conditions.

§ 162.444 Will BIA require an appeal bond for an appeal of a decision on a business lease document?

(a) If a party appeals our decision on a lease, assignment, amendment, or sublease, then the official to whom the appeal is made may require the appellant to post an appeal bond in accordance with part 2 of this chapter. We will not require an appeal bond:

(1) For an appeal of a decision on a leasehold mortgage; or

(2) If the tribe is a party to the appeal and requests a waiver of the appeal bond.

(b) The appellant may not appeal the appeal bond decision. The appellant may, however, request that the official to whom the appeal is made reconsider the bond decision, based on extraordinary circumstances. Any reconsideration decision is final for the Department.

Amendments

§ 162.445 May the parties amend a business lease?

The parties may amend a business lease by obtaining:

(a) The lessee's signature;

(b) The Indian landowners' consent under the requirements in § 162.446; and

(c) BIA approval of the amendment under §§ 162.447 and 162.448.

§ 162.446 What are the consent requirements for an amendment to a business lease?

(a) Unless the lease provides otherwise, the lessee must notify all Indian landowners of the proposed amendment.

(b) The Indian landowners, or their representatives under § 162.013, must consent to an amendment of a business lease in the same percentages and manner as a new business lease under § 162.012, unless the lease:

(1) Provides that individual Indian landowners are deemed to have consented where they do not object in writing to the amendment within a specified period of time following the landowners' receipt of the amendment and the lease meets the requirements of paragraph (c) of this section;

(2) Authorizes one or more representatives to consent to an amendment on behalf of all Indian landowners; or

(3) Designates us as the Indian landowners' representative for the purposes of consenting to an amendment.

(c) If the lease provides for deemed consent under paragraph (b)(1) of this section, it must require the parties to submit to us:

(1) A copy of the executed amendment or other documentation of any Indian landowners' actual consent;

(2) Proof of mailing of the amendment to any Indian landowners who are deemed to have consented; and

(3) Any other pertinent information for us to review.

(d) Unless specifically authorized in the lease, a written power of attorney, or a court document, Indian landowners may not be deemed to have consented to, and an Indian landowner's designated representative may not negotiate or consent to, an amendment that would:

(1) Reduce the payment obligations to the Indian landowners;

(2) Increase or decrease the lease area;

(3) Terminate or change the term of the lease; or

(4) Modify the dispute resolution procedures.

§ 162.447 What is the approval process for an amendment to a business lease?

(a) When we receive an amendment that meets the requirements of this subpart, we will notify the parties of the date we receive it. We have 30 days from receipt of the executed amendment, proof of required consents, and required documentation to approve or disapprove the amendment or inform the parties in writing that we need additional review time. Our determination whether to approve the amendment will be in writing and will state the basis for our approval or disapproval.

(b) Our letter informing the parties that we need additional review time must identify our initial concerns and invite the parties to respond within 15 days of the date of the letter. We have 30 days from sending the letter informing the parties that we need additional time to approve or disapprove the amendment.

(c) If we do not meet the deadline in paragraph (a) or this section, or paragraph (b) of this section if applicable, the amendment is deemed approved to the extent consistent with Federal law. Unless the lease provides otherwise, provisions of the amendment that are inconsistent with Federal law will be severed and unenforceable; all other provisions of the amendment will remain in force.

§ 162.448 How will BIA decide whether to approve an amendment to a business lease?

(a) We may disapprove a business lease amendment only if at least one of the following is true:

(1) The Indian landowners have not consented and their consent is required;

(2) The lessee's mortgagees or sureties have not consented;

(3) The lessee is in violation of the lease;

(4) The requirements of this subpart have not been met; or

(5) We find a compelling reason to withhold our approval in order to protect the best interests of the Indian landowners.

(b) We will defer, to the maximum extent possible to the Indian landowners' determination that the amendment is in their best interest.

(c) We may not unreasonably withhold approval of an amendment.

Assignments

§ 162.449 May a lessee assign a business lease?

(a) A lessee may assign a business lease by meeting the consent requirements in § 162.450 and obtaining our approval of the assignment under §§ 162.451 and 162.452, or by meeting the conditions in paragraphs (b) or (c) of this section.

(b) Where provided in the lease, the lessee may assign the lease to the following without meeting consent requirements or obtaining BIA approval of the assignment, as long as the lessee notifies BIA of the assignment within 30 days after it is executed:

(1) Not more than three distinct legal entities specified in the lease; or

(2) The lessee's wholly owned subsidiaries.

(c) The lessee may assign the lease without our approval or meeting consent requirements if:

(1) The assignee is a leasehold mortgagee or its designee, acquiring the lease either through foreclosure or by conveyance;

(2) The assignee agrees in writing to assume all of the obligations and conditions of the lease; and

(3) The assignee agrees in writing that any transfer of the lease will be in accordance with applicable law under § 162.014.

§ 162.450 What are the consent requirements for an assignment of a business lease?

(a) Unless the lease provides otherwise, the lessee must notify all Indian landowners of the proposed assignment.

(b) The Indian landowners, or their representatives under § 162.013, must consent to an amendment of a business lease in the same percentages and manner as a new business lease under § 162.012, unless the lease:

(1) Provides that individual Indian landowners are deemed to have consented where they do not object in writing to the amendment within a specified period of time following the landowners' receipt of the amendment and the lease meets the requirements of paragraph (c) of this section;

(2) Authorizes one or more representatives to consent to an amendment on behalf of all Indian landowners; or

(3) Designates us as the Indian landowners' representative for the purposes of consenting to an amendment.

(c) If the lease provides for deemed consent under paragraph (b)(1) of this section, it must require the parties to submit to us:

(1) A copy of the executed amendment or other documentation of any Indian landowners' actual consent;

(2) Proof of mailing of the amendment to any Indian landowners who are deemed to have consented; and

(3) Any other pertinent information for us to review.

(d) The lessee must obtain the consent of the holders of any bonds or mortgages.

§ 162.451 What is the approval process for an assignment of a business lease?

(a) When we receive an assignment that meets the requirements of this subpart, we will notify the parties of the date we receive it. If our approval is required, we have 30 days from receipt of the executed assignment, proof of required consents, and required documentation to approve or disapprove the assignment. Our determination whether to approve the assignment will be in writing and will state the basis for our approval or disapproval.

(b) If we do not meet the deadline in this section, the lessee or Indian landowners may take appropriate action under § 162.463.

§ 162.452 How will BIA decide whether to approve an assignment of a business lease?

(a) We may disapprove an assignment of a business lease only if at least one of the following is true:

(1) The Indian landowners have not consented and their consent is required;

(2) The lessee's mortgagees or sureties have not consented;

(3) The lessee is in violation of the lease;

(4) The assignee does not agree to be bound by the terms of the lease;

(5) The requirements of this subpart have not been met; or

(6) We find a compelling reason to withhold our approval in order to protect the best interests of the Indian landowners.

(b) In making the finding required by paragraph (a)(6) of this section, we may consider whether:

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

(2) If a performance bond is required, the assignee has posted the bond or security and provided supporting documents that demonstrate that:

(i) The lease will be enforceable against the assignee; and

(ii) The assignee will be able to perform its obligations under the lease or assignment.

(c) We will defer, to the maximum extent possible, to the Indian landowners' determination that the assignment is in their best interest.

(d) We may not unreasonably withhold approval of an assignment.

Subleases

§ 162.453 May a lessee sublease a business lease?

(a) A lessee may sublease a business lease by meeting the consent requirements in § 162.454 and obtaining our approval of the sublease under §§ 162.455 and 162.456, or by meeting the conditions in paragraph (b) of this section.

(b) Where the sublease is part of a commercial development or residential development, the lessee may sublease without meeting consent requirements or obtaining BIA approval of the sublease, if:

(1) The lease provides for subleasing without meeting consent requirements or obtaining BIA approval;

(2) The sublease does not relieve the lessee/sublessor of any liability; and

(3) The parties provide BIA with a copy of the sublease within 30 days after it is executed.

§ 162.454 What are the consent requirements for a sublease of a business lease?

(a) Unless the lease provides otherwise, the lessee must notify all Indian landowners of the proposed sublease.

(b) The Indian landowners must consent to a sublease of a business lease in the same percentages and manner as a new business lease under § 162.012, unless the lease:

(1) Provides that individual Indian landowners are deemed to have consented where they do not object in writing to the sublease within a specified period of time following the landowners' receipt of the sublease and the lease meets the requirements of paragraph (c) of this section;

(2) Authorizes one or more representatives to consent to a sublease on behalf of all Indian landowners; or

(3) Designates us as the Indian landowners' representative for the purposes of consenting to a sublease.

(c) If the lease provides for deemed consent under paragraph (b)(1) of this section, it must require the parties to submit to us:

(1) A copy of the executed sublease or other documentation of any Indian landowners' actual consent;

(2) Proof of mailing of the sublease to any Indian landowners who are deemed to have consented; and

(3) Any other pertinent information for us to review.

§ 162.455 What is the approval process for a sublease of a business lease?

(a) When we receive a sublease that meets the requirements of this subpart, we will notify the parties of the date we receive it. If our approval is required, we have 30 days from receipt of the executed sublease, proof of required consents, and required documentation to approve or disapprove the sublease or inform the parties in writing that we need additional review time. Our determination whether to approve the sublease will be in writing and will state the basis for our approval or disapproval.

(b) Our letter informing the parties that we need additional review time must identify our initial concerns and invite the parties to respond within 15 days of the date of the letter. We have 30 days from sending the letter informing the parties that we need additional time to approve or disapprove the sublease.

(c) If we do not meet the deadline in paragraph (a) of this section, or paragraph (b) of this section if applicable, the sublease is deemed approved to the extent consistent with Federal law. Unless the lease provides otherwise, provisions of the sublease that are inconsistent with Federal law will be severed and unenforceable; all other provisions of the sublease will remain in force.

§ 162.456 How will BIA decide whether to approve a sublease of a business lease?

(a) We may disapprove a sublease of a business lease only if at least one of the following is true:

(1) The Indian landowners have not consented and their consent is required;

(2) The lessee's mortgagees or sureties have not consented;

(3) The lessee is in violation of the lease;

(4) The lessee will not remain liable under the lease;

(5) The requirements of this subpart have not been met; or

(6) We find a compelling reason to withhold our approval in order to protect the best interests of the Indian landowners.

(b) In making the finding required by paragraph (a)(6) of this section, we may consider whether the value of any part of the leased premises not covered by the sublease would be adversely affected.

(c) We will defer, to the maximum extent possible, to the Indian landowners' determination that the sublease is in their best interest.

(d) We may not unreasonably withhold approval of a sublease.

Leasehold Mortgages

§ 162.457 May a lessee mortgage a business lease?

(a) A lessee may mortgage a business lease by meeting the consent requirements in § 162.458 and obtaining our approval of the leasehold mortgage under §§ 162.459 and 162.460.

(b) Refer to § 162.449(c) for information on what happens if a sale or foreclosure under an approved mortgage of the leasehold interest occurs.

§ 162.458 What are the consent requirements for a leasehold mortgage of a business lease?

(a) Unless the lease provides otherwise, the lessee must notify all Indian landowners of the proposed leasehold mortgage.

(b) The Indian landowners, or their representatives under § 162.013, must consent to a leasehold mortgage of a business lease in the same percentages and manner as a new business lease under § 162.012, unless the lease:

(1) States that landowner consent is not required for a leasehold mortgage and identifies what law would apply in case of foreclosure;

(2) Provides that individual Indian landowners are deemed to have consented where they do not object in writing to the leasehold mortgage within a specified period of time following the landowners' receipt of the leasehold mortgage and the lease meets the requirements of paragraph (c) of this section;

(3) Authorizes one or more representatives to consent to a leasehold

mortgage on behalf of all Indian landowners; or

(4) Designates us as the Indian landowners' representative for the purposes of consenting to a leasehold mortgage.

(c) If the lease provides for deemed consent under paragraph (b)(2) of this section, it must require the parties to submit to us:

(1) A copy of the executed leasehold mortgage or other documentation of any Indian landowners' actual consent;

(2) Proof of mailing of the leasehold mortgage to any Indian landowners who are deemed to have consented; and

(3) Any other pertinent information for us to review.

§ 162.459 What is the approval process for a leasehold mortgage of a business lease?

(a) When we receive a leasehold mortgage that meets the requirements of this subpart, we will notify the parties of the date we receive it. We have 20 days from receipt of the executed leasehold mortgage, proof of required consents, and required documentation to approve or disapprove the leasehold mortgage. Our determination whether to approve the leasehold mortgage will be in writing and will state the basis for our approval or disapproval.

(b) If we do not meet the deadline in this section, the lessee may take appropriate action under § 162.463.

§ 162.460 How will BIA decide whether to approve a leasehold mortgage of a business lease?

(a) We may disapprove a leasehold mortgage of a business lease only if at least one of the following is true:

(1) The Indian landowners have not consented and their consent is required;

(2) The lessee's mortgagees or sureties have not consented;

(3) The requirements of this subpart have not been met; or

(4) We find a compelling reason to withhold our approval in order to protect the best interests of the Indian landowners.

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

(1) The leasehold mortgage proceeds would be used for purposes unrelated to the leased premises; and

(2) The leasehold mortgage is limited to the leasehold.

(c) We will defer, to the maximum extent possible, to the Indian landowners' determination that the leasehold mortgage is in their best interest.

(d) We may not unreasonably withhold approval of a leasehold mortgage.

Effectiveness, Compliance, and Enforcement

§ 162.461 When will an amendment, assignment, sublease, or leasehold mortgage of a business lease be effective?

(a) An amendment, assignment, sublease, or leasehold mortgage of a business lease will be effective when approved, even if an appeal is filed under part 2 of this chapter, except:

(1) If the amendment or sublease was deemed approved under § 162.447(c) or § 162.455(c), the amendment or sublease becomes effective 45 days from the date the parties mailed or delivered the document to us for our review or, if we sent a letter informing the parties that we need additional time to approve or disapprove the lease, the amendment or sublease becomes effective 45 days from the date of the letter informing the parties that we need additional time to approve or disapprove the lease; and

(2) An assignment that does not require our approval under § 162.449(b) or § 162.449(c) or a sublease that does not require our approval under § 152.453(b) becomes effective on the effective date specified in the assignment or sublease. If the assignment or sublease does not specify the effective date, it becomes effective upon execution by the parties.

(b) We will provide copies of approved documents to the party requesting approval, to the tribe for tribal land, and upon request, to other parties to the lease document.

§ 162.462 What happens if BIA disapproves an amendment, assignment, sublease, or leasehold mortgage of a business lease?

If we disapprove an amendment, assignment, sublease, or leasehold mortgage of a business lease, we will notify the parties immediately and advise the landowners of their right to appeal the decision under part 2 of this chapter.

§ 162.463 What happens if BIA does not meet a deadline for issuing a decision on a lease document?

(a) If a Superintendent does not meet a deadline for issuing a decision on a lease, assignment, or leasehold mortgage, the parties may file a written notice to compel action with the appropriate Regional Director.

(b) The Regional Director has 15 days from receiving the notice to:

(1) Issue a decision; or

(2) Order the Superintendent to issue a decision within the time set out in the order.

(c) The parties may file a written notice to compel action with the BIA Director if:

(1) The Regional Director does not meet the deadline in paragraph (b) of this section;

(2) The Superintendent does not issue a decision within the time set by the Regional Director under paragraph (b)(2) of this section; or

(3) The initial decision on the lease, assignment, or leasehold mortgage is with the Regional Director, and he or she does not meet the deadline for such decision.

(d) The BIA Director has 15 days from receiving the notice to:

(1) Issue a decision; or

(2) Order the Regional Director or Superintendent to issue a decision within the time set out in the order.

(e) If the Regional Director or Superintendent does not issue a decision within the time set out in the order under paragraph (d)(2), then the BIA Director must issue a decision within 15 days from the expiration of the time set out in the order.

(f) The parties may file an appeal from our inaction to the Interior Board of Indian Appeals if the Director does not meet the deadline in paragraph (d) or (e) of this section.

(g) The provisions of 25 CFR 2.8 do not apply to the inaction of BIA officials with respect to a decision on a lease, amendment, assignment, sublease, or leasehold mortgage under this subpart.

§ 162.464 May BIA investigate compliance with a business lease?

(a) We may enter the leased premises at any reasonable time, upon reasonable notice, and consistent with any notice requirements under applicable tribal law and applicable lease documents, to protect the interests of the Indian landowners and to determine if the lessee is in compliance with the requirements of the lease.

(b) If an Indian landowner notifies us that a specific lease violation has occurred, we will promptly initiate an appropriate investigation.

§ 162.465 May a business lease provide for negotiated remedies if there is a violation?

(a) A business lease of tribal land may provide either or both parties with negotiated remedies in the event of a lease violation, including, but not limited to, the power to terminate the lease. If the lease provides one or both parties with the power to terminate the lease:

(1) BIA approval of the termination is not required;

(2) The termination is effective without BIA cancellation; and

(3) The Indian landowners must notify us of the termination so that we may record it in the LTRO.

(b) A business lease of individually owned Indian land may provide either or both parties with negotiated remedies, so long as the lease also specifies the manner in which those remedies may be exercised by or on behalf of the Indian landowners of the applicable percentage of interests under § 162.012 of this part. If the lease provides one or both parties with the power to terminate the lease:

(1) BIA concurrence with the termination is required to ensure that the Indian landowners of the applicable percentage of interests have consented; and

(2) BIA will record the termination in the LTRO.

(c) The parties must notify any surety or mortgagee of any violation that may result in termination and the termination of a business lease.

(d) Negotiated remedies may apply in addition to, or instead of, the cancellation remedy available to us, as specified in the lease. The landowners may request our assistance in enforcing negotiated remedies.

(e) A business lease may provide that lease violations will be addressed by a tribe, and that lease disputes will be resolved by a tribal court, any other court of competent jurisdiction, or by a tribal governing body in the absence of a tribal court, or through an alternative dispute resolution method. We may not be bound by decisions made in such forums, but we will defer to ongoing actions or proceedings, as appropriate, in deciding whether to exercise any of the remedies available to us.

§ 162.466 What will BIA do about a violation of a business lease?

(a) In the absence of actions or proceedings described in § 162.465(e), or if it is not appropriate for us to defer to the actions or proceedings, we will follow the procedures in paragraphs (b) and (c) of this section.

(b) If we determine there has been a violation of the conditions of a business lease, other than a violation of payment provisions covered by paragraph (c) of this section, we will promptly send the lessee and any surety and mortgagee a notice of violation by certified mail, return receipt requested.

(1) We will send a copy of the notice of violation to the tribe for tribal land, or provide constructive notice to Indian landowners for individually owned Indian land.

(2) The notice of violation will advise the lessee that, within 10 business days of the receipt of a notice of violation, the lessee must:

(i) Cure the violation and notify us, and the tribe for tribal land, in writing that the violation has been cured;

(ii) Dispute our determination that a violation has occurred; or

(iii) Request additional time to cure the violation.

(3) The notice of violation may order the lessee to cease operations under the lease.

(c) A lessee's failure to pay compensation in the time and manner required by a business lease is a violation of the lease, and we will issue a notice of violation in accordance with this paragraph.

(1) We will send the lessees and any surety and mortgagee a notice of violation by certified mail, return receipt requested:

(i) Promptly following the date on which the payment was due, if the lease requires that payments be made to us; or

(ii) Promptly following the date on which we receive actual notice of non-payment from the Indian landowners, if the lease provides for payment directly to the Indian landowners.

(2) We will send a copy of the notice of violation to the tribe for tribal land, or provide constructive notice to the Indian landowners for individually owned Indian land.

(3) The notice of violation will require the lessee to provide adequate proof of payment.

(d) The lessee and its sureties will continue to be responsible for the obligations in the lease until the lease expires, or is terminated or cancelled.

§ 162.467 What will BIA do if the lessee does not cure a violation of a business lease on time?

(a) If the lessee does not cure a violation of a business lease within the required time period, or provide adequate proof of payment as required in the notice of violation, we will consult with the tribe for tribal land or, where feasible, with Indian landowners for individually owned Indian land, and determine whether:

(1) We should cancel the lease;

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

(3) We should invoke other remedies available under the lease or applicable law, including collection on any available performance bond or, for failure to pay compensation, referral of the debt to the Department of the Treasury for collection; or

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

(b) Following consultation with the tribe for tribal land or, where feasible, with Indian landowners for individually owned Indian land, we may take action to recover unpaid compensation and any associated late payment charges.

(1) We do not have to cancel the lease or give any further notice to the lessee before taking action to recover unpaid compensation.

(2) We may still take action to recover any unpaid compensation if we cancel the lease.

(c) If we decide to cancel the lease, we will send the lessee and any surety and mortgagee a cancellation letter by certified mail, return receipt requested, within 5 business days of our decision. We will send a copy of the cancellation letter to the tribe for tribal land, and will provide Indian landowners for individually owned Indian land with actual or constructive notice of the cancellation. The cancellation letter will:

(1) Explain the grounds for cancellation;

(2) If applicable, notify the lessee of the amount of any unpaid compensation or late payment charges due under the lease;

(3) Notify the lessee of the lessee's right to appeal under part 2 of this chapter, including the possibility that the official to whom the appeal is made may require the lessee to post an appeal bond;

(4) Order the lessee to vacate the property within 31 days of the date of receipt of the cancellation letter, if an appeal is not filed by that time; and

(5) Order the lessee to take any other action BIA deems necessary to protect the Indian landowners.

(d) We may invoke any other remedies available to us under the lease, including collecting on any available performance bond, and the Indian landowners may pursue any available remedies under tribal law.

§ 162.468 Will late payment charges or special fees apply to delinquent payments due under a business lease?

(a) Late payment charges will apply as specified in the lease. The failure to pay these amounts will be treated as a lease violation.

(b) We may assess the following special fees to cover administrative costs incurred by the United States in the collection of the debt, if compensation is not paid in the time and manner required, in addition to the late payment charges that must be paid to the Indian landowners under the lease:

The lessee will pay . . .	For . . .
(1) $50.00	Any dishonored check.
(2) $15.00	Processing of each notice or demand letter.
(3) 18 percent of balance due	Treasury processing following referral for collection of delinquent debt.

§ 162.469 How will payment rights relating to a business lease be allocated?

The business lease may allocate rights to payment for insurance proceeds, trespass damages, condemnation awards, settlement funds, and other payments between the Indian landowners and the lessee. If not specified in the lease, insurance policy, order, award, judgment, or other document, the Indian landowners or lessees will be entitled to receive these payments.

§ 162.470 When will a cancellation of a business lease be effective?

(a) A cancellation involving a business lease will not be effective until 31 days after the lessee receives a cancellation letter from us, or 41 days from the date we mailed the letter, whichever is earlier.

(b) The cancellation decision will not be effective if an appeal is filed unless the cancellation is made immediately effective under part 2 of this chapter. While a cancellation decision is ineffective, the lessee must continue to pay compensation and comply with the other terms of the lease.

§ 162.471 What will BIA do if a lessee remains in possession after a business lease expires or is terminated or cancelled?

If a lessee remains in possession after the expiration, termination, or cancellation of a business lease, we may treat the unauthorized possession as a trespass under applicable law in consultation with the Indian landowners. Unless the Indian landowners of the applicable percentage of interests under § 162.012 have notified us in writing that they are engaged in good faith negotiations with the holdover lessee to obtain a new lease, we may take action to recover possession on behalf of the Indian landowners, and pursue any additional remedies available under applicable law, such as a forcible entry and detainer action.

§ 162.472 Will BIA appeal bond regulations apply to cancellation decisions involving business leases?

(a) Except as provided in paragraph (b) of this section, the appeal bond provisions in part 2 of this chapter will apply to appeals from lease cancellation decisions

(b) The lessee may not appeal the appeal bond decision. The lessee may, however, request that the official to whom the appeal is made reconsider the appeal bond decision, based on extraordinary circumstances. Any reconsideration decision is final for the Department.

§ 162.473 When will BIA issue a decision on an appeal from a business leasing decision?

BIA will issue a decision on an appeal from a business leasing decision within 60 days of receipt of all pleadings.

§ 162.474 What happens if the lessee abandons the leased premises?

If a lessee abandons the leased premises, we will treat the abandonment as a violation of the lease. The lease may specify a period of non-use after which the lease premises will be considered abandoned.

Subpart F—[Removed]

■ 14a. Remove subpart F, consisting of §§ 162.600 through 162.623.

Subpart E [Redesignated as Subpart F]

■ 14b. Redesignate subpart E, consisting of §§ 162.500 through 162.503, as new subpart F under the following heading:

Subpart F—Special Requirements for Certain Reservations

■ 15. Add a new subpart E to read as follows:

Subpart E—Wind and Solar Resource Leases

General Provisions Applicable to WEELs and WSR Leases

Sec.

WEELs

WEEL Monetary Compensation Requirements

WEEL Bonding and Insurance

WEEL Approval

WEEL Administration

WEEL Compliance and Enforcement

WSR Leases

Subpart E—Wind and Solar Resource Leases

General Provisions Applicable to WEELs and WSR Leases

§ 162.501 What types of leases does this subpart cover?

(a) This subpart covers:

(1) Wind energy evaluation leases (WEELs), which are short-term leases that authorize possession of Indian land for the purpose of installing, operating, and maintaining instrumentation, and associated infrastructure, such as meteorological towers, to evaluate wind resources for electricity generation; and

(2) Wind and solar resource (WSR) leases, which are leases that authorize possession of Indian land for the purpose of installing, operating, and maintaining instrumentation, facilities, and associated infrastructure, such as wind turbines and solar panels, to harness wind and/or solar energy to generate and supply electricity:

(i) For resale on a for-profit or non-profit basis;

(ii) To a utility grid serving the public generally; or

(iii) To users within the local community (e.g., on and adjacent to a reservation).

(b) If the generation of electricity is solely to support a use approved under subpart B, Agricultural Leases; subpart C, Residential Leases; or subpart D Business Leases (including religious, educational, recreational, cultural, or other public purposes), for the same parcel of land, then the installation, operation, and maintenance of instrumentation, facilities, and associated infrastructure are governed by subpart B, C, or D, as appropriate.

§ 162.502 Who must obtain a WEEL or WSR lease?

(a) Anyone seeking to possess Indian land to conduct activities associated with the evaluation of wind resources must obtain a WEEL, except that a WEEL is not required if use or possession of the Indian land to conduct wind energy evaluation activities is authorized:

(1) Under § 162.005(b);

(2) By a permit from the Indian landowners under § 162.007; or

(3) By a tribe on its land under 25 U.S.C. 81.

(b) Except as provided in §§ 162.005(b), 162.501, and paragraph (c) of this section, anyone seeking to possess Indian land to conduct activities associated with the development of wind and/or solar resources must obtain a WSR lease.

(c) A tribe that conducts wind and solar resource activities on its tribal land does not need a WEEL or WSR under this subpart.

§ 162.503 Is there a model WEEL or WSR lease?

There is no model WEEL or WSR lease because of the need for flexibility in negotiating and writing WEELs and WSR leases; however, we may:

(a) Provide other guidance, such as checklists and sample lease provisions,

to assist in the lease negotiation process; and

(b) Assist the Indian landowners, upon their request, in developing appropriate lease provisions or in using tribal lease forms that conform to the requirements of this part.

WEELs

§ 162.511 What is the purpose of a WEEL?

A WEEL is a short-term lease that allows the lessee to possess trust or restricted lands for the purpose of evaluating wind resources. The lessee may use information collected under the WEEL to assess the potential for wind energy development, and determine future placement and type of wind energy technology to use in developing the energy resource potential of the leased area.

§ 162.512 How long may the term of a WEEL run?

(a) A WEEL must provide for a definite term, state if there is an option to renew and if so, provide for a definite term for the renewal period. WEELs are for project evaluation purposes, and therefore may have:

(1) An initial term that is no longer than 3 years; and

(2) One renewal period not to exceed 3 years.

(b) The exercise of the option to renew must be in writing and the WEEL must specify:

(1) The time and manner in which the option must be exercised or is automatically effective;

(2) That confirmation of the renewal will be submitted to us, unless the WEEL provides for automatic renewal; and

(3) Additional consideration, if any, that will be due upon the exercise of the option to renew or the start of the renewal term.

§ 162.513 Are there mandatory provisions a WEEL must contain?

(a) All WEELs must identify:

(1) The tract or parcel of land being leased;

(2) The purpose of the WEEL and authorized uses of the leased premises;

(3) The parties to the WEEL;

(4) The term of the WEEL;

(5) The ownership of permanent improvements and the responsibility for constructing, operating, maintaining, and managing permanent improvements, under § 162.515;

(6) Payment requirements and late payment charges, including interest; and

(7) Due diligence requirements, under § 162.517.

(b) Where a representative executes a lease on behalf of an Indian landowner or lessee, the lease must identify the landowner or lessee being represented and the authority under which the action is taken.

(c) All WEELs must include the following provisions:

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

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

(3) The lessee must comply with all applicable laws, ordinances, rules, regulations, and other legal requirements under § 162.014;

(4) If historic properties, archeological resources, human remains, or other cultural items, not previously reported are encountered during the course of any activity associated with this lease, all activity in the immediate vicinity of the properties, resources, remains, or items will cease, and the lessee will contact BIA and the tribe with jurisdiction to determine how to proceed and appropriate disposition;

(5) BIA has the right, at any reasonable time during the term of the lease, and upon reasonable notice, in accordance with § 162.589, to enter the leased premises for inspection; and

(6) BIA may, at its discretion, treat as a lease violation any failure by the lessee to cooperate with a BIA request to make appropriate records, reports, or information available for BIA inspection and duplication.

(d) Unless the lessee would be prohibited by law from doing so, the lease must also contain the following provisions:

(1) The lessee holds the United States and the Indian landowners harmless from any loss, liability, or damages resulting from the lessee's use or occupation of the leased premises;

(2) The lessee indemnifies the United States and the Indian landowners against all liabilities or costs relating to the use, handling, treatment, removal, storage, transportation, or disposal of hazardous materials, or the release or discharge of any hazardous material from the leased premises that occurs during the lease term, regardless of fault, with the exception that the lessee is not required to indemnify the Indian landowners for liability or cost arising from the Indian landowners' negligence or willful misconduct.

§ 162.514 May permanent improvements be made under a WEEL?

(a) A WEEL anticipates the installation of facilities and associated infrastructure of a size and magnitude necessary for evaluation of wind resource capacity and potential effects of development. These facilities and associated infrastructure are considered permanent improvements. An equipment installation plan must be submitted with the lease under § 162.528(g).

(b) If any of the following changes are made to the equipment installation plan, the Indian landowners must approve the revised plan and the lessee must provide a copy of the revised plan to BIA:

(1) Location of permanent improvements;

(2) Type of permanent improvements; or

(3) Delay of 90 days or more in any phase of development.

§ 162.515 How must a WEEL address ownership of permanent improvements?

(a) A WEEL must specify who will own any permanent improvements the lessee installs during the lease term. In addition, the WEEL must indicate whether any permanent improvements the lessee installs:

(1) Will remain on the premises upon expiration, termination, or cancellation of the lease whether or not the WEEL is followed by a WSR lease, in a condition satisfactory to the Indian landowners;

(2) May be conveyed to the Indian landowners during the WEEL term and under what conditions the permanent improvements may be conveyed;

(3) Will be removed within a time period specified in the WEEL, at the lessee's expense, with the leased premises to be restored as closely as possible to their condition before installation of the permanent improvements; or

(4) Will be disposed of by other specified means.

(b) A WEEL that requires the lessee to remove the permanent improvements must also provide the Indian landowners with an option to take possession and title to the permanent improvements if the improvements are not removed within the specified time period.

§ 162.516 How will BIA enforce removal requirements in a WEEL?

We may take appropriate enforcement action to ensure removal of the permanent improvements and restoration of the premises at the lessee's expense:

(a) In consultation with the tribe, for tribal land or, where feasible, with Indian landowners for individually owned Indian land; and

(b) After termination, cancellation, or expiration of the WEEL.

§ 162.517 What requirements for due diligence must a WEEL include?

(a) A WEEL must include due diligence requirements that require the lessee to:

(1) Install testing and monitoring facilities within 12 months after the effective date of the WEEL or other period designated in the WEEL and consistent with the plan of development; and

(2) If installation does not occur, or is not expected to be completed, within the time period specified in paragraph (a)(1) of this section, provide the Indian landowners and BIA with an explanation of good cause for any delay, the anticipated date of installation of facilities, and evidence of progress toward installing or completing testing and monitoring facilities.

(b) Failure of the lessee to comply with the due diligence requirements of the WEEL is a violation of the WEEL and may lead to:

(1) Cancellation of the WEEL under § 162.592; and

(2) Application of the requirement that the lessee transfer ownership of energy resource information collected under the WEEL to the Indian landowners under § 162.520.

§ 162.518 How must a WEEL describe the land?

(a) A WEEL must describe the leased premises by reference to a public or private survey, if possible. If the land cannot be so described, the lease must include one or more of the following:

(1) A legal description;

(2) A survey-grade global positioning system description; or

(3) Another description prepared by a registered land surveyor that is sufficient to identify the leased premises.

(b) If the tract is fractionated, we will identify the undivided trust or restricted interests in the leased premises.

§ 162.519 May a WEEL allow for compatible uses by the Indian landowner?

The WEEL may provide for the Indian landowners to use, or authorize others to use, the leased premises for other noncompeting uses compatible with the purpose of the WEEL. This may include the right to lease the premises for other compatible purposes. Any such use by the Indian landowners will not reduce or offset the monetary compensation for the WEEL.

§ 162.520 Who owns the energy resource information obtained under the WEEL?

(a) The WEEL must specify the ownership of any energy resource information the lessee obtains during the WEEL term.

(b) Unless otherwise specified in the WEEL, the energy resource information the lessee obtains through the leased activity becomes the property of Indian landowners at the expiration, termination, or cancellation of the WEEL or upon failure by the lessee to diligently install testing and monitoring facilities on the leased premises in accordance with § 162.517.

(c) BIA will keep confidential any information it is provided that is marked confidential or proprietary and that is exempt from public release, to the extent allowed by law.

§ 162.521 May a lessee incorporate its WEEL analyses into its WSR lease analyses?

Any analyses a lessee uses to bring a WEEL activity into compliance with applicable laws, ordinances, rules, regulations under § 162.014 and any other legal requirements may be incorporated by reference, as appropriate, into the analyses of a proposed WSR lease.

§ 162.522 May a WEEL contain an option for the lessee to enter into a WSR lease?

(a) A WEEL may provide for an option period following the expiration of the WEEL term during which the lessee and the Indian landowners may enter into a WSR lease.

(b) Our approval of a WEEL that contains an option to enter into a WSR lease does not guarantee or imply our approval of any WSR lease.

WEEL Monetary Compensation Requirements

§ 162.523 How much compensation must be paid under a WEEL?

(a) The WEEL must state how much compensation will be paid.

(b) A WEEL must specify the date on which compensation will be due.

(c) Failure to make timely payments is a violation of the WEEL and may lead to cancellation of the WEEL.

(d) The lease compensation requirements of §§ 162.552 through 162.558 also apply to WEELs.

§ 162.524 Will BIA require a valuation for a WEEL?

We will not require a valuation for a WEEL.

WEEL Bonding and Insurance

§ 162.525 Must a lessee provide a performance bond for a WEEL?

We will not require the lessee to provide a performance bond or alternative form of security for a WEEL.

§ 162.526 [Reserved]

§ 162.527 Must a lessee provide insurance for a WEEL?

Except as provided in paragraph (d) of this section, a lessee must provide insurance necessary to protect the interests of Indian landowners and in the amount sufficient to protect all insurable permanent improvements on the leased premises.

(a) The insurance may include property, crop, liability, and casualty insurance, depending on the Indian landowners' interests to be protected.

(b) Both the Indian landowners and the United States must be identified as additional insured parties.

(c) Lease insurance may be increased and extended for use as the required WSR lease insurance.

(d) We may waive the requirement for insurance upon the request of the Indian landowner, if a waiver is in the best interest of the Indian landowner, including if the lease is for less than fair market rental or nominal compensation. For tribal land, we will defer, to the maximum extent possible, to the tribe's determination that a waiver is in its best interest.

WEEL Approval

§ 162.528 What documents are required for BIA approval of a WEEL?

A lessee or the Indian landowners must submit the following documents to us to obtain BIA approval of a WEEL:

(a) A WEEL executed by the Indian landowners and the lessee that meets the requirements of this part;

(b) For tribal land, a tribal authorization for the WEEL;

(c) Proof of insurance, as required by § 162.527;

(d) Statement from the appropriate tribal authority that the proposed use is in conformance with applicable tribal law, if required by the tribe;

(e) Environmental and archeological reports, surveys, and site assessments as needed to facilitate compliance with applicable Federal and tribal environmental and land use requirements, including any documentation prepared under § 162.027(b);

(f) An equipment installation plan;

(g) A restoration and reclamation plan (and any subsequent modifications to the plan);

(h) Where the lessee is not an entity owned and operated by the tribe, documents that demonstrate the technical capability of the lessee or lessee's agent to construct, operate, maintain, and terminate the proposed project and the lessee's ability to successfully design, construct, or obtain

the funding for a project similar to the proposed project, if appropriate;

(i) A legal description of the land under § 162.518;

(j) If the lease is being approved under 25 U.S.C. 415, information to assist us in our evaluation of the factors in 25 U.S.C. 415(a); and

(k) If the lessee is a corporation, limited liability company, partnership, joint venture, or other legal entity, except a tribal entity, information such as organizational documents, certificates, filing records, and resolutions, that demonstrates that:

(1) The representative has authority to execute a lease;

(2) The lease will be enforceable against the lessee; and

(3) The legal entity is in good standing and authorized to conduct business in the jurisdiction where the land is located.

§ 162.529 Will BIA review a proposed WEEL before or during preparation of the NEPA review documentation?

Upon request of the Indian landowners, we will review the proposed WEEL after negotiation by the parties, before or during preparation of the NEPA review documentation. Within 10 days of receiving the proposed WEEL, we will provide an acknowledgement of the terms of the lease and identify any provisions that, based on this acknowledgment review, would justify disapproval of the lease, pending results of the NEPA review.

§ 162.530 What is the approval process for a WEEL?

(a) Before we approve a WEEL, we must determine that the WEEL is in the best interest of the Indian landowners. In making that determination, we will:

(1) Review the WEEL and supporting documents;

(2) Identify potential environmental impacts and ensure compliance with all applicable environmental laws, land use laws, and ordinances;

(3) If the lease is being approved under 25 U.S.C. 415, assure ourselves that adequate consideration has been given to the factors in 25 U.S.C. 415(a); and

(4) Require any lease modifications or mitigation measures necessary to satisfy any requirements including any other Federal or tribal land use requirements.

(b) Upon receiving the WEEL package, we will promptly notify the parties whether the package is or is not complete. A complete package includes all the information and supporting documents required for a WEEL, including but not limited to, NEPA review documentation, where applicable.

(1) If the WEEL package is not complete, our letter will identify the missing information or documents required for a complete package. If we do not respond to the submission of a WEEL package, the parties may take action under § 162.588.

(2) If the WEEL package is complete, we will notify the parties of the date we receive the complete package, and, within 20 days of the date of receipt of the package at the appropriate BIA office, approve or disapprove the WEEL or return the package for revision.

(c) If we do not meet the deadline in this section, then the parties may take appropriate action under § 162.588.

(d) We will provide any WEEL approval determination and the basis for the determination, along with notification of appeal rights under part 2 of this chapter, in writing to the parties to the WEEL.

(e) We will provide any WEEL disapproval determination and the basis for the determination, along with notification of rights to an informal conference, in writing to the parties. Within 30 days of receipt of the disapproval determination, the parties may request an informal conference with the official who issued the determination. Within 30 days of receiving this request, the official must hold the informal conference with the parties. Within 10 days of the informal conference, the official must issue a decision and the basis for the decision, along with a notification of appeal rights under part 2 of this chapter, in writing to the parties to the WEEL.

(f) We will provide the approved WEEL on tribal land to the lessee and provide a copy to the tribe. We will provide the approved WEEL on individually owned Indian land to the lessee, and make copies available to the Indian landowners upon written request.

§ 162.531 How will BIA decide whether to approve a WEEL?

(a) We will approve a WEEL unless:

(1) The required consents have not been obtained from the parties to the WEEL;

(2) The requirements applicable to WEELs have not been met; or

(3) We find a compelling reason to withhold our approval in order to protect the best interests of the Indian landowners.

(b) We will defer, to the maximum extent possible, to the Indian landowners' determination that the WEEL is in their best interest.

(c) We may not unreasonably withhold approval of a WEEL.

§ 162.532 When will a WEEL be effective?

(a) A WEEL will be effective on the date on which we approve the WEEL, even if an appeal is filed under part 2 of this chapter.

(b) The WEEL may specify a date on which the obligations between the parties to a WEEL are triggered. Such date may be before or after the approval date under paragraph (a) of this section.

(c) WEEL lease documents not requiring our approval are effective upon execution by the parties, or on the effective date specified in the lease document. If the WEEL lease document does not specify an effective date, it becomes effective upon execution by the parties.

§ 162.533 Must a WEEL lease document be recorded?

(a) Any WEEL lease document must be recorded in our LTRO with jurisdiction over the leased land.

(1) We will record the lease document immediately following our approval.

(2) If our approval of an assignment or sublease is not required, the parties must record the assignment or sublease in the LTRO with jurisdiction over the leased land.

(b) The tribe must record lease documents for the following types of leases in the LTRO with jurisdiction over the tribal lands, even though BIA approval is not required:

(1) Leases of tribal land that a corporate entity leases to a third party under 25 U.S.C. 477; and

(2) Leases of tribal land under a special act of Congress authorizing leases without our approval.

WEEL Administration

§ 162.534 May the parties amend, assign, sublease, or mortgage a WEEL?

The parties may amend, assign, sublease, or mortgage a WEEL by following the procedures and requirements for amending, assigning, subleasing, or mortgaging a WSR lease.

WEEL Compliance and Enforcement

§ 162.535 What effectiveness, compliance, and enforcement provisions apply to WEELs?

(a) The provisions at § 162.586 apply to WEEL lease documents.

(b) The provisions at §§ 162.587 through 162.589 and 162.591 through 162.599 apply to WEELs, except that any references to § 162.590 will apply instead to § 162.536.

§ 162.536 Under what circumstances may a WEEL be terminated?

A WEEL must state whether, and under what conditions, the Indian landowners may terminate the WEEL.

§ 162.537 [Reserved]

WSR Leases

§ 162.538 What is the purpose of a WSR lease?

A WSR lease authorizes a lessee to possess Indian land to conduct activities related to the installation, operation, and maintenance of wind and/or solar energy resource development projects. Activities include installing instrumentation facilities and infrastructure associated with the generation, transmission, and storage of electricity and other related activities. Leases for biomass or waste-to-energy purposes are governed by subpart D of this part.

§ 162.539 Must I obtain a WEEL before obtaining a WSR lease?

You may enter into a WSR lease without a WEEL. While you may enter into a lease as a direct result of energy resource information gathered from a WEEL activity, obtaining a WEEL is not a precondition to entering into a WSR lease.

§ 162.540 How long may the term of a WSR lease run?

(a) A WSR lease must provide for a definite lease term, state if there is an option to renew, and if so, provide for a definite term for the renewal period. The maximum term of a lease approved under 25 U.S.C. 415(a) may not exceed 50 years (consisting of an initial term not to exceed 25 years and one renewal not to exceed 25 years), unless a Federal statute provides for a longer maximum term (e.g., 25 U.S.C. 415(a) allows for a maximum term of 99 years for certain tribes), a different initial term, renewal term, or number of renewals.

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

(1) Purpose of the lease;

(2) Type of financing; and

(3) Level of investment.

(c) The lease may not be extended by holdover.

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

(a) If the lease provides for an option to renew, the lease must specify:

(1) The time and manner in which the option must be exercised or is automatically effective;

(2) That confirmation of the renewal will be submitted to us, unless the lease provides for automatic renewal;

(3) Whether Indian landowner consent to the renewal is required;

(4) That the lessee must provide notice of the renewal to the Indian landowners and any sureties and mortgagees;

(5) The additional consideration, if any, that will be due upon the exercise of the option to renew or the start of the renewal term; and

(6) Any other conditions for renewal (e.g., that the lessee not be in violation of the lease at the time of renewal).

(b) We will record any renewal of a lease in the LTRO.

§ 162.542 Are there mandatory provisions a WSR lease must contain?

(a) All WSR leases must identify:

(1) The tract or parcel of land being leased;

(2) The purpose of the lease and authorized uses of the leased premises;

(3) The parties to the lease;

(4) The term of the lease;

(5) The ownership of permanent improvements and the responsibility for constructing, operating, maintaining, and managing, WSR equipment, roads, transmission lines and related facilities under § 162.543;

(6) Who is responsible for evaluating the leased premises for suitability; purchasing, installing, operating, and maintaining WSR equipment; negotiating power purchase agreements; and transmission;

(7) Payment requirements and late payment charges, including interest;

(8) Due diligence requirements, under § 162.546;

(9) Insurance requirements, under § 162.562; and

(10) Bonding requirements under § 162.559. If a performance bond is required, the lease must state that the lessee must obtain the consent of the surety for any legal instrument that directly affects their obligations and liabilities.

(b) Where a representative executes a lease on behalf of an Indian landowner or lessee, the lease must identify the landowner or lessee being represented and the authority under which such action is taken.

(c) All WSR leases must include the following provisions:

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

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

(3) The lessee must comply with all applicable laws, ordinances, rules, regulations, and other legal requirements under § 162.014;

(4) If historic properties, archeological resources, human remains, or other cultural items not previously reported are encountered during the course of any activity associated with the lease, all activity in the immediate vicinity of the properties, resources, remains, or items will cease and the lessee will contact BIA and the tribe with jurisdiction to determine how to proceed and appropriate disposition;

(5) BIA has the right, at any reasonable time during the term of the lease and upon reasonable notice, in accordance with § 162.589, to enter the leased premises for inspection and to ensure compliance; and

(6) BIA may, at its discretion, treat as a lease violation any failure by the lessee to cooperate with a BIA request to make appropriate records, reports, or information available for BIA inspection and duplication.

(d) Unless the lessee would be prohibited by law from doing so, the lease must also contain the following provisions:

(1) The lessee holds the United States and the Indian landowners harmless from any loss, liability, or damages resulting from the lessee's use or occupation of the leased premises; and

(2) The lessee indemnifies the United States and the Indian landowners against all liabilities or costs relating to the use, handling, treatment, removal, storage, transportation, or disposal of hazardous materials, or the release or discharge of any hazardous material from the leased premises that occurs during the lease term, regardless of fault, with the exception that the lessee is not required to indemnify the Indian landowners for liability or cost arising from the Indian landowners' negligence or willful misconduct.

(e) We may treat any provision of a lease document that violates Federal law as a violation of the lease.

§ 162.543 May permanent improvements be made under a WSR lease?

(a) A WSR lease must provide for the installation of a facility and associated infrastructure of a size and magnitude necessary for the generation and delivery of electricity, in accordance with § 162.019. These facilities and associated infrastructure are considered permanent improvements. A resource development plan must be submitted for approval with the lease under § 162.563(h).

(b) If the parties agree to any of the following changes to the resource development plan after lease approval, they must submit the revised plan to BIA for the file:

(1) Location of permanent improvements;

(2) Type of permanent improvements; or

(3) Delay of 90 days or more in any phase of development.

§ 162.544 How must a WSR lease address ownership of permanent improvements?

(a) A WSR lease must specify who will own any permanent improvements the lessee installs during the lease term and may specify under what conditions, if any, permanent improvements the lessee constructs may be conveyed to the Indian landowners during the lease term. In addition, the lease must indicate whether each specific permanent improvement the lessee installs will:

(1) Remain on the leased premises upon the expiration, termination, or cancellation of the lease, in a condition satisfactory to the Indian landowners and become the property of the Indian landowners;

(2) Be removed within a time period specified in the lease, at the lessee's expense, with the leased premises to be restored as closely as possible to their condition before installation of the permanent improvements; or

(3) Be disposed of by other specified means.

(b) A lease that requires the lessee to remove the permanent improvements must also provide the Indian landowners with an option to take possession of and title to the permanent improvements if the improvements are not removed within the specified time period.

§ 162.545 How will BIA enforce removal requirements in a WSR lease?

(a) We may take appropriate enforcement action to ensure removal of the permanent improvements and restoration of the premises at the lessee's expense:

(1) In consultation with the tribe, for tribal land or, where feasible, with Indian landowners for individually owned Indian land; and

(2) Before or after expiration, termination, or cancellation of the lease.

(b) We may collect and hold the performance bond until removal and restoration are completed.

§ 162.546 What requirements for due diligence must a WSR lease include?

(a) A WSR lease must include due diligence requirements that require the lessee to:

(1) Commence installation of energy facilities within 2 years after the effective date of the lease or consistent with a timeframe in the resource development plan;

(2) If installation does not occur, or is not expected to be completed, within the time period specified in paragraph (a)(1) of this section, provide the Indian landowners and BIA with an explanation of good cause as to the nature of any delay, the anticipated date of installation of facilities, and evidence of progress toward commencement of installation;

(3) Maintain all on-site electrical generation equipment and facilities and related infrastructure in accordance with the design standards in the resource development plan; and

(4) Repair, place into service, or remove from the site within a time period specified in the lease any idle, improperly functioning, or abandoned equipment or facilities that have been inoperative for a continuous period specified in the lease (unless the equipment or facilities were idle as a result of planned suspension of operations, for example, for grid operations or during bird migration season).

(b) Failure of the lessee to comply with the due diligence requirements of the lease is a violation of the lease and may lead to cancellation of the lease under § 162.592.

§ 162.547 How must a WSR lease describe the land?

(a) A WSR lease must describe the leased premises by reference to a private or public survey, if possible. If the land cannot be so described, the lease must include one or more of the following:

(1) A legal description;

(2) A survey-grade global positioning system description; or

(3) Another description prepared by a registered land surveyor that is sufficient to identify the leased premises.

(b) If the tract is fractionated, we will identify the undivided trust or restricted interests in the leased premises.

§ 162.548 May a WSR lease allow compatible uses?

The lease may provide for the Indian landowners to use, or authorize others to use, the leased premises for other uses compatible with the purpose of the WSR lease and consistent with the terms of the WSR lease. This may include the right to lease the premises for other compatible purposes. Any such use or authorization by the Indian landowners will not reduce or offset the monetary compensation for the WSR lease.

WSR Lease Monetary Compensation Requirements

§ 162.549 How much monetary compensation must be paid under a WSR lease of tribal land?

(a) A WSR lease of tribal land may allow for any payment negotiated by the tribe, and we will defer to the tribe and not require a valuation if the tribe submits a tribal authorization expressly stating that it:

(1) Has negotiated compensation satisfactory to the tribe;

(2) Waives valuation; and

(3) Has determined that accepting such negotiated compensation and waiving valuation is in its best interest.

(b) The tribe may request, in writing, that we determine fair market rental, in which case we will use a valuation in accordance with § 162.551. After providing the tribe with the fair market rental, we will defer to a tribe's decision to allow for any payment amount negotiated by the tribe.

(c) If the conditions in paragraph (a) or (b) of this section are not met, we will require that the lease provide for fair market rental based on a valuation in accordance with § 162.551.

§ 162.550 How much monetary compensation must be paid under a WSR lease of individually owned Indian land?

(a) A WSR lease of individually owned Indian land must require payment of not less than fair market rental before any adjustments, based on a fixed amount, a percentage of the projected gross income, megawatt capacity fee, or some other method, unless paragraphs (b) or (c) of this section permit a lesser amount. The lease must establish how the fixed amount, percentage or combination will be calculated and the frequency at which the payments will be made.

(b) We may approve a lease of individually owned Indian land that provides for the payment of nominal compensation, or less than a fair market rental, if:

(1) The Indian landowners execute a written waiver of the right to receive fair market rental; and

(2) We determine it is in the Indian landowners' best interest, based on factors including, but not limited to:

(i) The lessee is a member of the immediate family, as defined in § 162.003, of an Indian landowner;

(ii) The lessee is a co-owner of the leased tract;

(iii) A special relationship or circumstances exist that we believe warrant approval of the lease;

(iv) The lease is for public purposes; or

(v) We have waived the requirement for a valuation under paragraph (e) of this section.

(c) We may approve a lease that provides for the payment of less than a fair market rental during the periods before the generation and transmission of electricity begins, if we determine it is in the Indian landowners' best interest. The lease must specify the amount of the compensation and the applicable periods.

(d) We will require a valuation in accordance with § 162.422, unless:

(1) 100 percent of the landowners submit to us a written request to waive the valuation requirement; or

(2) We waive the requirement under paragraph (e) of this section; or

(3) We determine it is in the best interest of the Indian landowners to accept an economic analysis in lieu of an appraisal and:

(i) The Indian landowners submit an economic analysis that is approved by the Office of Indian Energy & Economic Development (IEED); or

(ii) IEED prepares an economic analysis at the request of the Indian landowners.

(e) If the owners of the applicable percentage of interests under § 162.011 of this part grant a WSR lease on behalf of all of the Indian landowners of a fractionated tract, the lease must provide that the non-consenting Indian landowners, and those on whose behalf we have consented, receive a fair market rental, as determined by a valuation, unless we waive the requirement because the tribe or lessee will construct infrastructure improvements on, or serving, the leased premises, and we determine it is in the best interest of all the landowners.

§ 162.551 How will BIA determine fair market rental for a WSR lease?

(a) We will use a market analysis, appraisal, or other appropriate valuation method to determine the fair market rental before we approve a WSR lease of individually owned Indian land or, at the request of the tribe, for tribal land.

(b) We will either:

(1) Prepare, or have prepared, a market analysis, appraisal, or other appropriate valuation method; or

(2) Use an approved market analysis, appraisal, or other appropriate valuation method from the Indian landowners or lessee.

(c) We will use or approve use of a market analysis, appraisal, or other appropriate valuation method only if it:

(1) Has been prepared in accordance with USPAP or a valuation method developed by the Secretary under 25 U.S.C. 2214; and

(2) Complies with Department policies regarding appraisals, including third-party appraisals.

(d) Indian landowners may use competitive bidding as a valuation method.

§ 162.552 When are monetary compensation payments due under a WSR lease?

(a) A WSR lease must specify the dates on which all payments are due.

(b) Unless the lease provides otherwise, payments may not be made or accepted more than one year in advance of the due date.

(c) Payments are due at the time specified in the lease, regardless of whether the lessee receives an advance billing or other notice that a payment is due.

§ 162.553 Must a WSR lease specify who receives monetary compensation payments?

(a) A WSR lease must specify whether the lessee will make payments directly to the Indian landowners (direct pay) or to us on their behalf.

(b) The lessee may make payments directly to the Indian landowners if:

(1) The Indian landowners' trust accounts are unencumbered;

(2) There are 10 or fewer beneficial owners; and

(3) One hundred percent of the beneficial owners (including those on whose behalf we have consented) agree to receive payment directly from the lessee at the start of the lease.

(c) If the lease provides that the lessee will directly pay the Indian landowners, then:

(1) The lease must include provisions for proof of payment upon our request.

(2) When we consent on behalf of an Indian landowner, the lessee must make payment to us on behalf of that landowner.

(3) The lessee must send direct payments to the parties and addresses specified in the lease, unless the lessee receives notice of a change of ownership or address.

(4) Unless the lease provides otherwise, payments may not be made payable directly to anyone other than the Indian landowners.

(5) Direct payments must continue through the duration of the lease, except that:

(i) The lessee must make all Indian landowners' payments to us if 100 percent of the Indian landowners agree to suspend direct pay and provide us with documentation of their agreement; and

(ii) The lessee must make that individual Indian landowner's payment to us if any individual Indian landowner who dies, is declared non compos mentis, owes a debt resulting in a trust account encumbrance, or his or her whereabouts become unknown.

§ 162.554 What form of monetary compensation payment is acceptable under a WSR lease?

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

(b) When payments are made to us, our preferred method of payment is electronic funds transfer payments. We will also accept:

(1) Money orders;

(2) Personal checks;

(3) Certified checks; or

(4) Cashier's checks.

(c) We will not accept cash or foreign currency.

(d) We will accept third-party checks only from financial institutions or Federal agencies.

§ 162.555 May a WSR lease provide for non-monetary or varying types of compensation?

(a) A WSR lease may provide for the following, subject to the conditions in paragraphs (b) and (c) of this section:

(1) Alternative forms of compensation, including but not limited to, in-kind consideration and payments based on percentage of income; or

(2) Varying types of consideration at specific stages during the life of the lease, including but not limited to fixed annual payments during installation, payments based on income during an operational period, and bonuses.

(b) For tribal land, we will defer to the tribe's determination that the compensation in paragraph (a) of this section is in its best interest, if the tribe submits a signed certification or tribal authorization stating that it has determined the compensation in paragraph (a) of this section to be in its best interest.

(c) For individually owned land, we may approve a lease that provides for compensation under paragraph (a) of this section if we determine that it is in the best interest of the Indian landowners.

§ 162.556 Will BIA notify a lessee when a payment is due under a WSR lease?

Upon request of the Indian landowners, we may issue invoices to a lessee in advance of the dates on which payments are due under a WSR lease. The lessee's obligation to make these payments in a timely manner will not be excused if invoices are not delivered or received.

§ 162.557 Must a WSR lease provide for compensation reviews or adjustments?

(a) For a WSR lease of tribal land, unless the lease provides otherwise, no periodic review of the adequacy of compensation or adjustment is required if the tribe states in its tribal certification or authorization that it has determined that not having reviews and/or adjustments is in its best interest.

(b) For a WSR lease of individually owned Indian land, unless the lease provides otherwise, no periodic review of the adequacy of compensation or adjustment is required if:

(1) If the term of the lease is 5 years or less;

(2) The lease provides for automatic adjustments; or

(3) We determine it is in the best interest of the Indian landowners not to require a review or automatic adjustment based on circumstances including, but not limited to, the following:

(i) The lease provides for payment of less than fair market rental;

(ii) The lease is for public purposes;

(iii) The lease provides for most or all of the compensation to be paid during the first 5 years of the lease term or before the date the review would be conducted; or

(iv) The lease provides for graduated rent or non-monetary or various types of compensation.

(c) If the conditions in paragraph (a) or (b) of this section are not met, a review of the adequacy of compensation must occur at least every fifth year, in the manner specified in the lease. The lease must specify:

(1) When adjustments take effect;

(2) Who can make adjustments;

(3) What the adjustments are based on; and

(4) How to resolve disputes arising from the adjustments.

(d) When a review results in the need for adjustment of compensation, the Indian landowners must consent to the adjustment in accordance with § 162.012, unless the lease provides otherwise.

§ 162.558 What other types of payments are required under a WSR lease?

(a) The lessee may be required to pay additional fees, taxes, and assessments associated with the use of the land, as determined by entities having jurisdiction, except as provided in § 162.017. The lessee must pay these amounts to the appropriate office.

(b) If the leased premises are within an Indian irrigation project or drainage district, except as otherwise provided in part 171 of this chapter, the lessee must pay all operation and maintenance charges that accrue during the lease term. The lessee must pay these amounts to the appropriate office in charge of the irrigation project or drainage district. We will treat failure to make these payments as a violation of the lease.

(c) Where the property is subject to at least one other lease for another compatible use, such as grazing, the lessees may agree among themselves how to allocate payment of the operation and maintenance charges.

WSR Lease Bonding and Insurance

§ 162.559 Must a lessee provide a performance bond for a WSR lease?

The lessee must provide a performance bond or alternative form of security, except as provided in paragraph (f) of this section.

(a) The performance bond or alternative form of security must be in an amount sufficient to secure the contractual obligations including:

(1) No less than:

(i) The highest annual rental specified in the lease, if the compensation is paid annually; or

(ii) If the compensation is not paid annually, another amount established by BIA in consultation with the tribe for tribal land or, where feasible, with Indian landowners for individually owned Indian land;

(2) The installation of any required permanent improvements;

(3) The operation and maintenance charges for any land located within an irrigation project; and

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

(b) The performance bond or other security:

(1) Must be deposited with us and made payable only to us, and may not be modified without our approval, except as provided in paragraph (b)(2) of this section; and

(2) For tribal land, if the lease so provides, may be deposited with the tribe and made payable to the tribe, and may not be modified without the approval of the tribe.

(c) The lease must specify the conditions under which we may adjust security or performance bond requirements to reflect changing conditions, including consultation with the tribal landowner for tribal land before adjustment.

(d) We may require that the surety provide any supporting documents needed to show that the performance bond or alternative forms of security will be enforceable, and that the surety will be able to perform the guaranteed obligations.

(e) The performance bond or other security instrument must require the surety to provide notice to us at least 60 days before canceling a performance bond or other security. This will allow us to notify the lessee of its obligation to provide a substitute performance bond or other security and require collection of the bond or security before the cancellation date. Failure to provide a substitute performance bond or security is a violation of the lease.

(f) We may waive the requirement for a performance bond or alternative forms of security if:

(1) The lease is for public purposes; or

(2) The Indian landowners request it and we determine a waiver is in the Indian landowners' best interest.

(g) For tribal land, we will defer to the tribe's determination that a waiver of the performance bond or alternative form of security is in its best interest, to the maximum extent possible.

§ 162.560 What forms of security are acceptable under a WSR lease?

(a) We will accept a performance bond only in one of the following forms:

(1) Certificates of deposit issued by a federally insured financial institution authorized to do business in the United States;

(2) Irrevocable letters of credit issued by a federally insured financial institution authorized to do business in the United States;

(3) Negotiable Treasury securities; or

(4) Surety bonds issued by a company approved by the U.S. Department of the Treasury.

(b) We may accept an alternative form of security approved by us that provides adequate protection for the Indian landowners and us, including but not limited to an escrow agreement and assigned savings account.

(c) All forms of performance bonds or alternative security must, if applicable:

(1) Indicate on their face that BIA approval is required for redemption;

(2) Be accompanied by a statement granting full authority to BIA to make an immediate claim upon or sell them if the lessee violates the terms of the lease;

(3) Be irrevocable during the term of the performance bond or alternative security; and

(4) Be automatically renewable during the term of the lease.

(d) We will not accept cash bonds.

§ 162.561 What is the release process for a performance bond or alternative form of security under a WSR lease?

(a) Upon expiration, termination, or cancellation of the lease, the lessee must

ask BIA in writing to release the performance bond or alternative form of security.

(b) Upon receiving the request under paragraph (a) of this section, BIA will:

(1) Confirm with the tribe, for tribal land or, where feasible, with the Indian landowners for individually owned Indian land, that the lessee has complied with all lease obligations; and

(2) Release the performance bond or alternative form of security to the lessee unless we determine that the bond or security must be redeemed to fulfill the contractual obligations.

§ 162.562 Must a lessee provide insurance for a WSR lease?

Except as provided in paragraph (c) of this section, a lessee must provide insurance when necessary to protect the interests of Indian landowners and in the amount sufficient to protect all insurable permanent improvements on the leased premises.

(a) The insurance may include property, liability, and casualty insurance, depending on the Indian landowners' interests to be protected.

(b) Both the Indian landowners and the United States must be identified as additional insured parties.

(c) We may waive the requirement for insurance upon the request of the Indian landowner, if a waiver is in the best interest of the Indian landowner, including if the lease is for less than fair market rental or nominal compensation. For tribal land, we will defer, to the maximum extent possible, to the tribe's determination that a waiver is in its best interest.

WSR Lease Approval

§ 162.563 What documents are required for BIA approval of a WSR lease?

A lessee or the Indian landowners must submit the following documents to us to obtain BIA approval of a WSR lease:

(a) A lease executed by the Indian landowners and the lessee that meets the requirements of this part;

(b) For tribal land, a tribal authorization for the lease and, if applicable, meeting the requirements of §§ 162.549(a), 162.555(b), and 162.557(a), or a separate signed certification meeting the requirements of §§ 162.555(b) and 162.557(a));

(c) A valuation, if required under § 162.549 or § 162.550;

(d) Proof of insurance, if required under § 162.562;

(e) A performance bond or other security, if required under § 162.559;

(f) Statement from the appropriate tribal authority that the proposed use is in conformance with applicable tribal law, if required by the tribe;

(g) Environmental and archeological reports, surveys, and site assessments as needed to facilitate compliance with applicable Federal and tribal environmental and land use requirements, including any documentation prepared under § 162.027(b);

(h) A resource development plan that describes the type and location of any permanent improvements the lessee plans to install and a schedule showing the tentative commencement and completion dates for those improvements;

(i) A restoration and reclamation plan (and any subsequent modifications to the plan);

(j) Where the lessee is not an entity owned and operated by the tribe, documents that demonstrate the technical capability of the lessee or lessee's agent to construct, operate, maintain, and terminate the proposed project and the lessee's ability to successfully design, construct, or obtain the funding for a project similar to the proposed project, if appropriate;

(k) A legal description of the land under § 162.547;

(l) If the lease is being approved under 25 U.S.C. 415, information to assist us in our evaluation of the factors in 25 U.S.C. 415(a); and

(m) If the lessee is a corporation, limited liability company, partnership, joint venture, or other legal entity, except a tribal entity, information such as organizational documents, certificates, filing records, and resolutions, that demonstrates that:

(1) The representative has authority to execute a lease;

(2) The lease will be enforceable against the lessee; and

(3) The legal entity is in good standing and authorized to conduct business in the jurisdiction where the land is located.

§ 162.564 Will BIA review a proposed WSR lease before or during preparation of the NEPA review documentation?

Upon request of the Indian landowners, we will review the proposed WSR lease after negotiation by the parties, before or during preparation of the NEPA review documentation and any valuation. Within 60 days of receiving the proposed lease, we will provide an acknowledgement of the terms of the lease and identify any provisions that, based on this acknowledgment review, would justify disapproval of the lease, pending results of the NEPA review and any valuation.

§ 162.565 What is the approval process for a WSR lease?

(a) Before we approve a WSR lease, we must determine that the lease is in the best interest of the Indian landowners. In making that determination, we will:

(1) Review the lease and supporting documents;

(2) Identify potential environmental impacts and ensure compliance with all applicable environmental laws, land use laws, and ordinances;

(3) If the lease is being approved under 25 U.S.C. 415, assure ourselves that adequate consideration has been given to the factors in 25 U.S.C. 415(a); and

(4) Require any lease modifications or mitigation measures necessary to satisfy any requirements including any other Federal or tribal land use requirements.

(b) Upon receiving a WSR lease package, we will promptly notify the parties whether the package is or is not complete. A complete package includes all the information and supporting documents required under this subpart, including but not limited to, NEPA review documentation and valuation documentation, where applicable.

(1) If the WSR lease package is not complete, our letter will identify the missing information or documents required for a complete package. If we do not respond to the submission of a WSR lease package, the parties may take action under § 162.588.

(2) If the WSR lease package is complete, we will notify the parties of the date of receipt. Within 60 days of the receipt date, we will approve or disapprove the lease, return the package for revision, or inform the parties in writing that we need additional review time. If we inform the parties in writing that we need additional time, then:

(i) Our letter informing the parties that we need additional review time must identify our initial concerns and invite the parties to respond within 15 days of the date of the letter; and

(ii) We have 30 days from sending the letter informing the parties that we need additional time to approve or disapprove the lease.

(c) If we do not meet the deadlines in this section, then the parties may take appropriate action under § 162.588.

(d) We will provide any lease approval or disapproval and the basis for the determination, along with notification of any appeal rights under part 2 of this chapter, in writing to the parties to the lease.

(e) We will provide approved WSR leases on tribal land to the lessee and provide a copy to the tribe. We will provide approved WSR leases on

individually owned Indian land to the lessee, and make copies available to the Indian landowners upon written request.

§ 162.566 How will BIA decide whether to approve a WSR lease?

(a) We will approve a WSR lease unless:

(1) The required consents have not been obtained from the parties to the lease;

(2) The requirements of this subpart have not been met; or

(3) We find a compelling reason to withhold our approval in order to protect the best interests of the Indian landowners.

(b) We will defer, to the maximum extent possible, to the Indian landowners' determination that the WSR lease is in their best interest.

(c) We may not unreasonably withhold approval of a WSR lease.

§ 162.567 When will a WSR lease be effective?

(a) A WSR lease will be effective on the date that we approve the lease, even if an appeal is filed under part 2 of this chapter.

(b) The lease may specify a date on which the obligations between the parties to the lease are triggered. Such date may be before or after the approval date under paragraph (a) of this section.

§ 162.568 Must a WSR lease document be recorded?

(a) Any WSR lease document must be recorded in the LTRO with jurisdiction over the leased land.

(1) We will record the lease document immediately following our approval.

(2) If our approval of an assignment or sublease is not required, the parties must record the assignment or sublease in the LTRO with jurisdiction over the leased land.

(b) The tribe must record lease documents for the following types of leases in the LTRO with jurisdiction over the tribal lands, even though BIA approval is not required:

(1) Leases of tribal land that a corporate entity leases to a third party under 25 U.S.C. 477; and

(2) Leases of tribal land under a special act of Congress authorizing leases without our approval.

§ 162.569 Will BIA require an appeal bond for an appeal of a decision on a WSR lease document?

(a) If a party appeals our decision on a WSR lease, assignment, amendment, or sublease, then the official to whom the appeal is made may require the appellant to post an appeal bond in accordance with part 2 of this chapter. We will not require an appeal bond:

(1) For an appeal of a decision on a leasehold mortgage; or

(2) If the tribe is a party to the appeal and requests a waiver of the appeal bond.

(b) The appellant may not appeal the appeal bond decision. The appellant may, however, request that the official to whom the appeal is made reconsider the bond decision, based on extraordinary circumstances. Any reconsideration decision is final for the Department.

WSR Lease Amendments

§ 162.570 May the parties amend a WSR lease?

The parties may amend a WSR lease by obtaining:

(a) The lessee's signature;

(b) The Indian landowners' consent under the requirements in § 162.571; and

(c) BIA approval of the amendment under §§ 162.572 and 162.573.

§ 162.571 What are the consent requirements for an amendment to a WSR lease?

(a) Unless the lease provides otherwise, the lessee must notify all Indian landowners of the proposed amendment.

(b) The Indian landowners, or their representatives under § 162.013, must consent to an amendment of a WSR lease in the same percentages and manner as a new WSR lease under § 162.012, unless the lease:

(1) Provides that individual Indian landowners are deemed to have consented if they do not object in writing to the amendment within a specified period of time following the landowners' receipt of the amendment and the lease meets the requirements of paragraph (c) of this section;

(2) Authorizes one or more representatives to consent to an amendment on behalf of all Indian landowners; or

(3) Designates us as the Indian landowners' representative for the purposes of consenting to an amendment.

(c) If the lease provides for deemed consent under paragraph (b)(1) of this section, it must require the parties to submit to us:

(1) A copy of the executed amendment or other documentation of any Indian landowners' actual consent;

(2) Proof of mailing of the amendment to any Indian landowners who are deemed to have consented; and

(3) Any other pertinent information for review.

(d) Unless specifically authorized in the lease, a written power of attorney, or a court document, Indian landowners may not be deemed to have consented to, and an Indian landowner's designated representative may not negotiate or consent to, an amendment that would:

(1) Reduce the payment obligations to the Indian landowners;

(2) Increase or decrease the lease area;

(3) Terminate or change the term of the lease; or

(4) Modify dispute resolution procedures.

§ 162.572 What is the approval process for an amendment to a WSR lease?

(a) When we receive an amendment that meets the requirements of this subpart, we will notify the parties of the date we receive it. We have 30 days from receipt of the executed amendment, proof of required consents, and required documentation to approve or disapprove the amendment or inform the parties in writing that we need additional review time. Our determination whether to approve the amendment will be in writing and will state the basis for our approval or disapproval.

(b) Our letter informing the parties that we need additional review time must identify our initial concerns and invite the parties to respond within 15 days of the date of the letter. We have 30 days from sending the letter informing the parties that we need additional time to approve or disapprove the amendment.

(c) If we do not meet the deadline in paragraph (a) of this section, or paragraph (b) of this section if applicable, the amendment is deemed approved to the extent consistent with Federal law. Unless the lease provides otherwise, provisions of the amendment that are inconsistent with Federal law will be severed and unenforceable; all other provisions of the amendment will remain in force.

§ 162.573 How will BIA decide whether to approve an amendment to a WSR lease?

(a) We may disapprove a WSR lease amendment only if at least one of the following is true:

(1) The Indian landowners have not consented and their consent is required;

(2) The lessee's mortgagees or sureties have not consented;

(3) The lessee is in violation of the lease;

(4) The requirements of this subpart have not been met; or

(5) We find a compelling reason to withhold our approval in order to protect the best interests of the Indian landowners.

(b) We will defer, to the maximum extent possible, to the Indian

landowners' determination that the amendment is in their best interest.

(c) We may not unreasonably withhold approval of an amendment.

WSR Lease Assignments

§ 162.574 May a lessee assign a WSR lease?

(a) A lessee may assign a WSR lease by meeting the consent requirements in § 162.575 and obtaining our approval of the assignment under §§ 162.576 and 162.577 or by meeting the conditions in paragraphs (b) or (c) of this section.

(b) Where provided in the lease, the lessee may assign the lease to the following without meeting consent requirements or obtaining BIA approval of the assignment, as long as the lessee notifies BIA of the assignment within 30 days after it is executed:

(1) Not more than three distinct legal entities specified in the lease; or

(2) The lessee's wholly owned subsidiaries.

(c) The lessee may assign the lease without our approval or meeting consent requirements if:

(1) The assignee is a leasehold mortgagee or its designee, acquiring the lease either through foreclosure or by conveyance;

(2) The assignee agrees in writing to assume all of the obligations and conditions of the lease; and

(3) The assignee agrees in writing that any transfer of the lease will be in accordance with applicable law under § 162.014.

§ 162.575 What are the consent requirements for an assignment of a WSR lease?

(a) Unless the lease provides otherwise, the lessee must notify all Indian landowners of the proposed assignment.

(b) The Indian landowners, or their representatives under § 162.013, must consent to an assignment in the same percentages and manner as a new WSR lease under § 162.012, unless the lease:

(1) Provides that individual Indian landowners are deemed to have consented where they do not object in writing to the assignment within a specified period of time following the landowners' receipt of the assignment and the lease meets the requirements of paragraph (c) of this section;

(2) Authorizes one or more representatives to consent to an assignment on behalf of all Indian landowners; or

(3) Designates us as the Indian landowners' representative for the purposes of consenting to an assignment.

(c) If the lease provides for deemed consent under paragraph (b)(1) of this section, it must require the parties to submit to us:

(1) A copy of the executed assignment or other documentation of any Indian landowners' actual consent;

(2) Proof of mailing of the assignment to any Indian landowners who are deemed to have consented; and

(3) Any other pertinent information for us to review.

(d) The lessee must obtain the consent of the holders of any bonds or mortgages.

§ 162.576 What is the approval process for an assignment of a WSR lease?

(a) When we receive an assignment that meets the requirements of this subpart, we will notify the parties of the date we receive it. If our approval is required, we have 30 days from receipt of the executed assignment, proof of required consents, and required documentation to approve or disapprove the assignment. Our determination whether to approve the assignment will be in writing and will state the basis for our approval or disapproval.

(b) If we do not meet any of the deadlines in this section, the lessee or Indian landowners may take appropriate action under § 162.588.

§ 162.577 How will BIA decide whether to approve an assignment of a WSR lease?

(a) We may disapprove an assignment of a WSR lease only if at least one of the following is true:

(1) The Indian landowners have not consented and their consent is required;

(2) The lessee's mortgagees or sureties have not consented;

(3) The lessee is in violation of the lease;

(4) The assignee does not agree to be bound by the terms of the lease;

(5) The requirements of this subpart have not been met; or

(6) We find a compelling reason to withhold our approval in order to protect the best interests of the Indian landowners.

(b) In making the finding required by paragraph (a)(6) of this section, we may consider whether:

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

(2) If a performance bond is required, the assignee has posted the bond or security and provided supporting documents that demonstrate that:

(i) The lease will be enforceable against the assignee; and

(ii) The assignee will be able to perform its obligations under the lease or assignment.

(c) We will defer, to the maximum extent possible, to the Indian landowners' determination that the assignment is in their best interest.

(d) We may not unreasonably withhold approval of an assignment.

WSR Lease Subleases

§ 162.578 May a lessee sublease a WSR lease?

(a) A lessee may sublease a WSR lease by meeting the consent requirements in § 162.579 and obtaining our approval of the sublease under §§ 162.580 and 162.581, or by meeting the conditions in paragraph (b) of this section.

(b) The lessee may sublease without meeting consent requirements or obtaining BIA approval of the sublease, if:

(1) The lease provides for subleasing without meeting consent requirements or obtaining BIA approval;

(2) The sublease does not relieve the lessee/sublessor of any liability; and

(3) The parties provide BIA with a copy of the sublease within 30 days after it is executed.

§ 162.579 What are the consent requirements for a sublease of a WSR lease?

(a) Unless the lease provides otherwise, the lessee must notify all Indian landowners of the proposed sublease.

(b) The Indian landowners, or their representatives under § 162.013, must consent to a sublease in the same percentages and manner as a new WSR lease under § 162.012, unless the lease:

(1) Provides that individual Indian landowners are deemed to have consented where they do not object in writing to the sublease within a specified period of time following the landowners' receipt of the sublease and the lease meets the requirements in paragraph (c) of this section;

(2) Authorizes one or more representatives to consent to a sublease on behalf of all Indian landowners; or

(3) Designates us as the Indian landowners' representative for the purposes of consenting to a sublease.

(c) If the lease provides for deemed consent under paragraph (b)(1) of this section, it must require the parties to submit to us:

(1) A copy of the executed sublease or other documentation of any Indian landowners' actual consent;

(2) Proof of mailing of the sublease to any Indian landowners who are deemed to have consented; and

(3) Any other pertinent information for us to review.

§ 162.580 What is the approval process for a sublease of a WSR lease?

(a) When we receive a sublease that meets the requirements of this subpart,

we will notify the parties of the date we receive it. If our approval is required, we have 30 days from receipt of the executed sublease, proof of required consents, and required documentation to approve or disapprove the sublease or inform the parties to the sublease and Indian landowners in writing that we need additional review time. Our determination whether to approve the sublease will be in writing and will state the basis for our approval or disapproval.

(b) Our letter informing parties that we need additional review time must identify our initial concerns and invite the parties to respond within 15 days of the date of the letter. We have 30 days from sending the letter informing the parties that we need additional time to approve or disapprove the sublease.

(c) If we do not meet the deadline in paragraph (a) of this section, or paragraph (b) of this section if applicable, the sublease is deemed approved to the extent consistent with Federal law. Unless the lease provides otherwise, provisions of the sublease that are inconsistent with Federal law will be severed and unenforceable; all other provisions of the sublease will remain in force.

§ 162.581 How will BIA decide whether to approve a sublease of a WSR lease?

(a) We may disapprove a sublease of a WSR lease only if at least one of the following is true:

(1) The Indian landowners have not consented and their consent is required;

(2) The lessee's mortgagees or sureties have not consented;

(3) The lessee is in violation of the lease;

(4) The lessee will not remain liable under the lease; and

(5) We find a compelling reason to withhold our approval in order to protect the best interests of the Indian landowners.

(b) In making the finding required by paragraph (a)(5) of this section, we may consider whether the value of any part of the leased premises not covered by the sublease would be adversely affected.

(c) We will defer, to the maximum extent possible, to the Indian landowners' determination that the sublease is in their best interest.

(d) We may not unreasonably withhold approval of a sublease.

WSR Leasehold Mortgages

§ 162.582 May a lessee mortgage a WSR lease?

(a) A lessee may mortgage a WSR lease by meeting the consent requirements in § 162.583 and obtaining our approval of the leasehold mortgage under §§ 162.584 and 162.585.

(b) Refer to § 162.574(c) for information on what happens if a sale or foreclosure under an approved mortgage of the leasehold interest occurs.

§ 162.583 What are the consent requirements for a leasehold mortgage of a WSR lease?

(a) Unless the lease provides otherwise, the lessee must notify all Indian landowners of the proposed leasehold mortgage.

(b) The Indian landowners, or their representatives under § 162.013, must consent to a leasehold mortgage in the same percentages and manner as a new WSR lease under § 162.012, unless the lease:

(1) States that landowner consent is not required for a leasehold mortgage and identifies what law would apply in case of foreclosure;

(2) Provides that individual Indian landowners are deemed to have consented where they do not object in writing to the leasehold mortgage within a specified period of time following the landowners' receipt of the leasehold mortgage and the lease meets the requirements of paragraph (c) of this section;

(3) Authorizes one or more representatives to consent to a leasehold mortgage on behalf of all Indian landowners; or

(4) Designates us as the Indian landowners' representative for the purposes of consenting to a leasehold mortgage.

(c) If the lease provides for deemed consent under paragraph (b)(2) of this section, it must require the parties to submit to us:

(1) A copy of the executed leasehold mortgage or other documentation of any Indian landowners' actual consent;

(2) Proof of mailing of the leasehold mortgage to any Indian landowners who are deemed to have consented; and

(3) Any other pertinent information for us to review.

§ 162.584 What is the approval process for a leasehold mortgage of a WSR lease?

(a) When we receive a leasehold mortgage that meets the requirements of this subpart, we will notify the parties of the date we receive it. We have 20 days from receipt of the executed leasehold mortgage, proof of required consents, and required documentation to approve or disapprove the leasehold mortgage. Our determination whether to approve the leasehold mortgage will be in writing and will state the basis for our approval or disapproval.

(b) If we do not meet the deadline in this section, the lessee may take appropriate action under § 162.588.

§ 162.585 How will BIA decide whether to approve a leasehold mortgage of a WSR lease?

(a) We may disapprove a leasehold mortgage of a WSR lease only if at least one of the following is true:

(1) The Indian landowners have not consented and their consent is required;

(2) The lessee's mortgagees or sureties have not consented;

(3) The requirements of this subpart have not been met; or

(4) We find a compelling reason to withhold our approval in order to protect the best interests of the Indian landowners.

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

(1) The leasehold mortgage proceeds would be used for purposes unrelated to the leased premises; and

(2) The leasehold mortgage is limited to the leasehold.

(c) We will defer, to the maximum extent possible, to the Indian landowners' determination that the leasehold mortgage is in their best interest.

(d) We may not unreasonably withhold approval of a leasehold mortgage.

WSR Lease Effectiveness, Compliance, and Enforcement

§ 162.586 When will an amendment, assignment, sublease, or leasehold mortgage of a WSR lease be effective?

(a) An amendment, assignment, sublease, or leasehold mortgage of a WSR lease will be effective when approved, even if an appeal is filed under part 2 of this chapter, except:

(1) If the amendment or sublease was deemed approved under § 162.572(b) or § 162.580(b), the amendment or sublease becomes effective 45 days from the date the parties mailed or delivered the document to us for our review or, if we sent a letter informing the parties that we need additional time to approve or disapprove the lease, the amendment or sublease becomes effective 45 days from the date of the letter informing the parties that we need additional time to approve or disapprove the lease; and

(2) An assignment that does not require our approval under § 162.574(b) or a sublease that does not require our approval under § 162.578(b) becomes effective on the effective date specified in the assignment or sublease. If the assignment or sublease does not specify the effective date, it becomes effective upon execution by the parties.

(b) We will provide copies of approved documents to the party requesting approval, to the tribe for tribal land, and upon request, to other parties to the lease document.

§ 162.587 What happens if BIA disapproves an amendment, assignment, sublease, or leasehold mortgage of a WSR lease?

If we disapprove an amendment, assignment, sublease, or leasehold mortgage of a WSR lease, we will notify the parties immediately and advise the landowners of their right to appeal the decision under part 2 of this chapter.

§ 162.588 What happens if BIA does not meet a deadline for issuing a decision on a lease document?

(a) If a Superintendent does not meet a deadline for issuing a decision on a lease, assignment, or leasehold mortgage, the parties may file a written notice to compel action with the appropriate Regional Director.

(b) The Regional Director has 15 days from receiving the notice to:

(1) Issue a decision; or

(2) Order the Superintendent to issue a decision within the time set out in the order.

(c) The parties may file a written notice to compel action with the BIA Director if:

(1) The Regional Director does not meet the deadline in paragraph (b) of this section;

(2) The Superintendent does not issue a decision within the time set by the Regional Director under paragraph (b)(2) of this section; or

(3) The initial decision on the lease, assignment, or leasehold mortgage is with the Regional Director, and he or she does not meet the deadline for such decision.

(d) The BIA Director has 15 days from receiving the notice to:

(1) Issue a decision; or

(2) Order the Regional Director or Superintendent to issue a decision within the time set out in the order.

(e) If the Regional Director or Superintendent does not issue a decision within the time set out in the order under paragraph (d)(2), then the BIA Director must issue a decision within 15 days from the expiration of the time set out in the order.

(f) The parties may file an appeal from our inaction to the Interior Board of Indian Appeals if the Director does not meet the deadline in paragraph (d) or (e) of this section.

(g) The provisions of 25 CFR 2.8 do not apply to the inaction of BIA officials with respect to a decision on a lease, amendment, assignment, sublease, or leasehold mortgage under this subpart.

§ 162.589 May BIA investigate compliance with a WSR lease?

(a) We may enter the leased premises at any reasonable time, upon reasonable notice, and consistent with any notice requirements under applicable tribal law and applicable lease documents, to protect the interests of the Indian landowners and to determine if the lessee is in compliance with the requirements of the lease.

(b) If an Indian landowner notifies us that a specific lease violation has occurred, we will promptly initiate an appropriate investigation.

§ 162.590 May a WSR lease provide for negotiated remedies if there is a violation?

(a) A WSR lease of tribal land may provide either or both parties with negotiated remedies in the event of a lease violation, including, but not limited to, the power to terminate the lease. If the lease provides one or both parties with the power to terminate the lease:

(1) BIA approval of the termination is not required;

(2) The termination is effective without BIA cancellation; and

(3) The Indian landowners must notify us of the termination so that we may record it in the LTRO.

(b) A WSR lease of individually owned Indian land may provide either or both parties with negotiated remedies, so long as the lease also specifies the manner in which those remedies may be exercised by or on behalf of the Indian landowners of the applicable percentage of interests under § 162.012 of this part. If the lease provides one or both parties with the power to terminate the lease:

(1) BIA concurrence with the termination is required to ensure that the Indian landowners of the applicable percentage of interests have consented; and

(2) BIA will record the termination in the LTRO.

(c) The parties must notify any surety or mortgagee of any violation that may result in termination and the termination of a WSR lease.

(d) Negotiated remedies may apply in addition to, or instead of, the cancellation remedy available to us, as specified in the lease. The landowners may request our assistance in enforcing negotiated remedies.

(e) A WSR lease may provide that lease violations will be addressed by the tribe, and that lease disputes will be resolved by a tribal court, any other court of competent jurisdiction, or by a tribal governing body in the absence of a tribal court, or through an alternative dispute resolution method. We may not be bound by decisions made in such forums, but we will defer to ongoing actions and proceedings, as appropriate, in deciding whether to exercise any of the remedies available to us.

§ 162.591 What will BIA do about a violation of a WSR lease?

(a) In the absence of actions or proceedings described in § 162.590(e), or if it is not appropriate for us to defer to the actions or proceedings, we will follow the procedures in paragraphs (b) and (c) of this section.

(b) If we determine there has been a violation of the conditions of a WSR lease, other than a violation of payment provisions covered by paragraph (c) of this section, we will promptly send the lessee and any surety and mortgagee a notice of violation by certified mail, return receipt requested.

(1) We will send a copy of the notice of violation to the tribe for tribal land, or provide constructive notice to Indian landowners for individually owned Indian land.

(2) The notice of violation will advise the lessee that, within 10 business days of the receipt of a notice of violation, the lessee must:

(i) Cure the violation and notify us, and the tribe for tribal land, in writing that the violation has been cured;

(ii) Dispute our determination that a violation has occurred; or

(iii) Request additional time to cure the violation.

(3) The notice of violation may order the lessee to cease operations under the lease.

(c) A lessee's failure to pay compensation in the time and manner required by a WSR lease is a violation of the lease, and we will issue a notice of violation in accordance with this paragraph.

(1) We will send the lessees and any surety and mortgagee a notice of violation by certified mail, return receipt requested:

(i) Promptly following the date on which payment was due, if the lease requires that payments be made to us; or

(ii) Promptly following the date on which we receive actual notice of non-payment from the Indian landowners, if the lease provides for payment directly to the Indian landowners.

(2) We will send a copy of the notice of violation to the tribe for tribal land, or provide constructive notice to the Indian landowners for individually owned Indian land.

(3) The notice of violation will require the lessee to provide adequate proof of payment.

(d) The lessee and its sureties will continue to be responsible for the

obligations in the lease until the lease expires or is terminated or cancelled.

§ 162.592 What will BIA do if a lessee does not cure a violation of a WSR lease on time?

(a) If the lessee does not cure a violation of a WSR lease within the required time period, or provide adequate proof of payment as required in the notice of violation, we will consult with the tribe for tribal land or, where feasible, with Indian landowners for individually owned Indian land, and determine whether:

(1) We should cancel the lease;

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

(3) We should invoke other remedies available under the lease or applicable law, including collection on any available performance bond or, for failure to pay compensation, referral of the debt to the Department of the Treasury for collection; or

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

(b) Following consultation with the tribe for tribal land or, where feasible, with Indian landowners for individually owned Indian land, we may take action to recover unpaid compensation and any associated late payment charges.

(1) We do not have to cancel the lease or give any further notice to the lessee before taking action to recover unpaid compensation.

(2) We may still take action to recover any unpaid compensation if we cancel the lease.

(c) If we decide to cancel the lease, we will send the lessee and any surety and mortgagee a cancellation letter by certified mail, return receipt requested, within 5 business days of our decision. We will send a copy of the cancellation letter to the tribe for tribal land, and will provide Indian landowners for individually owned Indian land with actual or constructive notice of the cancellation. The cancellation letter will:

(1) Explain the grounds for cancellation;

(2) If applicable, notify the lessee of the amount of any unpaid compensation or late payment charges due under the lease;

(3) Notify the lessee of the lessee's right to appeal under part 2 of this chapter, including the possibility that the official to whom the appeal is made may require the lessee to post an appeal bond;

(4) Order the lessee to vacate the property within 31 days of the date of receipt of the cancellation letter, if an appeal is not filed by that time; and

(5) Order the lessee to take any other action BIA deems necessary to protect the Indian landowners.

(d) We may invoke any other remedies available to us under the lease, including collecting on any available performance bond, and the Indian landowners may pursue any available remedies under tribal law.

§ 162.593 Will late payment charges or special fees apply to delinquent payments due under a WSR lease?

(a) Late payment charges will apply as specified in the lease. The failure to pay these amounts will be treated as a lease violation.

(b) We may assess the following special fees to cover administrative costs incurred by the United States in the collection of the debt, if compensation is not paid in the time and manner required, in addition to late payment charges that must be paid to the Indian landowners under the lease:

The lessee will pay . . .	For . . .
(1) $50.00	Any dishonored check.
(2) $15.00	Processing of each notice or demand letter.
(3) 18 percent of balance due	Treasury processing following referral for collection of delinquent debt.

§ 162.594 How will payment rights relating to WSR leases be allocated?

The WSR lease may allocate rights to payment for insurance proceeds, trespass damages, compensation awards, settlement funds, and other payments between the Indian landowners and the lessee. If not specified in the lease, insurance policy, order, award, judgment, or other document, the Indian landowners will be entitled to receive these payments.

§ 162.595 When will a cancellation of a WSR lease be effective?

(a) A cancellation involving a WSR lease will not be effective until 31 days after the lessee receives a cancellation letter from us, or 41 days from the date we mailed the letter, whichever is earlier.

(b) The cancellation decision will not be effective if an appeal is filed unless the cancellation is made immediately effective under part 2 of this chapter. While a cancellation decision is ineffective, the lessee must continue to pay compensation and comply with the other terms of the lease.

§ 162.596 What will BIA do if a lessee remains in possession after a WSR lease expires or is terminated or cancelled?

If a lessee remains in possession after the expiration, termination, or cancellation of a WSR lease, we may treat the unauthorized possession as a trespass under applicable law in consultation with the Indian landowners. Unless the Indian landowners of the applicable percentage of interests under § 162.012 have notified us in writing that they are engaged in good faith negotiations with the holdover lessee to obtain a new lease, we may take action to recover possession on behalf of the Indian landowners, and pursue any additional remedies available under applicable law, such as a forcible entry and detainer action.

§ 162.597 Will BIA appeal bond regulations apply to cancellation decisions involving WSR leases?

(a) Except as provided in paragraph (b) of this section, the appeal bond provisions in part 2 of this chapter will apply to appeals from lease cancellation decisions.

(b) The lessee may not appeal the appeal bond decision. The lessee may, however, request that the official to whom the appeal is made reconsider the appeal bond decision, based on extraordinary circumstances. Any reconsideration decision is final for the Department.

§ 162.598 When will BIA issue a decision on an appeal from a WSR leasing decision?

BIA will issue a decision on an appeal from a WSR leasing decision within 60 days of receipt of all pleadings.

§ 162.599 What happens if the lessee abandons the leased premises?

If a lessee abandons the leased premises, we will treat the abandonment as a violation of the lease. The lease may specify a period of non-use after which the lease premises will be considered abandoned.

■ 16. Add subpart G to read as follows:

Subpart G—Records

Sec.

Subpart G—Records

§ 162.701 Who owns the records associated with this part?

(a) Records are the property of the United States if they:

(1) Are made or received by a tribe or tribal organization in the conduct of a Federal trust function under 25 U.S.C. 450f *et seq.,* including the operation of a trust program; and

(2) Evidence the organization, functions, policies, decisions, procedures, operations, or other activities undertaken in the performance of a Federal trust function under this part.

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

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

(a) Any organization, including a tribe or tribal organization, that has records identified in § 162.701(a) of this part, must preserve the records in accordance with approved Departmental records retention procedures under the Federal Records Act, 44 U.S.C. chapters 29, 31 and 33. These records and related records management practices and safeguards required under the Federal Records Act are subject to inspection by the Secretary and the Archivist of the United States.

(b) A tribe or tribal organization should preserve the records identified in § 162.701(b) of this part, for the period of time authorized by the Archivist of the United States for similar Department of the Interior records under 44 U.S.C. chapter 33. If a tribe or tribal organization does not preserve records associated with its conduct of business with the Department of the Interior under this part, it may prevent the tribe or tribal organization from being able to adequately document essential transactions or furnish information necessary to protect its legal and financial rights or those of persons directly affected by its activities.

§ 162.703 How does the Paperwork Reduction Act affect this part?

The collections of information in this part have been approved by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.* and assigned OMB Control Number 1076–0155. Response is required to obtain a benefit. A Federal agency may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a currently valid OMB Control Number.

Dated: June 7, 2012.

Donald E. Laverdure,

Acting Assistant Secretary—Indian Affairs.

[FR Doc. 2012–28926 Filed 11–28–12; 4:15 pm]

BILLING CODE 4310–6W–P

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Part II

Department of the Interior

Bureau of Indian Affairs

25 CFR Part 162
Residential, Business, and Wind and Solar Resource Leases on Indian Land; Proposed Rule

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

25 CFR Part 162

[Docket ID BIA–2011–0001]

RIN 1076–AE73

Residential, Business, and Wind and Solar Resource Leases on Indian Land

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Proposed rule.

SUMMARY: The Bureau of Indian Affairs (BIA) is proposing to revise the regulations addressing non-agricultural leasing of Indian land. This rule would add new subparts to address residential leases, business leases, wind resource evaluation and development leases, and solar resource development leases on Indian land, and would therefore remove the existing subpart for non-agricultural leases.

DATES: Comments on this proposed rule must be received by January 30, 2012. *Comments on the information collections contained in this proposed regulation are separate from those on the substance of the rule.* Comments on the information collection burden should be received by December 29, 2011 to ensure consideration, but must be received no later than January 30, 2012.

ADDRESSES: You may submit comments by any of the following methods:

Federal rulemaking portal: http://www.regulations.gov. The rule is listed under the agency name ''Bureau of Indian Affairs.'' The rule has been assigned Docket ID: BIA–2011–0001. If you would like to submit comments through the Federal e-Rulemaking Portal, go to *http://www.regulations.gov* and do the following. Go to the box entitled ''Enter Keyword or ID,'' type in ''BIA–2011–0001,'' and click the ''Search'' button. The next screen will display the Docket Search Results for the rulemaking. If you click on BIA–2011–0001, you can view this rule and submit a comment. You can also view any supporting material and any comments submitted by others.

—*Email: consultation@bia.gov.* Include the number 1076–AE73 in the subject line of the message.

—*Mail:* Del Laverdure, Principal Deputy Assistant Secretary—Indian Affairs, U.S. Department of the Interior, Mail Stop 4141, 1849 C Street NW., Washington, DC 20240. Include the number 1076–AE73 on the outer envelope.

—*Hand delivery:* Del Laverdure, Principal Deputy Assistant Secretary—Indian Affairs, U.S. Department of the Interior, Room 4141, 1849 C Street NW., Washington, DC 20240. Include the number 1076–AE73 on the outer envelope.

We cannot ensure that comments received after the close of the comment period (see **DATES**) will be included in the docket for this rulemaking and considered. Comments sent to an address other than those listed above will not be included in the docket for this rulemaking.

Comments on the information collections contained in this proposed regulation are separate from those on the substance of the rule. Send comments on the information collection burden to OMB by facsimile to (202) 395–5806 or email to the OMB Desk Officer for the Department of the Interior at *OIRA_DOCKET@omb.eop.gov.* Please send a copy of your comments to the person listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice.

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

SUPPLEMENTARY INFORMATION:

I. Background

This proposed rule would revise the current 25 CFR part 162, Leases and Permits, to establish subparts specifically addressing the following categories of leasing on Indian land: residential; business; wind resource evaluation and development; and solar resource development. Specifically, this rule would:

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

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

II. Summary of Substantive Revisions

This rule makes the procedures for leasing as explicit and transparent as possible. The consent requirements in the proposed regulations are consistent with the Indian Land Consolidation Act of 2000 (ILCA), as amended by the American Indian Probate Reform Act (AIPRA). Because this statute does not apply to tribes in Alaska, the consent requirements for Alaska remain the same as the previous regulations governing leasing. The proposed regulations provide procedures for approval of lease amendments, assignments, subleases and leasehold mortgages. The current regulations provide for the approval of such instruments, but do not specify the procedure for such approval, leading to the possibility of inconsistencies nationwide, to the detriment of lessees and lenders.

This rule provides that leases on tribal land may be approved for the compensation established in the lease. Leases for less than fair market rental may be approved on individually owned Indian land under certain circumstances.

Subpart C, Residential Leases, addresses leasing for single-family homes and housing for public purposes on Indian land. The proposed regulations provide for a 30-day time frame within which BIA must issue a decision on a complete residential lease application. Bonds are not required for leases for housing for public purposes and otherwise may be waived by BIA upon a determination that it is in the best interest of the landowner(s). Subpart C also includes provisions for enforcement of lease violations.

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

decision on a complete business lease application.

Subpart E, WEELs and WSR Leases, establishes procedures for obtaining BIA review and approval of wind energy evaluation leases (WEELs) and wind and solar resource (WSR) development leases. For wind energy, this proposed rule establishes a two-part process whereby developers obtain BIA approval of a short-term lease for possession of Indian land for the purposes of installation and maintenance of wind evaluation equipment, such as meteorological towers. The WEEL may provide the developer with an option to lease the Indian land for wind energy development purposes. The environmental reviews conducted for the short-term lease, which would only evaluate the impacts of the evaluation equipment, not the full development of the wind project, may be rolled into environmental reviews conducted for a lease for full development of the wind project. This two-part process is not necessary for solar resource development because solar evaluation does not require possession of the land.

Some of the more notable cross-cutting substantive changes include:

BIA Approval Process

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

Compensation and Valuations

- Providing that BIA will defer to the tribe's negotiated value for a lease of tribal land and will not require valuation of tribal land;
- Allowing for waivers of valuation for residential leases of individually owned land if the individual landowners provide 100 percent consent and a waiver and BIA determines it is in the best interest of the landowners (100 percent consent is necessary because non-consenting owners receive fair market value, so a valuation will be necessary if any individual does not consent);
- Allowing short-term leases for wind resource evaluation purposes at the value negotiated by the Indian landowners (whether tribal or individual Indians);
- Allowing alternative forms of rental (other than monetary compensation) if BIA determines it is in the best interest of the Indian landowners;
- Allowing other types of valuation (other than appraisals) under certain circumstances;
- Allowing for automatic rental adjustments and restricting the need for reviews of the lease compensation (to determine if an adjustment is needed) to certain circumstances.

Improvements

- Requiring plans of development and schedules for construction of improvements to assist the BIA and Indian landowners in enforcement of diligent development of the leased premises.
- Clarifying that improvements on trust or restricted land are not taxable by States or localities, without regard to ownership. The purposes of residential, business, and WSR leasing on Indian land are to promote Indian housing and to allow Indian landowners to use their land profitably for economic development. These regulations are intended to preempt the field of leasing of Indian lands. The Federal statutory and regulatory scheme for leasing, including the regulation of improvements, is so pervasive as to preclude the additional burden of State taxation. The assessment of State taxes would obstruct Federal policies supporting tribal economic development and self-determination, and tribal interests in effective tribal government and economic self-sufficiency.

Direct Pay

- Allowing for direct pay only where there are 10 or fewer landowners, and all landowners consent to direct pay;
- Continuing direct pay unless and until 100 percent of the owners agree to discontinue direct pay, but suspending direct pay for any one Indian landowner who dies, is declared non compos mentis, or whose whereabouts become unknown.

These changes are intended to increase the efficiency and transparency of the BIA approval process for leasing of Indian land, support tribal decisions regarding the use of their land, increase flexibility in compensation and valuations, and facilitate management of direct pay.

III. Procedural Requirements

III. Procedural Requirements

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

The Office of Management and Budget (OMB) has determined that this rule is significant under Executive Order 12866. This rule replaces provisions that apply to non-agricultural leasing of Indian land, generally, with provisions that apply specifically to the different types of non-agricultural leasing: Residential, business, and wind and solar resource leasing of Indian land. This rule describes how the BIA will administer residential, business, and wind and solar resource leases on trust and restricted land. Thus, the impact of the rule is confined to the Federal Government and individual Indian and tribal landowners and does not impose a compliance burden on the economy generally or create any inconsistencies or budgetary impacts to any other agency or Federal program.

(1) This rule will not have an annual effect of $100 million or more on the economy or adversely affect in a material way the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities. This rule makes changes to promote economic development on Indian land through, for example, providing greater transparency to procedures for obtaining BIA approval, imposing timelines on BIA to act on certain lease requests, and establishing that BIA will defer to tribes' negotiated values. The rule's changes will not have direct effects on the economy as a whole; however, the changes should result in increased leasing of Indian land, which will have a beneficial effect on tribal economies and communities.

(2) This rule will not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency because the Department is the only agency with authority for approving leases on Indian land. We

have coordinated with the Department of Housing and Urban Development (HUD) to ensure that the leasing procedures will not impede Indian landowners' ability to obtain HUD-funding for residences.

(3) This rule does involve entitlements, grants, user fees, or loan programs or the rights or obligations of their recipients. The revisions have no budgetary effects and do not affect the rights or obligations of any recipients.

(4) This rule may raise novel legal or policy issues because it alters established procedures for reviewing and approving leases of Indian land.

B. Regulatory Flexibility Act

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

C. Small Business Regulatory Enforcement Fairness Act

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

D. Unfunded Mandates Reform Act

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

E. Takings (E.O. 12630)

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

F. Federalism (E.O. 13132)

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

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

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

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

In accordance with the President's memorandum of April 29, 1994, ''Government-to-Government Relations with Native American Tribal Governments,'' Executive Order 13175 (59 FR 22951, November 6, 2000), and 512 DM 2, we have evaluated the potential effects on federally recognized Indian tribes and Indian trust assets. During the development of this proposed rule, the Department discussed the rule with tribal representatives at several consultation sessions. We distributed a preliminary draft of the rule to tribes in February 2011 and held three consultation sessions: Thursday, March 17, 2011 at the Reservation Economic Summit (RES) 2011 in Las Vegas; March 31, 2011 in Minnesota; and April 6, 2011, in Albuquerque, New Mexico. We requested that tribes submit written comments by April 18, 2011. We received written and oral comments from over 70 Indian tribes during tribal consultation. We reviewed each comment in depth and revised the rule accordingly. This proposed rule incorporates those revisions. We also compiled a summary of tribal comments received and our responses to those comments and are making that document available to tribes at: *http://www.bia.gov/WhoWeAre/AS-IA/Consultation/index.htm.* We plan to hold additional tribal consultation sessions, particularly in the geographic areas we were not able to reach prior to this proposed rule. We will announce the dates and locations of the additional tribal consultation sessions by letter to tribal leaders.

I. Paperwork Reduction Act

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

Current CFR cite	New CFR cite	Information collection requirement	Explanation of change
162.109, 162.204, 162.205	162.109, 162.204, 162.205, 162.338(e), 162.438(e), 162.528(d), 162.568(e).	Provide notice of tribal leasing laws, regulations, exemptions.	No change. Previously required, but now listed in specific subparts.
	162.320(a), 321(a), 162.420(a), 421(a), 162,546(a), 162.547(a).	Request for fair market rental/valuation on tribal land.	New.
	162.320(b), 321(b), 162.420(b), 421(b), 162,546(b), 162.547(b).	Request for waiver of fair market rental/valuation for individually owned land.	New.
	162.324, 162.424, 162.550	Agreement to suspend direct pay	New.
	162.368, 162.468, 162.593	Notification of good faith negotiations with holdover.	New.
162.207, 162.242–244, 162.604(a), 162.610.	162.009, 162.207, 162.242–244, 162. 345, 350, 353, 357, 162. 445, 450, 453, 457, 162. 530, 162.570, 574, 578, 582.	Submit lease, assignment, amendment, leasehold mortgage for approval.	No change. Previously required, but now listed in separate subparts.
162.213, 162.604(a)	162.024, 162.213, 162.338, 162.438, 162.528, 162.563.	Provide supporting documentation	No change. Previously required, but now listed in separate subparts.
	162.004	Submit permits to BIA for file	Permits must now be submitted to BIA for file.
162.217, 162.246	162.217, 162.246, 162.341, 162.441, 162.566.	Submit lease for recording	No change. Previously required, but now listed in separate subparts.
162.234, 162.604(c)	162.234, 162.334, 162.434, 162.525, 162.559.	Provide a bond	No change. Previously required, but now listed in separate subparts.
162.237, 162.604(d)	162.237, 162.337, 162.437, 162.527, 162.562.	Provide information for acceptable insurance.	No change. Previously required, but now listed in separate subparts.
162.241	162.241	Administrative fees	No change.
162.247, 162.613	162.247, 162.325, 329, 162.425, 429, 162.523, 551, 555.	Pay rent	No change. Previously required, but now listed in separate subparts.
162.248, 162.616	162.248, 162.365, 162.465, 162.590.	Pay penalties for late payment	No change. Previously required, but now listed in separate subparts.
162.212, 162.606	162.009, 162.212	Bidding on advertised lease	No change. Previously required, but now listed in separate subparts.
162.603	162.008(b)(2)	Use of minor's land	No change. Previously required, but now listed in separate subparts.
162.251, 162.618	162.251, 162.363, 162.463, 162.588.	Provide notice of curing violation	No change. Previously required, but now listed in separate subparts.
162.256, 162.623	162.256, 162.368, 162.468, 162.593.	Respond to notice of trespass	No change. Previously required, but now listed in separate subparts.
162.113	162.022, 162.113	Appealing decisions	No change. Previously required, but now listed in separate subparts.

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

BILLING CODE 4310–6W–P

CFR Cite	Description	Respondent Type	No. Respondents	Annual Responses	Burden Hours per Response	Total Annual Burden Hours
162.109, 162.204, 162.205, 162.338(e) 162.438(e) 162.528(d) 162.568(e)	Provide notice of tribal leasing laws, regulations, exemptions	Tribal	500	500	0.5	250
162.320(a), 321(a) 162.420(a), 421(a) 162,546(a), 162.547(a)	Request for fair market rental/valuation on tribal land	Tribal	50	50	0.5	25
162.320(b), 321(b) 162.420(b), 421(b) 162,546(b), 162.547(b)	Request for waiver of fair market rental/valuation for individually owned land	Individuals	5,000	5,000	0.5	2,500
162.324 162.424 162.550	Agreement to suspend direct pay.	Individuals	20	20	0.5	10
162.368 162.468 162.593	Notification of good faith negotiations with holdover.	Tribal	100	100	0.5	50
		Individuals	500	500	0.5	250
162.009 162.207, 242-244 162, 345, 350, 353, 357 162. 445, 450, 453, 457 162. 530, 570, 574, 578, 582	Submit lease, assignment, amendment, leasehold mortgage for approval	Individuals	10,000	10,000	1	10,000
		Businesses	2500	2500	1	2,500
		Tribal	2000	2000	1	2,000
162.024 162.213 162.338 162.438 162.528 162.563	Provide supporting documentation	Individuals	5,000	5,000	0.25	1,250
		Businesses	2,000	2,000	0.25	500
		Tribal	250	250	0.25	62.5
162.004	Submit permits to BIA for file	Individuals	100	100	0.25	25
		Businesses	100	100	0.25	25
		Tribal	100	100	0.25	25
162.217 162.246 162.341 162.441 162.566	Submit lease for recording	Individuals	10,000	10,000	0.5	5,000
		Businesses	2500	2500	0.5	1,250
		Tribal	2000	2000	0.5	1,000
162.234 162.334 162.434 162.525 162.559	Provide a bond	Individuals	10,000	10,000	0.5	5,000
		Businesses	2500	2500	0.5	1,250
		Tribal	2000	2000	0.5	1,000
162.237 162.337 162.437 162.527 162.562	Provide information for acceptable insurance	Individuals	10,000	10,000	0.25	2,500
		Businesses	2500	2500	0.25	625
		Tribal	2000	2000	0.25	500
162.241	Administrative fees	Individuals	10,000	10,000	2	20,000
		Businesses	2500	2500	2	5,000
		Tribal	2000	2000	2	4,000
162.247 162.325, 329 162.425, 429 162.523, 551, 555	Pay rent	Individuals	10,000	10,000	0.25	2,500
		Businesses	2500	2500	0.25	625
		Tribal	2000	2000	0.25	500

162.248 162.365 162.465 162.590	Pay penalties for late payment	Individuals	3,000	3,000	0.25	750
		Businesses	600	600	0.25	150
		Tribal	25	25	0.25	6
162.009 162.212	Bidding on advertised lease	Individuals	10,000	10,000	1	10,000
		Businesses	2500	2500	1	2,500
		Tribal	2000	2000	1	2,000
162.008(b)(2)	Use of a minor's land	All	7,250	7,250	3	21,750
162.251 162.363 162.463 162.588	Provide notice of curing violation	Individuals	100	100	0.5	50
		Businesses	45	45	0.5	23
162.256 162.368 162.468 162.593	Respond to notice of trespass	Individuals	100	100	0.5	50
		Businesses	45	45	0.5	23
162.022 162.113	Appealing decisions	Individuals	400	400	2	800
		Businesses	225	225	2	450
		Tribal	100	100	2	200
	Total		**14,500**	**127,110**		**108,975**

BILLING CODE 4310–6W–C

BIA invites comments on the information collection requirements in the proposed regulation. You may submit comments to OMB by facsimile to (202) 395–5806 or you may send an email to the attention of the OMB Desk Officer for the Department of the Interior: *OIRA_DOCKET@omb.eop.gov.* Please send a copy of your comments to the person listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice. *Note that the request for comments on the rule and the request for comments on the information collection are separate.* To best ensure consideration of your comments on the information collection, we encourage you to submit them by December 29, 2011; while OMB has 60 days from the date of publication to act on the information collection request, OMB may choose to act on or after 30 days. Comments on the information collection should address: (a) The necessity of this information collection for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden (hours and cost) of the collection of information, including the validity of the methodology and assumptions used; (c) ways we could enhance the quality, utility and clarity of the information to be collected; and (d) ways we could minimize the burden of the collection of the information on the respondents, such as through the use of automated collection techniques or other forms of information technology. Please note that an agency may not sponsor or request, and an individual need not respond to, a collection of information unless it has a valid OMB Control Number.

J. National Environmental Policy Act

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

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

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

L. Clarity of This Regulation

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

(a) Be logically organized;

(b) Use the active voice to address readers directly;

(c) Use clear language rather than jargon;

(d) Be divided into short sections and sentences; and

(e) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in the ''COMMENTS'' section. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you believe lists or tables would be useful, etc.

M. Public Availability of Comments

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

List of Subjects in 25 CFR Part 162

Indians—lands.

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

PART 162—LEASES AND PERMITS

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

Authority: 5 U.S.C. 301, R.S. 463 and 465; 25 U.S.C. 2 and 9. Interpret or apply sec. 3, 26 Stat. 795, sec. 1, 28 Stat. 305, secs. 1, 2, 31 Stat. 229, 246, secs. 7, 12, 34 Stat. 545, 34 Stat. 1015, 1034, 35 Stat. 70, 95, 97, sec. 4, 36 Stat. 856, sec. 1, 39 Stat. 128, 41 Stat. 415, as amended, 751, 1232, sec. 17, 43 Stat. 636, 641, 44 Stat. 658, as amended, 894, 1365, as amended, 47 Stat. 1417, sec. 17, 48

Stat. 984, 988, 49 Stat. 115, 1135, sec. 55, 49 Stat. 781, sec. 3, 49 Stat. 1967, 54 Stat. 745, 1057, 60 Stat. 308, secs. 1, 2, 60 Stat. 962, sec. 5, 64 Stat. 46, secs. 1, 2, 4, 5, 6, 64 Stat. 470, 69 Stat. 539, 540, 72 Stat. 968, 107 Stat. 2011, 108 Stat. 4572, March 20, 1996, 110 Stat. 4016; 25 U.S.C. 380, 393, 393a, 394, 395, 397, 402, 402a, 403, 403a, 403b, 403c, 409a, 413, 415, 415a, 415b, 415c, 415d, 477, 635, 2201 *et seq.*, 3701, 3702, 3703, 3712, 3713, 3714, 3715, 3731, 3733, 4211; 44 U.S.C. 3101 *et seq*.

§ 162.100 [Removed]

2. Remove § 162.100.

§§ 162.101.162.113 [Redesignated]

3. Redesignate § 162.101–§ 162.113 in subpart A as § 162.101–§ 162.113 in subpart B.

4. Revise subpart A to read as follows:

PART 162—LEASES AND PERMITS

Subpart A—General Provisions

Purpose, Definitions, and Scope

Sec.

When to Get a Lease

How to Get a Lease

Lease Administration

Subpart A—General Provisions

Purpose, Definitions, and Scope

§ 162.001 What is the purpose of this part?

This part identifies:

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

(b) How to obtain leases;

(c) Terms and conditions required in leases;

(d) How we administer and enforce leases; and

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

§ 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);

(7) Records (Subpart G).

(b) Subpart F identifies special provisions applicable only to leases made under special acts of Congress that apply only to certain 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.

(c) 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.

§ 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 that provides a security or guaranty if an appeal creates a delay in implementing a BIA decision that could cause a significant and measurable financial loss to another party.

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 § 162.015, except that this term means only the Secretary of the Interior or Bureau of Indian Affairs if the function is an inherently Federal function.

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.

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

Constructive notice means:

(1) Public notice posted at the tribal government office, tribal community building, and/or the United States Post Office; and

(2) Notice 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 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 tribal land that has been reserved for administrative purposes.

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 and single-family residential developments (i) administered by a tribe, Tribally-Designated Housing Entity, or a tribally-sponsored or tribally sanctioned not-for-profit entity; or (ii) substantially financed using a tribal, Federal, or State housing assistance program or not-for profit entity.

Immediate family means a spouse, brother, sister, aunt, uncle, niece, nephew, first cousin, lineal ancestor, lineal descendant, or member of the household.

Improvements means buildings, other structures, and associated infrastructure constructed or installed under a lease to serve the purposes of the lease.

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 pursuant to 25 U.S.C. 2206, any person described in paragraph (1) or (2) 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 possession of Indian land, for a specified purpose and duration.

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 of possession to 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 mailing by U.S. Postal Service or commercial delivery service.

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

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 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.

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 who does not have one or more guardians duly appointed by a court of competent jurisdiction.

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.

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 legal right of use to Indian land or Government land by a permit.

Power of attorney means an authority by which one person enables another to act for him/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 tribal zoning law or other tribal authorization.

Single-family residential development means one 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 less than that held by the lessee under the lease.

Surety means one who guarantees the performance of another.

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.

Tribally Designated Housing Entity means a tribally designated housing entity under 25 U.S.C. 4103(21).

Tribal land means the surface estate of lands or any interest therein, title to which is held by the United States in trust for one or more tribes, or title to which is held by one or more tribes subject to Federal restrictions against alienation or encumbrance, 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 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.

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

Trust or restricted land or *trust or restricted status* means any tract, or interest therein, that the United States

holds in trust for the benefit of one or more tribes or individual Indians, or any tract, or interest therein, that one or more tribes or individual Indians holds title to, but can only alienate or encumber with the approval of the United States because of limitations contained in the conveyance instrument pursuant to Federal law or limitations contained 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.

Us/we/our means the Secretary or the Bureau of Indian Affairs (BIA) and any tribe acting on behalf of the Secretary or BIA under § 162.015, except that this term means only the Secretary or BIA if the function is an inherently Federal function.

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

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 this part no matter how ''violation'' or ''default'' is defined in the lease.

§ 162.004 May BIA approve or grant permits under this part?

(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 for us to confirm that the document meets the definition of ''permit'' and does not grant an interest in Indian land and allow us to maintain a copy of the permit in our records.

(b) The following table provides 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.
Subject to unlimited access by others.	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 may grant permits for the use of Government land. The leasing regulations in this part will apply to such permits, as appropriate.

When to Get a Lease

§ 162.005 When does this part apply?

(a) This part applies to all leases, amendments, assignments, subleases, and leasehold mortgages submitted to BIA for approval after [INSERT FINAL RULE EFFECTIVE DATE].

(b) If the terms of a lease document approved by BIA prior to [INSERT FINAL RULE EFFECTIVE DATE] conflict with this part, the terms of the lease document govern.

(c) We may amend this part at any time.

§ 162.006 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 tribe owns an interest in trust or restricted status.

(1) We will not lease 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 a lease having been obtained from the owners of any fee interests.

(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 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 life estate, the life tenant may lease the land without our approval, for the duration of the life estate. The following conditions apply:

(i) Such a lease must be recorded;

(ii) The lessee must pay rent directly to the life tenant under the terms of the lease;

(iii) 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.

(iv) 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;

(v) We will not lease on the life tenant's behalf, but we may collect rents on behalf of the life tenant; and

(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 life estate, the life tenant may not lease the land unless the remainder interests are also leased. The following conditions apply:

(i) We will not lease on the life tenant's behalf, but we may collect rents on behalf of the life tenant; and

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

(3) Rent payable under the lease will be paid to the life tenant in accordance with Part 179 of this chapter, unless the document creating the life estate provides otherwise.

(4) All leases entered into by life tenants must be recorded in our Land Titles and Records Office, even where our approval is not required.

§ 162.007 To what types of land use agreements does this part not apply?

(a) This part does not apply to the following types of land use agreements:

This part does not apply to . . .	which are covered by . . .
Mineral leases, prospecting permits, or mineral development agreements.	25 CFR parts 211, 212 and 225.
Grazing permits	25 CFR part 166.
Timber contracts	25 CFR part 163.
Contracts or agreements that encumber tribal land.	25 U.S.C. 81.
Rights-of-way	25 CFR part 169.
Tribal land assignments and similar instruments authorizing temporary uses.	tribal laws.
Traders' licenses	25 CFR part 140.

(b) This part does not apply to leases of water rights associated with Indian land, except to the extent the use of such water rights is incorporated in a lease of the land itself.

§ 162.008 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.

If you are . . .	then you must obtain a lease under this part . . .
(1) A person or legal entity (including an independent legal entity owned and operated by a tribe) who is not an owner of the Indian land.	from the owners of the land before taking possession of the land or any portion thereof.
(2) An Indian landowner of a fractional interest in the land	from the owners of other trust and restricted interests in the land, unless those 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 you meet any of the criteria in the following table.

You do not need a lease if you are . . .	but the following conditions apply . . .
(1) An Indian landowner who owns 100 percent of the trust or restricted interests in a tract.	(1) We may require you to provide evidence of a direct benefit to the minor child; and (2) When the child is no longer a minor, you must obtain a lease to authorize continued possession.
(2) A parent or guardian of a minor child who owns 100 percent of the trust interests in the land.	
(3) A 25 U.S.C. 477 corporate entity that holds the Indian land directly under its Federal charter (not pursuant to a lease from the Indian tribe).	You must record documents in accordance with § 162.341, § 162.441, and § 162.566.
(4) A person or legal entity that is leasing Indian land under a special act of Congress authorizing leases without our approval.	You must record documents in accordance with § 162.341, § 162.441, and § 162.566.

(c) Landowners who enter into an agreement under paragraph (a)(2) may wish to consider documenting such an agreement and recording it in the LTRO.

How to Get a Lease

§ 162.009 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) Notify all Indian landowners and obtain the consent of the Indian landowners of the applicable percentage of interests, for fractionated tracts; and

(2) Prospective lessees and Indian landowners must:

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

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

(3) Prospective lessees and/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.

§ 162.010 How does a prospective lessee identify and contact Indian landowners to negotiate a lease?

(a) Prospective lessees may submit a written request to us to obtain the following information for the purpose of negotiating a lease:

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

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

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

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

(c) We will assist the Indian landowners in those negotiations, upon their request.

§ 162.011 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, their consent will be included in the percentages in paragraphs (a)(1) and (a)(2).

(4) Where owners of the applicable percentages in paragraph (a)(1) 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.

(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 shall be construed to affect 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) 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.

§ 162.012 Who is authorized to consent to a lease?

(a) Indian tribes, adult Indian landowners, or 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 recognized 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 part 1 and has been retained by the Indian landowner;

(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 § 162.013; and

(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 § 162.011, 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) Individuals whose whereabouts are unknown to us, after we make a reasonable attempt to locate such individuals;

(3) Individuals who are found to be non compos mentis, or determined to be an adult in need of assistance or under legal disability as defined in part 115 of this chapter;

(4) Orphaned minors who do not have guardians duly appointed by a court of competent jurisdiction;

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

(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 three month negotiation period following the notice; and

(iii) The land is not being used by an Indian landowner under § 162.008(b)(1).

Lease Administration

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

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

(1) Applicable Federal laws and any specific Federal statutory requirements that are not incorporated in this part;

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

(3) State law, in the specific areas and circumstances in Indian country where Congress or a Federal court has made it expressly applicable.

(b) If any regulation in this part conflicts with a tribal law, the Secretary may waive the application of such regulation to tribal land, unless the waiver would:

(1) Violate a Federal statute or judicial decision; or

(2) Conflict with the United States' trust responsibility under Federal law.

(c) The parties to a specific lease may subject it 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.

§ 162.014 Will BIA comply with tribal laws in making decisions regarding leases?

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.

§ 162.015 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 inherent Federal function.

§ 162.016 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.

§ 162.017 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 each tract acreage contribution 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.

§ 162.018 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 § 162.339, § 162.439, § 162.529, and § 162.564.

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

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

(a) Upon notification from the 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 § 162.362, § 162.462, and § 162.587.

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

§ 162.020 What may BIA do 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 on behalf of the Indian landowners and pursue any additional remedies available under applicable law. The Indian landowner may pursue any available remedies under tribal law.

§ 162.021 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 Indian landowners before and after taking emergency action. In all cases, we will notify the Indian landowners after taking emergency action by constructive notice.

§ 162.022 May decisions under this part be appealed?

Appeals from BIA decisions under this part may be taken pursuant to part 2 of this chapter, except where 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.

§ 162.023 Who may I contact with questions concerning the leasing process?

The Indian landowner or prospective lessee may contact the local BIA realty office with jurisdiction over the land for answers to questions about the leasing process.

§ 162.024 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, administration, and enforcement of leases.

(b) We will adopt environmental assessments and environmental impact statements prepared by another Federal agency, entity, or person under 43 CFR 46.320 and 42 CFR 1506.3, but may require a supplement. We shall 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 such information that is marked confidential or proprietary and is exempt from public release, to the extent allowed by law. Failure to cooperate with such request, provide data, or grant access to information or records, may, at our discretion, be treated as a lease violation. All approved leases must include such disclosure provisions.

5. In § 162.101, revise the section heading and the introductory language to read as follows:

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

For the purposes of this subpart:

* * * * *

§§ 162.102–162.104 [Removed]

6. Remove § 162.102–§ 162.104.

§§ 162.105 and 162.106 [Amended]

7. In § 162.105 and § 162.106, remove the word ''lease'' and add in its place the words ''agricultural lease'' and remove the word ''leasing'' and add in its place the words ''agricultural leasing'' wherever they appear.

8. In § 162.107, revise the section heading and the introductory language in paragraph (a) to read as follows:

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

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

* * * * *

§§ 162.108–162.110 [Amended]

9. In § 162.108–§ 162.110 remove the word ''lease'' wherever it appears and add in its place the words ''agricultural lease''.

10. In § 162.111, revise the section heading, the introductory language in paragraph (a), and paragraph (b) to read as follows:

§ 162.111 Who owns the records associated with this subpart?

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

* * * * *

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

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

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

§ 162.113 [Amended]

12. In § 162.113 remove the word ''part'' wherever it appears and add in its place the word ''subpart''.

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

Subpart C—Residential Leases

Residential Leasing General Provisions

Sec.

Lease Requirements

Rental Requirements

Bonding and Insurance

Approval

Amendments

Subpart C—Residential Leases

Residential Leasing General Provisions

§ 162.301 What types of leases does this subpart cover?

(a) This subpart covers both ground leases (undeveloped land) and leases of developed land (together with the 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.

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

§ 162.302 Is there a model residential lease form?

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. If a model lease form is not used, we will assist the Indian landowners in drafting lease provisions or in using tribal lease forms that conform to the requirements of this part.

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.

(b) Unless otherwise provided by paragraphs (b)(1) or (b)(2) of this section, the maximum term may not exceed 50 years. The lease may provide for a primary 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.

(1) If 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), the lease may provide for a primary term, and one renewal not to exceed 25 years, so long as the maximum term, including the renewal, does not exceed the maximum term established by statute.

(2) 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.

(c) 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;

(3) Whether landowner consent to the renewal is required;

(4) That the lessee must provide notice to the Indian landowner and any mortgagees of the renewal;

(5) The additional consideration, if any, that will be due upon the exercise of the option to renew or the commencement of the renewal term;

(6) That any change in the terms of the lease will be considered an amendment subject to consent and BIA approval requirements pursuant to §§ 162.343 through 162.346; and

(7) Any other conditions for renewal (*e.g.,* the lessee may not be in violation of the lease at the time of renewal).

(b) We must record any renewal of a lease in the Land Titles and Records Office.

§ 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 owner being represented and the authority under which such action is being taken, where one executes a lease in a representative capacity;

(6) The citation of the statute that authorizes our approval;

(7) Who is responsible for constructing, owning, operating, maintaining, and managing improvements;

(8) Payment requirements and late payment charges, including interest;

(9) Insurance requirements under § 162.337; and

(10) Bonding requirements under § 162.334. 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) All residential 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) Nothing in the lease would prevent or delay termination of Federal trust responsibilities for the land during the lease's term;

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

(4) The lessee must comply with all applicable laws, ordinances, rules, regulations, and other legal requirements under § 162.013;

(5) The lessee indemnifies and 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 (this provision is not mandatory if the lessee would be prohibited by law from making such an agreement);

(6) 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, unless the liability or cost arises from the gross negligence or willful misconduct of the Indian landowner (this provision is not mandatory if the lessee would be prohibited by law from making such an agreement);

(7) In the event that 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 that has jurisdiction to determine how to proceed and appropriate disposition;

(8) BIA has the right, at any reasonable time during the term of the lease and upon reasonable notice, to enter upon the leased premises for inspection and compliance; and

(9) Unless otherwise indicated, this is a lease of the trust and restricted interests in the property described and is not a lease of any undivided fee interests. All rental payments by the

lessee will be distributed to the trust and restricted landowners and life estate holders on trust and restricted land only. The lessee will be responsible for accounting to the owners of any fee interests that may exist in the property being leased.

(c) We may treat any provision of a lease, sublease, amendment, assignment, or leasehold mortgage that is in violation of Federal law as a violation of the lease.

§ 162.314 May improvements be made under a residential lease?

(a) The lessee may construct improvements under a residential lease if the residential lease authorizes the construction and generally describes the type and location of the improvements to be constructed during the lease term.

(b) The lessee must provide reasonable notice to the Indian landowners of the construction of any major improvements not generally described in the lease. We will treat any attempt by the lessee to construct major improvements, without the necessary notice, as a lease violation.

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

(a) A residential lease must specify who will own any improvements the lessee constructs during the lease term. In addition, the lease must indicate whether each specific improvement the lessee constructs will, upon the expiration or termination of the lease:

(1) Remain on the leased premises, in a condition satisfactory to the Indian landowners and become the property of the Indian landowner;

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

(3) Be disposed of by other means.

(b) A lease that requires the lessee to remove the improvements must also provide the Indian landowners with an option to take possession of and title to the improvements if the improvements are not removed within the specified time period.

(c) Any permanent improvements on the leased land shall be subject to 25 CFR 1.4 and, in addition, shall not be subject to any fee, tax, assessment, levy, or other such charge imposed by any State or political subdivision of a State, without regard to ownership of those improvements. Improvements may be subject to taxation by the Indian tribe with jurisdiction.

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

We may take appropriate enforcement action in consultation with the tribe for tribal land or, where feasible, with Indian landowners for individually owned Indian land, to ensure removal of the improvements or restoration of the premises at the lessee's expense. We may take such enforcement action after termination or expiration of the lease. We may collect and hold the performance bond until removal and restoration are completed.

§ 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 a legal description or other description that is sufficient to identify the leased premises, subject to our approval.

(b) If the tract is fractionated, we will describe the undivided trust or restricted interest in the leased premises.

Rental Requirements

§ 162.320 How much rent must be paid under a residential lease?

(a) A residential lease of tribal land may allow for any payment amount negotiated by the tribe, if the tribe submits a signed certification stating that it has determined the negotiated amount to be in its best interest. The tribe may request, in writing, that we require fair market rental, in which case we will determine fair market rental in accordance with § 162.322 and will approve the lease only if it requires payment of not less than fair market rental. Unless the tribe makes such a request, BIA will not require a valuation or appraisal or determine fair market rental, but instead will defer to the tribe's determination that the negotiated compensation is in its best interest.

(b) 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) 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 Indian landowner's immediate family as defined in § 162.003;

(ii) The lessee is a co-owner of the leased tract; or

(iii) A special relationship or circumstances exist that we believe warrant approval of the lease.

(c) Where the owners of the applicable percentage of interests 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.

§ 162.321 Will BIA require a valuation to determine fair market rental for a residential lease?

(a) We will not require valuations for negotiated residential leases of tribal land, or of any undivided tribal interest in a fractionated tract, if the tribe submits a signed certification. The tribe may request, in writing, that we require a valuation, in which case we will determine fair market rental in accordance with § 162.322.

(b) We will require valuations for individually owned Indian land, except that we may waive the valuation requirement when:

(1) 100 percent of the Indian landowners submit to us a written request to waive the valuation requirement; and

(2) We determine that the waiver is in the best interest of the Indian landowners, taking into consideration the landowners' written request.

(c) We have 30 days from receipt of the waiver request in paragraph (b) of this section to make a determination. Our determination whether to approve the request will be in writing and will state the basis for our approval or disapproval. If we fail to meet the 30-day deadline, the lessee or Indian landowners may take appropriate action under part 2 of this chapter.

§ 162.322 What type of valuation may be used to 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, or at the request of the tribe for tribal land.

(b) We will either:

(1) Prepare 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 landowner or lessee.

(c) We will 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 pursuant to 25 U.S.C. 2214; and

(2) Complies with Department policies.

§ 162.323 When are rental payments due under a residential lease?

(a) A residential lease must specify the dates on which all payments are due.

(b) Unless otherwise provided in the lease, payments may not be made or accepted more than one year in advance of the due date.

§ 162.324 Must a residential lease specify to whom rental payments may be made?

(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 whose trust accounts are unencumbered when there are 10 or fewer beneficial owners and 100 percent of the beneficial owners agree to receive payment from the lessee at the commencement of the lease.

(1) If the lease provides that the lessee will directly pay the Indian landowners, the lease must include provisions for proof of payment.

(2) When we consent on behalf of an Indian landowner, the lessee must make payment to us.

(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 otherwise provided in the lease, 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 if:

(i) 100 percent of the Indian landowners agree to suspend direct pay and provide us with documentation of their agreement, then the lessee must make all Indian landowners' payments to us; or

(ii) If any individual Indian landowner dies, is declared non compos mentis, becomes whereabouts unknown, or owes a debt resulting in a trust account encumbrance, then the lessee must make that individual Indian landowner's payment to us.

§ 162.325 What form of payment may be accepted 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, we will accept:

(1) Money orders;

(2) Personal checks;

(3) Certified checks;

(4) Cashier's checks; or

(5) Electronic funds transfer payments.

(c) We will not accept cash, foreign currency, or third-party checks, except that we will accept third-party checks from financial institutions or Federal agencies.

(d) The preferred method of payment is electronic funds transfer payments.

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

(a) With our approval, the lease may provide for:

(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 individually owned land, we will approve alternative forms of rental and varying types of compensation if we determine that it is in the best interest of the Indian landowners. For tribal land, we will defer to the tribe's determination that the alternative forms of rental and varying types of consideration are in its best interest, if the tribe submits a signed certification stating that it has determined the alternative forms of rental and varying types of consideration to be in its best interest.

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

Upon request of the Indian landowner, we may issue invoices to a lessee in advance of the dates on which payments are due under a residential lease, but the lessee's obligation to make such payments in a timely manner will not be excused if such invoices are not issued, delivered, or received.

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

(a) For a residential lease with a term of five years or less, the parties may agree in the lease to provide for periodic reviews of the adequacy of rent in the lease. For a residential lease with a term of more than five years, a review of the adequacy of rent must occur at least every fifth year, in the manner specified in the lease, unless the conditions in paragraph (b) of this section are met. The lease must specify:

(1) When adjustments take effect;

(2) Who is authorized to make adjustments;

(3) What the adjustments are based on; and

(4) How to resolve disputes arising from the adjustments.

(b) A review of the adequacy of rent is not required if:

(1) The lease provides for automatic rental adjustments; or

(2) 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, where the lease provides for payment of less than fair market rental or the lease provides for most or all rent to be paid during the first five years of the lease term or prior to the date the review would be conducted.

(c) When a review results in the need for adjustment of rent, we must approve the adjustment and Indian landowners must consent to the adjustment in accordance with § 162.011, unless otherwise provided in the lease.

§ 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/or assessments associated with the use of the land, as determined by entities having jurisdiction, except as provided in § 162.315(c). 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. Failure to make such payments will be treated as a violation of the lease.

Bonding and Insurance

§ 162.334 Must a lessee or assignee provide a performance bond for a residential lease?

(a) Except for leases for housing for public purposes or as provided in (f), the lessee must provide a performance bond in an amount sufficient to secure the contractual obligations including:

(1) No less than the highest annual rental specified in the lease, if the rent is paid annually, or other amount established by BIA in consultation with the tribe for tribal land or, where feasible, with Indian landowners for individually owned Indian land, if the rent is to be paid on a non-annual schedule;

(2) The operation and maintenance charges for any land located within an irrigation project; and

(3) As appropriate, the restoration and reclamation of the leased premises to

their condition at the commencement of the lease term or some other specified condition.

(b) The performance bond must be deposited with us and made payable only to us, and may not be modified without our approval.

(c) The lease must provide that we may adjust security or performance bond requirements at any time to reflect changing conditions.

(d) We may require that the surety provide any supporting documents needed to show that the performance bond will be enforceable, and that the surety will be able to perform the guaranteed obligations.

(e) The surety must provide notice to us at least 60 days before canceling a performance bond so that we may notify the lessee of its obligation to provide a substitute performance bond. Failure to provide a substitute performance bond will be a violation of the lease.

(f) We may waive the requirement for a performance bond upon the request of the Indian landowner, if the waiver is in the best interest of the Indian landowner, including if the lease is for less than fair market rental or nominal rent. We may revoke the waiver and require a performance bond at any time if the waiver is no longer in the best interest of the Indian landowner.

§ 162.335 What forms of performance bonds may be accepted under a residential lease?

(a) We will only accept a performance bond in one of the following forms:

(1) Cashiers' checks;

(2) Certificates of deposit issued by a federally insured financial institution authorized to do business in the United States;

(3) Irrevocable letters of credit issued by a federally insured financial institution authorized to do business in the United States;

(4) Negotiable Treasury securities; or

(5) Surety bond issued by a company approved by the U.S. Department of the Treasury.

(b) All forms of performance bonds must:

(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 lessee violates the lease;

(3) Be irrevocable during the term of the performance bond; and

(4) Be automatically renewable during the term of the lease.

§ 162.336 What is the bond release process under a residential lease?

(a) Upon expiration, termination, or cancellation of the lease, the lessee must submit a written request for a performance bond release to BIA.

(b) Upon receipt of a request under paragraph (a) of this section, BIA will 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, then release the performance bond to the lessee unless we determine that the bond must be redeemed to fulfill the contractual obligations.

§ 162.337 Must a lessee provide insurance for a residential 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 an amount sufficient to protect all insurable improvements on the premises.

(a) The insurance may include property, liability and/or 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. We may revoke the waiver and require insurance at any time if the waiver is no longer in the best interest of the Indian landowner.

Approval

§ 162.338 What documents must the parties submit to obtain BIA approval of a residential lease?

A lessee or the Indian landowner must submit the following documents to us to obtain BIA approval of a residential lease:

(a) A lease executed by the Indian landowner and the lessee that complies with the requirements of this part;

(b) A valuation, if required under § 162.321;

(c) Organizational documents, certificates, filing records, and resolutions or other authorization documents, including evidence of the representative's authority to execute a lease, if the lessee is a corporation, limited liability company, partnership, joint venture, or other legal entity, except a tribal entity, to show that the lease will be enforceable and that the legal entity is in good standing and authorized to conduct business in the jurisdiction where the land is located;

(d) A performance bond, where required;

(e) Statement from the appropriate tribal authority that the proposed use is in conformance with applicable tribal law;

(f) Reports, surveys, and site assessments as needed to facilitate compliance with applicable Federal and tribal land use requirements;

(g) A preliminary site plan identifying the proposed location of residential development, roads and utilities, if applicable;

(h) Information to assist us in our evaluation of the factors in 25 U.S.C. 415(a);

(i) Information to facilitate BIA's analysis under applicable environmental and cultural resources laws; and

(j) Any additional documentation we determine to be reasonably necessary for approval.

§ 162.339 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 all applicable laws and ordinances;

(3) Assure ourselves that adequate consideration has been given to the factors in 25 U.S.C. 415(a);

(4) Require any lease modifications or mitigation measures necessary to satisfy any requirements including any other Federal or tribal land use requirements; and

(5) If the lease is a negotiated lease, defer to the Indian landowners' determination that the lease is in their best interest, to the maximum extent possible.

(b) When we receive a residential lease proposal and all of the supporting documents that conform to this part, we will, within 30 days of receiving the documents at the appropriate BIA office, approve, disapprove, return the submission for revision, or notify the parties in writing that we need additional time to review the lease. Our letter notifying the parties that we need additional time to review the lease must identify our initial concerns and invite the parties to respond within 15 days. We have 30 days from sending the notification to make a determination whether to approve or disapprove the lease.

(c) If we fail to meet the deadlines in this section, then the parties may take appropriate action under part 2 of this chapter.

(d) We will make any lease approval or disapproval determination and the

basis for the determination, along with notification of appeal rights under part 2 of this chapter, in writing and will send the determination and notification 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.

§ 162.340 When will a residential lease be effective?

(a) A residential lease will be effective on the date that we approve the lease, notwithstanding any appeal that may be filed under part 2 of this chapter.

(b) The lease may specify a date on which the obligations between the parties are triggered. Such date may be before or after the approval date under paragraph (a) of this section.

§ 162.341 Must residential lease documents be recorded?

(a) A residential lease, amendment, assignment, leasehold mortgage, and sublease must be recorded in our Land Titles and Records Office with jurisdiction over the leased land.

(1) We will record the lease or other document immediately following our approval.

(2) When our approval of an assignment or sublease is not required, the parties must record the assignment or sublease in the Land Title and Records Office with jurisdiction over the leased land.

(b) The tribe must record the following leases in the Land Titles and Records Office 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.

§ 162.342 What action may BIA take if a residential lease disapproval decision is appealed?

(a) If a party appeals our decision to disapprove a lease, assignment, amendment, sublease, or leasehold mortgage, then the official to whom the appeal is made may require the lessee to post an appeal bond in an amount necessary to protect the Indian landowners against financial losses and damage to trust resources likely to result from the delay caused by an appeal. The requirement to post an appeal bond will apply in addition to all of the other requirements in part 2 of this chapter.

(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

§ 162.343 May the parties amend a residential lease?

(a) The parties may amend a residential lease by obtaining:

(1) The lessee's signature;

(2) The Indian landowners' consent pursuant to the requirements contained in § 162.344; and

(3) BIA approval of the amendment under § 162.345 and § 162.346.

(b) The parties may not amend a residential lease if the lease expressly prohibits amendments.

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

(a) The Indian landowners, or their representatives under § 162.012, must consent to an amendment of a residential lease in the same percentages and manner as a new residential lease under § 162.011, unless the requirements in paragraphs (a)(1) or (a)(2) of this section are met.

(1) The approved residential lease establishes that individual Indian landowners are deemed to have consented if they do not object in writing to the amendment after a specified period of time following Indian landowners' receipt of the amendment. If the lease provides for deemed consent, it must require the parties to submit to us: a copy of the executed amendment or other documentation of the Indian landowners' consent; proof of mailing of the amendment to any Indian landowners who are deemed to have consented; and any other pertinent information to us for review.

(2) The approved residential lease authorizes one or more representatives to consent to an amendment on behalf of all Indian landowners. The lease may also designate us as the Indian landowners' representative for the purposes of consent to an amendment.

(b) Unless specifically authorized in the lease, the written power of attorney, or 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 or terms to the Indian landowners;

(2) Increase or decrease the lease area; or

(3) Terminate or change the term of the lease.

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

We have 30 days from receipt of the executed amendment, proof of required consents, and required documentation to make a determination whether to approve the amendment or notify the parties in writing that we need additional time to review the amendment.

(a) Our letter notifying the parties that we need additional time to review the amendment must identify our initial concerns and invite the parties to respond within 15 days. We have 30 days from sending the notification to make a determination whether to approve or disapprove the amendment.

(b) If we fail to send either a determination or notification within 30 days from receipt of the required documents or 30 days from sending the notification, the amendment is deemed approved to the extent consistent with Federal law. We will retain our full enforcement authority for amendments that are deemed approved.

(c) Our determination whether to approve the amendment will be in writing and will state the basis for our approval or disapproval.

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

(a) We may only disapprove a residential lease amendment if:

(1) The required consents have not been obtained from the parties to the lease and any mortgagees or sureties;

(2) The lessee is in violation of the lease; or

(3) We find a compelling reason to withhold our approval in order to protect the best interests of the Indian landowners.

(b) We may not unreasonably withhold approval of an amendment.

Assignments

§ 162.347 May a lessee assign a residential lease?

A lessee may assign a residential lease by meeting the consent requirements in

§ 162.348 and obtaining our approval of the assignment under § 162.349 and § 162.350, unless the lease expressly prohibits assignments.

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

(a) The Indian landowners, or their representatives under § 162.012, must consent to an assignment of a residential lease in the same percentages and manner as a new residential lease under § 162.011, unless the requirements in paragraphs (a)(1), (a)(2), or (a)(3) of this section are met.

(1) The assignee agrees in writing to assume all of the lessee's obligations under the lease, including bonding requirements, and:

(i) The lease provides for assignments without further consent of the Indian landowners or with consent in specified percentages and manner; or

(ii) The assignee is a leasehold mortgagee or its designee, acquiring the lease either through foreclosure or by conveyance.

(2) The lease establishes that individual Indian landowners are deemed to have consented where they do not object in writing to the assignment after a specified period of time following landowners' receipt of the assignment. If the lease provides for deemed consent, it must require the parties to submit to us: a copy of the executed assignment or other documentation of the Indian landowners' consent; proof of mailing of the assignment to any Indian landowners who are deemed to have consented; and any other pertinent information for us to review.

(3) The lease authorizes one or more of the Indian landowners to consent on behalf of all Indian landowners. The lease may also designate us as the Indian landowners' representative for the purposes of consenting to an assignment.

(b) The lessee must obtain the consent of the holders or any bonds or mortgages.

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

(a) The lessee may assign the lease without our approval 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 of the lease; and

(3) The assignee agrees in writing that any transfer of the lease will be in accordance with applicable law under § 162.013.

(b) We have 30 days from receipt of the executed assignment, proof of required consents, and required documentation to make a determination whether to approve the assignment or notify the parties that we need additional information. Our determination whether to approve the assignment will be in writing and will state the basis for our approval or disapproval.

(c) If we fail to meet the deadline in this section, the lessee or Indian landowners may take appropriate action under part 2 of this chapter.

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

(a) We may only disapprove an assignment of a residential lease if:

(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 proposed use by the assignee will require an amendment to the lease; 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 bonded its performance and provided supporting documents that demonstrate that the lease will be enforceable against the assignee, and that the assignee will be able to perform its obligations under the lease or assignment.

(c) If the lease was approved at less than fair market rental and the assignee is not a co-owner or member of the Indian landowners' immediate family, the assignment must provide for the assignee to pay fair market rental to the Indian landowner.

(d) We may not unreasonably withhold approval of an assignment.

Subleases

§ 162.351 May a lessee sublease a residential lease?

(a) A lessee may sublease a residential lease by meeting the consent requirements in § 162.352 and obtaining our approval of the sublease under § 162.353 and § 162.354, or by meeting the conditions in paragraph (b) of this section, unless the lease expressly prohibits subleases.

(b) Where the sublease is part of a housing development for public purposes, the lessee may sublease without meeting consent requirements or obtaining BIA approval of the sublease, as long as:

(1) The lease provides for subleasing without meeting consent requirements or obtaining BIA approval;

(2) We have approved a general plan for the development; and

(3) We have approved a sublease form and general rent schedule for use in the project.

§ 162.352 What are the consent requirements for a sublease of a residential lease?

(a) The Indian landowners must consent to a sublease of a residential lease in the same percentages and manner as a new residential lease pursuant to § 162.011, unless the requirements in paragraphs (a)(1) or (a)(2) of this section are met.

(1) The lease establishes that individual Indian landowners are deemed to have consented where they do not object in writing to the sublease after a specified period of time following landowners' receipt of the sublease. If the lease provides for deemed consent, it must require the parties to submit to us: a copy of the executed sublease or other documentation of the landowners' consent; proof of mailing of the sublease to any Indian landowners who are deemed to have consented; and any other pertinent information for us to review.

(2) The lease authorizes one or more of the Indian landowners to consent on behalf of all Indian landowners. The lease may also designate us as the Indian landowners' representative for the purposes of consenting to a sublease.

(b) The lessee must obtain the consent of any sureties.

§ 162.353 What is the approval process for a sublease of a residential lease?

We have 30 days from receipt of the executed sublease, proof of required consents, and required documentation to make a determination whether to approve the sublease or notify the parties in writing that we need additional time to review the sublease.

(a) Our letter notifying the parties that we need additional time to review the sublease must identify our initial concerns and invite the parties to respond within 15 days. We have 30 days from sending the notification to

make a determination whether to approve or disapprove the sublease. Our determination whether to approve the sublease will be in writing and will state the basis for our approval or disapproval.

(b) If we fail to send either a determination or notification within 30 days from receipt of required documents or from sending the notification, the sublease is deemed approved to the extent consistent with Federal law. We will retain our full enforcement authority for subleases that are deemed approved.

§ 162.354 How will BIA decide whether to approve a sublease of a residential lease?

(a) We may only disapprove a sublease of a residential lease if:

(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 sublessee does not agree to be bound by the terms of the lease;

(6) The proposed use by the sublessee will require an amendment of the lease; or

(7) 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)(7) of this section, we will consider whether:

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

(2) If a performance bond is required by the sublease, the sublessee has bonded its performance and provided supporting documents that demonstrate that the lease will be enforceable against the sublessee, and that the sublessee will be able to perform its obligations under the lease or sublease.

(c) If the lease was approved at less than fair market rental, and the sublessee is not a co-owner or a member of the Indian landowner's immediate family, the sublease must provide for the sublessee to pay fair market rental to the Indian landowner.

(d) We may not unreasonably withhold approval of a sublease.

Leasehold Mortgages

§ 162.355 May a lessee mortgage a residential lease?

A lessee may mortgage a residential lease by meeting the consent requirements in § 162.356 and obtaining BIA approval of the leasehold mortgage under in § 162.357 and § 162.358, unless the lease expressly prohibits leasehold mortgages.

§ 162.356 What are the consent requirements for a leasehold mortgage of a residential lease?

The Indian landowners, or their representatives under § 162.012, must consent to a leasehold mortgage under a residential lease in the same percentages and manner as a new residential lease under § 162.011, unless the requirements in paragraphs (a), (b), or (c) of this section are met.

(a) The lease contains a general authorization for a leasehold mortgage and states what law would apply in case of foreclosure.

(b) The lease establishes that individual Indian landowners are deemed to have consented where they do not object in writing to the leasehold mortgage after a specified period of time following landowners' receipt of the leasehold mortgage. If the lease provides for deemed consent, it must require the parties to submit to us: A copy of the executed leasehold mortgage or other documentation of the Indian landowners' consent; proof of mailing of the leasehold mortgage to any Indian landowners who are deemed to have consented; and any other pertinent information for us to review.

(c) The lease authorizes one or more representatives to consent to a leasehold mortgage on behalf of all Indian landowners. The lease may also designate us as the Indian landowners' representative for the purposes of consenting to a leasehold mortgage.

§ 162.357 What is the approval process for a leasehold mortgage of a residential lease?

(a) We have 30 days from receipt of the executed leasehold mortgage, proof of required consents, and required documentation to make a determination whether to approve the leasehold mortgage or notify the parties that we need additional information. 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 fail to meet the deadline in this section, the lessee may take appropriate action under part 2 of this chapter.

§ 162.358 How will BIA decide whether to approve a leasehold mortgage of a residential lease?

(a) We may only disapprove the leasehold mortgage if:

(1) The Indian landowners have not consented, and their consent is required;

(2) The holders of lessee's bond have not consented; 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 will consider whether:

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

(2) Any lease provisions would require modification to be consistent with the mortgage;

(3) The remedies available to us or to 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 lessee.

(c) We may not unreasonably withhold approval of a leasehold mortgage.

Effectiveness, Compliance, and Enforcement

§ 162.359 When will an amendment, assignment, sublease, or leasehold mortgage under a residential lease be effective?

(a) An amendment, assignment, sublease, or leasehold mortgage under a residential lease will be effective upon our approval, notwithstanding any appeal that may be filed under part 2 of this chapter, unless approval is not required under § 162.008(b), § 162.349(a), or § 162.351(b), or the conditions in paragraph (b) of this section apply. We will provide copies of approved documents to the party requesting approval, and upon request, to other parties to the agreement.

(b) If the amendment or sublease was deemed approved pursuant to § 162.345(b) or § 162.353(b), the amendment or sublease becomes effective 45 days from the date the parties mailed or delivered the document to us for our review.

(c) An assignment or sublease that does not require landowner consent or BIA approval shall be effective upon execution by the parties.

§ 162.360 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 them of their right to appeal the decision under part 2 of this chapter.

§ 162.361 May BIA investigate compliance with a residential lease?

(a) We may enter the leased premises at any reasonable time, upon reasonable notice, to protect the interests of the Indian landowners and ensure that the lessee is in compliance with the requirements of the lease.

(b) If the Indian landowner notifies us that a specific lease violation has occurred, we will promptly initiate an appropriate investigation.

§ 162.362 May a residential lease provide for negotiated remedies in the event of 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 the parties with the power to terminate the lease, BIA approval of the termination is not required and the termination is effective without BIA cancellation. The parties must notify us of the termination so that we may record it in the Land Titles and Records Office.

(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 § 162.011 of this part. If the lease provides the parties with the power to terminate the lease, BIA concurrence with the termination is required to ensure that the Indian landowners of the applicable percentage of interests have consented. BIA will record the termination in the Land Titles and Records Office.

(c) The parties must notify any surety or mortgagee of a 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.

(e) A residential lease may provide for lease disputes to be resolved in tribal court or any other court of competent jurisdiction, 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 proceedings, as appropriate, in deciding whether to exercise any of the remedies available to us.

162.363 What will BIA do about a violation of a residential lease?

(a) 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 (b) of this section, we will promptly send the lessee and its sureties 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) Within 10 business days of the receipt of a notice of violation, the lessee must:

(i) Cure the violation and notify us 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) If a violation is determined to have occurred, we will make a reasonable attempt to notify the Indian landowners.

(4) We may order the lessee to stop work.

(b) 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 lessees and its sureties a notice of violation by certified mail, return receipt requested:

(i) Promptly following the date on which the payment was due, if the lease requires that rental payments be made to us; or

(ii) Promptly following the date on which we receive actual notice of non-payment from the Indian landowners, if the lease provides for payment directly to the Indian landowners.

(2) We will send a copy of the notice of violation to the tribe for tribal land, or provide constructive notice to Indian landowners for individually owned Indian land.

(3) The lessee must provide adequate proof of payment as required in the notice of violation.

(c) The lessee and its sureties will continue to be responsible for the obligations contained in the lease until the lease is terminated, cancelled, or expires.

§ 162.364 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 requisite 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) 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 its sureties and any mortgagees 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 their 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) Require 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 landowner may pursue any available remedies under tribal law.

§ 162.365 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 such amounts will be treated as a lease violation.

(b) The following special fees may be assessed 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 . . .
(a) $50.00	Dishonored checks.
(b) $15.00	Processing of each notice or demand letter.
(c) 18 percent of balance due.	Treasury processing following referral for collection of delinquent debt.

§ 162.366 How will payment rights relating to a residential lease be allocated between the Indian landowners and the lessee?

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 insurance policy, order, award, judgment, or other document including the lease, the Indian landowners will be entitled to receive such payments.

§ 162.367 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 be stayed if an appeal is filed unless the cancellation is made immediately effective under part 2 of this chapter. While a cancellation decision is stayed, the lessee must continue to pay rent and comply with the other terms of the lease.

§ 162.368 What will BIA do if a lessee remains in possession after a residential lease expires or is cancelled?

If a lessee remains in possession after the expiration or cancellation of a residential lease, we may treat the unauthorized possession as a trespass under applicable law. Unless the applicable percentage of Indian landowners under § 162.011 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 forcible entry and detainer action.

§ 162.369 Will BIA regulations concerning appeal bonds 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.

§ 162.370 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.

§ 162.371 What happens if the lessee abandons the leased premises?

If a lessee abandons the leased premises, we will treat the abandonment as a violation of the lease. The lease may specify a period of non-use after which the lease premises will be considered abandoned.

Subpart D—Business Leases

Business Leasing General Provisions

§ 162.401 What types of leases does this subpart cover?

(a) This subpart covers both ground leases (undeveloped land) and leases of developed land (together with the improvements thereon) on Indian land, 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 because of the need for flexibility in negotiating and writing business leases; however, we may provide other guidance, such as checklists and sample lease provisions to assist in the lease negotiation process. Additionally, we may 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. Unless authorized by paragraph (b), a business lease may have an initial term not to exceed 25 year and one renewal period not to exceed 25 years.

(b) If 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), the lease may provide for a primary term, and one renewal not to exceed 25 years, so long as the maximum term, including the renewal, does not exceed the maximum term established by statute.

(c) The lease term, including any renewal, must be reasonable, given the:

(1) Purpose of the lease;

(2) Type of financing; and

(3) Level of investment.

(d) 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.

(e) 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;

(3) Whether Indian landowner consent to the renewal is required;

(4) That the lessee must provide notice to the Indian landowner and any mortgagees of the renewal;

(5) The additional consideration, if any, that will be due upon the exercise of the option to renew or the commencement of the renewal term;

(6) That any change in the terms of the lease will be considered an amendment subject to consent and BIA approval requirements pursuant to § 162.444; and

(7) Any other conditions for renewal (*e.g.,* the lessee may not be in violation of the lease at the time of renewal).

(b) We must record any renewal of a lease in the Land Title and Records Office.

§ 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 owner being represented and the authority under which such action is being taken, where one executes a lease in a representative capacity;

(6) The citation of the statute that authorizes our approval;

(7) Who is responsible for constructing, owning, operating, maintaining, and managing improvements pursuant to § 162.415;

(8) Payment requirements and late payment charges, including interest;

(9) Due diligence requirements under § 162.417 (unless the lease is for religious, educational, recreational, cultural, or other public purposes);

(10) Insurance requirements under § 162.437; and

(11) 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) 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) Nothing in the lease would prevent or delay termination of Federal trust responsibilities for the land during the lease's term;

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

(4) The lessee must comply with all applicable laws, ordinances, rules, regulations, and other legal requirements under § 162.013;

(5) The lessee indemnifies and 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 (this provision is not mandatory if the lessee would be prohibited by law from making such an agreement);

(6) 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, unless the liability or cost arises from the gross negligence or willful misconduct of the Indian landowner (this provision is not mandatory if the lessee would be prohibited by law from making such an agreement);

(7) In the event that 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 that has jurisdiction over the land to determine how to proceed and appropriate disposition;

(8) BIA has the right, at any reasonable time during the term of the lease and upon reasonable notice, to enter upon the leased premises for inspection; and

(9) Unless otherwise indicated, this is a lease of the trust and restricted interests in the property described and is not a lease of any undivided fee interests. All rental payments by the lessee will be distributed to the trust and restricted landowners and life estate holders on trust and restricted land only. The lessee will be responsible for accounting to the owners of any fee interests that may exist in the property being leased.

(c) We may treat any provision of a lease, sublease, amendment, assignment, or leasehold mortgage that is in violation of Federal law as a violation of the lease.

§ 162.414 May improvements be made under a business lease?

The lessee may construct 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 improvements to be built by the lessee; and

(b) A schedule for construction of the improvements.

§ 162.415 How must a business lease address ownership of improvements?

(a) A business lease must specify who will own any improvements the lessee builds during the lease term and may specify that any improvements the lessee builds may be conveyed to the Indian landowners during the lease term. In addition, the lease must indicate whether each specific improvement the lessee builds will, upon the expiration or termination of the lease:

(1) Remain on the leased premises, 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 close as possible to their condition before construction of such improvements; or

(3) Be disposed of by other specified means.

(b) A lease that requires the lessee to remove the improvements must also provide the Indian landowners with an option to take possession of and title to the improvements if the improvements are not removed within the specified time period.

(c) Any permanent improvements on the leased land shall be subject to 25 CFR 1.4 and, in addition, shall not be subject to any fee, tax, assessment, levy, or other such charge imposed by any State or political subdivision of a State, without regard to ownership of those improvements. Improvements may be subject to taxation by the Indian tribe with jurisdiction.

§ 162.416 How will BIA enforce removal requirements in a business lease?

We may take appropriate enforcement action in consultation with the tribe for tribal land or, where feasible, with Indian landowners for individually owned Indian land, to ensure removal of the improvements or restoration of the premises at the lessee's expense. We may take such enforcement action after termination or expiration of the lease. We may collect and hold the performance bond until removal and restoration are completed.

§ 162.417 What requirements for due diligence must a business lease include?

(a) If improvements are to be built, the business lease must include due diligence requirements that require the lessee to complete construction of any improvements within the schedule specified in the lease. The lessee must provide the Indian landowners and BIA good cause as to the nature of any delay, the anticipated date of construction of facilities, and evidence of progress toward commencement of construction, if construction does not occur, or is not expected to be completed, within the time period specified in the lease.

(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 § 162.464.

(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 May a business lease allow compatible uses?

A business lease may provide for the Indian landowner 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 landowner will not reduce or offset the monetary compensation for the business lease.

§ 162.419 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 pursuant to § 162.438(j) of this part.

(b) If the tract is fractionated we will describe the undivided trust interest in the leased premises.

Monetary Compensation Requirements

§ 162.420 How much monetary compensation must be paid under a business lease?

(a) A business lease of tribal land may allow for any payment amount negotiated by the tribe as long as the tribe provides the tribal authorization required by § 162.421(a). The tribe may request, in writing, that we require fair market rental, in which case we will determine fair market rental in accordance with § 162.422 and will approve the lease only if it requires payment of not less than fair market rental. Unless the tribe makes such a request, BIA will not require a valuation or appraisal or determine fair market rental, but instead will defer to the tribe's determination that the negotiated compensation is in its best interest.

(b) 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 (1) or (2) 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.

(1) 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:

(i) The Indian landowners execute a written waiver of the right to receive fair market rental; and

(ii) We determine it is in the Indian landowners' best interest, based on factors including, but not limited to:

(A) The lessee is a member of the individual Indian landowner's immediate family as defined in § 162.003;

(B) The lessee is a co-owner in the leased tract;

(C) A special relationship or circumstances exist that we believe warrant approval of the lease; or

(D) The lease is for religious, educational, recreational, cultural, or other public purposes.

(2) 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.

(3) Where the owners of the applicable percentage of interests under § 162.011 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.

§ 162.421 Will BIA require a valuation to determine fair market rental for a business lease?

(a) We will not require valuations or appraisals for negotiated business leases of tribal land, or of any undivided tribal interest in a fractionated tract, if the tribe submits a tribal authorization expressly stating that it:

(1) Has negotiated compensation satisfactory to the tribe;

(2) Waives valuation and appraisal; and

(3) Has determined that accepting such negotiated compensation and waiving valuation and appraisal is in its best interest.

(b) The tribe may request that BIA require a valuation or appraisal, in which case BIA must determine fair market rental in accordance with § 162.422.

(c) We may only waive the valuation requirement for business leases on individually owned Indian land if:

(1) The lease is for religious, educational, recreational, cultural, or other public purposes; and

(2) 100 percent of the Indian landowners submit to us a written request to waive the valuation requirement; and

(3) We determine that the waiver is in the best interest of the Indian landowners, taking into consideration the landowners' written request.

(d) We have 30 days from receipt of the waiver request in paragraph (c) of this section to make a determination. Our determination whether to approve the request will be in writing and will state the basis for our approval or disapproval. If we fail to meet the 30-day deadline, the lessee or Indian landowners may take appropriate action under part 2 of this chapter.

§ 162.422 What type of valuation may be used to determine fair market rental for a business lease?

(a) We will use an appraisal 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, unless we approve another type of valuation pursuant to paragraph (d).

(b) We will either:

(1) Prepare an appraisal; or

(2) Use an approved appraisal from the Indian landowner or lessee.

(c) We will approve an appraisal for use only if it:

(1) Has been prepared in accordance with USPAP or a valuation method developed by the Secretary pursuant to 25 U.S.C. 2214; and

(2) Complies with Departmental policies regarding appraisals, including third-party appraisals.

(d) Upon receipt of a tribal authorization, we may use some other type of valuation for a business lease on tribal land, if it conforms to USPAP or a valuation method developed by the Secretary pursuant to 25 U.S.C. 2214.

§ 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 otherwise provided in the lease, payments may not be made or accepted more than one year in advance of the due date.

§ 162.424 Must a business lease specify to whom monetary compensation payments may be made?

(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 whose trust accounts are unencumbered when there are 10 or fewer beneficial owners and 100 percent of the beneficial owners agree to receive payment directly from the lessee.

(1) If the lease provides that the lessee will directly pay the Indian landowners,

the lease must also require that the lessee provide us with certification of payment.

(2) When we consent on behalf of an Indian landowner, the lessee must make payment to us.

(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 otherwise provided in the lease, 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 if:

(i) 100 percent of the Indian landowners agree to suspend direct pay and provide us with documentation of their agreement, then the lessee must make all Indian landowners' payments to us; or

(ii) If any individual Indian landowner dies, is declared non compos mentis, becomes whereabouts unknown, or owes a debt resulting in a trust account encumbrance, then the lessee must make that individual Indian landowner's payment to us.

§ 162.425 What form of monetary compensation payment may be accepted 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, we will accept:

(1) Money orders;

(2) Certified checks;

(3) Cashier's checks; or

(4) Electronic funds transfer payments.

(c) We will not accept cash, personal checks, foreign currency, or third-party checks except for third-party checks from financial institutions.

(d) The preferred method of payment is electronic funds transfer payments.

§ 162.426 May the business lease provide for non-monetary or varying types of compensation?

(a) With our approval, the lease may provide for:

(1) Alternative forms of compensation, including but not limited to payments based on percentage of income or in-kind consideration; 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 and payments based on income during an operational period.

(b) For individually owned land, we will approve alternative forms of compensation and varying types of compensation if we determine that it is in the best interest of the Indian landowners. For tribal land, we will defer to the tribe's determination that the alternative forms of rental and varying types of consideration are in its best interest, if the tribe submits a signed certification stating that it has determined the alternative forms of rental and varying types of consideration to be in its best interest.

§ 162.427 Will BIA notify a lessee when a payment is due under a business lease?

Upon request of the Indian landowner, we may issue invoices to a lessee in advance of the dates on which payments are due under a business lease, but the lessee's obligation to make such payments in a timely manner will not be excused if such invoices are not issued, delivered, or received.

§ 162.428 Must a business lease provide for compensation reviews or adjustments?

(a) A review of the adequacy of compensation must occur at least every fifth year, in the manner specified in the lease, unless the conditions in paragraph (b) of this section are met. The lease must specify:

(1) When adjustments take effect;

(2) Who is authorized to make adjustments;

(3) What the adjustments are based on; and

(4) How disputes arising from the adjustments are resolved.

(b) A review of the adequacy of compensation is not required if:

(1) The lease provides for automatic adjustments; or

(2) 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:

(1) The lease provides for payment of less than fair market rental;

(2) The lease is for religious, educational, recreational, cultural, or other public purposes; or

(3) The lease provides for most or all of the compensation to be paid during the first five years of the lease term or prior to the date the review would be conducted.

(c) When a review results in the need for adjustment of compensation, we must approve the adjustment and Indian landowners must consent to the adjustment in accordance with § 162.011, unless otherwise provided in the lease.

§ 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/or assessments associated with the use of the land, as determined by entities having jurisdiction, except as provided in § 162.415(c). 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. Failure to make such payments will be treated 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 as to 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?

(a) Except as provided in paragraph (f) of this section, the lessee must provide a performance bond in an amount sufficient to secure the contractual obligations including:

(1) No less than the highest annual rental specified in the lease, if compensation is paid annually, or other amount established by BIA in consultation with the tribe for tribal land or, where feasible, with Indian landowners for individually owned Indian land, if the compensation is to be paid on a non-annual schedule;

(2) The construction of any required 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 commencement of the lease term or some other specified condition.

(b) The performance bond must be deposited with us and made payable only to us, and may not be modified without our approval.

(c) The lease must provide that we may adjust security or performance bond requirements at any time to reflect changing conditions.

(d) We may require that the surety provide any supporting documents needed to show that the performance bond will be enforceable, and that the surety will be able to perform the guaranteed obligations.

(e) The surety must provide notice to us at least 60 days before canceling a performance bond so that we may notify the lessee of its obligation to provide a substitute performance bond and require collection of the bond prior to the cancellation date. Failure to provide a substitute performance bond will be a violation of the lease.

(f) We may waive the requirement for a performance bond if the lease is for religious, educational, recreational, cultural, or other public purposes, or upon the request of the Indian landowner, if a waiver is in the best interest of the Indian landowner. We may revoke the waiver and require a performance bond at any time if the waiver is no longer in the best interest of the Indian landowner.

§ 162.435 What forms of performance bond may be accepted under a business lease?

(a) We will only accept a performance bond 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 bond issued by a company approved by the U.S. Department of the Treasury.

(b) All forms of performance bonds must:

(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; and

(4) Be automatically renewable during the term of the lease.

§ 162.436 What is the bond release process under a business lease?

(a) Upon expiration, termination, or cancellation of the lease, the lessee may submit a written request for a performance bond release to BIA.

(b) Upon receipt of a request under paragraph (a) of this section, BIA will 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, then release the performance bond to the lessee, unless we determine that the bond 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 improvements on the premises, unless otherwise provided in the lease.

(a) Such insurance may include property, crop, liability and/or 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. We may revoke the waiver and require insurance at any time if the waiver is no longer in the best interest of the Indian landowner.

Approval

§ 162.438 What documents must the parties submit to obtain BIA approval of a business lease?

A lessee or the Indian landowner must submit the following documents to us to obtain BIA approval of a business lease:

(a) A lease executed by the Indian landowner and the lessee that complies with the requirements of this part;

(b) An appraisal or other valuation under § 162.421, if appropriate;

(c) Organizational documents, certificates, filing records, and resolutions or other authorization documents, including evidence of the representative's authority to execute a lease, if the lessee is a corporation, limited liability company, partnership, joint venture, or other legal entity, to show that the lease will be enforceable and that the legal entity is in good standing and authorized to conduct business in the jurisdiction where the land is located;

(d) A performance bond, where required:

(e) Statement from appropriate tribal authority that the proposed use is in conformance with applicable tribal law;

(f) Environmental and archeological reports, surveys, and site assessments as needed to facilitate compliance with applicable Federal and tribal environmental and land use requirements;

(g) A restoration and reclamation plan (and any subsequent modifications to the plan), if appropriate;

(h) Documents that demonstrate the lessee's technical capability to construct, operate, maintain, and terminate the proposed project and the lessee's history in successfully designing, constructing, or obtaining the funding for a project similar to the proposed project, if appropriate;

(i) A preliminary plan of development that describes the type and location of any improvements the lessee plans to construct and a schedule showing the tentative commencement and completion dates for those improvements, if appropriate;

(j) An official or a certified survey of the leased premises that includes the legal description of the land encumbered by the lease and a description of each tract of trust or restricted land in the lease and the acreage of each. We will review the survey under the DOI Standards for Indian Trust Land Boundary Evidence;

(k) Information to assist us in our evaluation of the factors in 25 U.S.C. 415(a); and

(l) Any additional documentation we determine to be reasonably necessary for approval.

§ 162.439 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) Assure ourselves that adequate consideration has been given to the factors in 25 U.S.C. 415(a).

(4) Require any lease modifications or mitigation measures necessary to satisfy any requirements including any other Federal or tribal land use requirements; and

(5) If the lease is a negotiated lease, defer to the Indian landowners' determination that the lease is in their best interest, to the maximum extent possible.

(b) When we receive a business lease and all of the supporting documents that conform to this part, we will, within 60 days of the date of receipt of the documents at the appropriate BIA office, approve, disapprove, return the submission for revision, or notify the parties in writing that we need additional time to review the lease. Our letter notifying the parties that we need additional time to review the lease must identify our initial concerns and invite

the parties to respond within 15 days. We have 30 days from sending the notification to make a determination whether to approve or disapprove the sublease.

(c) If we fail to the deadlines in this section, then the parties may take appropriate action under part 2 of this chapter.

(d) Any lease approval or disapproval determination and the basis for the determination, along with notification of appeal rights under part 2 of this chapter, will be made in writing and will be sent 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.

§ 162.440 When will a business lease be effective?

(a) A business lease will be effective on the date on which we approve the lease, notwithstanding any appeal that may be filed under part 2 of this chapter.

(b) The lease may specify a date on which the obligations between the parties to a business lease are triggered. Such date may be before or after the approval date under paragraph (a) of this section.

§ 162.441 Must business lease documents be recorded?

(a) A business lease, amendment, assignment, leasehold mortgage, and sublease must be recorded in our Land Titles and Records Office with jurisdiction over the leased land.

(1) We will record the lease or other document immediately following our approval.

(2) If our approval is not required, the parties must record the assignment or sublease in the Land Title and Records Office with jurisdiction over the leased land.

(b) The tribe must record the following leases in the Land Title and Records Office 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.

§ 162.442 What action may BIA take if a lease disapproval decision is appealed?

(a) If a party appeals our decision to disapprove a lease, assignment, amendment, sublease or leasehold mortgage, then the official to whom the appeal is made may require the lessee to post an appeal bond in an amount necessary to protect the Indian landowners against financial losses and damage to trust resources likely to result from the delay caused by an appeal. The requirement to post an appeal bond will apply in addition to all of the other requirements in part 2 of this chapter.

(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

§ 162.443 May the parties amend a business lease?

(a) The parties may amend a business lease by obtaining:

(1) The lessee's signature;

(2) The Indian landowners' consent pursuant to the requirements contained in § 162.444; and

(3) BIA approval of the amendment under § 162.445 and § 162.446.

(b) The parties may not amend a business lease if the lease expressly prohibits amendments.

§ 162.444 What are the consent requirements for an amendment to a business lease?

(a) The Indian landowners, or their representatives under § 162.012, must consent to an amendment in the same percentages and manner as a new business lease pursuant to § 162.011, unless the requirements in paragraphs (a)(1) or (a)(2) of this section are met.

(1) The approved business lease establishes that individual Indian landowners are deemed to have consented where they do not object in writing to the amendment after a specified period of time following landowners' receipt of the amendment. If the lease provides for deemed consent, it must require the parties to submit to us: A copy of the executed amendment or other documentation of the Indian landowners' consent; proof of mailing of the amendment to any Indian landowners who are deemed to have consented; and any other pertinent information for us to review.

(2) The approved business lease authorizes one or more representatives to consent to an amendment on behalf of all Indian landowners. The lease may also designate us as the Indian landowners' representative for the purposes of consenting to an amendment.

(b) Unless specifically authorized in the lease, the written power of attorney, or court document, Indian landowners may not be deemed to have consented, and an Indian landowner's designated representative may not negotiate or consent to an amendment that would:

(1) Reduce the payment obligations or terms to the Indian landowners;

(2) Increase or decrease the lease area; or

(3) Terminate or change the term of the lease.

§ 162.445 What is the approval process for an amendment to a business lease?

We have 30 days from receipt of the executed amendment, proof of required consents, and required documentation to make a determination whether to approve the amendment or notify the parties in writing that we need additional time to review the amendment.

(a) Our letter notifying the parties that we need additional time to review the amendment must identify our initial concerns and invite the parties to respond within 15 days. We have 30 days from sending the notification to make a determination whether to approve or disapprove the amendment.

(b) If we fail to send either a determination or a notification within 30 days from receipt of required documents and completion of environmental reviews or 30 days from sending the notification, the amendment is deemed approved to the extent consistent with Federal law. We will retain our full enforcement authority for amendments that are deemed approved.

(c) Our determination whether to approve the amendment will be in writing and will state the basis for our approval or disapproval.

§ 162.446 How will BIA decide whether to approve an amendment to a business lease?

(a) We may only disapprove a business lease amendment if:

(1) The required consents have not been obtained from the parties to the lease and any mortgagees or sureties;

(2) The lessee is in violation of the lease; or

(3) We find a compelling reason to withhold our approval in order to protect the best interests of the Indian landowners.

(b) We may not unreasonably withhold approval of an amendment.

Assignments

§ 162.447 May a lessee assign a business lease?

(a) A lessee may assign a business lease by meeting the consent

requirements contained in § 162.448 and obtaining our approval of the assignment under § 162.449 and § 162.450, or by meeting the conditions in paragraphs (b) or (c) of this section, unless the lease expressly prohibits assignments.

(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:

(1) Not more than two distinct legal entities specified in the lease; or

(2) The lessee's wholly owned subsidiaries.

(c) If a sale or foreclosure under an approved mortgage of the leasehold interest occurs and the mortgagee is the purchaser, the mortgagee/purchaser may assign the leasehold interest without meeting the consent requirements or obtaining BIA approval, as long as the assignee accepts and agrees in writing to be bound by all the terms and conditions of the lease.

§ 162.448 What are the consent requirements for an assignment of a business lease?

(a) The Indian landowners, or their representatives under § 162.012, must consent to an assignment of a business lease in the same percentages and manner as a new business lease pursuant to § 162.011, unless the requirements in paragraphs (a)(1) or (a)(2) of this section are met.

(1) The approved business lease establishes that individual Indian landowners are deemed to have consented where they do not object in writing to the assignment after a specified period of time following landowners' receipt of the assignment. If the lease provides for deemed consent, it must require the parties to submit to us: A copy of the executed assignment or other documentation of the Indian landowners' consent; proof of mailing to any Indian landowners who are deemed to have consented; and any other pertinent information to us for review.

(2) The approved business lease authorizes one or more representatives to consent to an assignment on behalf of all Indian landowners. The lease may also designate us as the Indian landowners' representative for the purposes of consenting to an assignment.

(b) The lessee must obtain the consent of the holders of any bonds or mortgages.

§ 162.449 What is the approval process for an assignment of a business lease?

(a) We have 30 days from receipt of the executed assignment, proof of required consents, and required documentation to make a determination whether to approve the assignment or notify the parties that we need additional information. Our determination whether to approve the assignment will be in writing and will state the basis for our approval or disapproval.

(b) If we fail to meet the deadline in this section, the lessee or Indian landowners may take appropriate action under part 2 of this chapter.

§ 162.450 How will BIA decide whether to approve an assignment of a business lease?

(a) We may only disapprove an assignment of a business lease if:

(1) The required consents have not been obtained from the parties to the lease or the lessee's mortgagees or sureties;

(2) The lessee is in violation of the lease;

(3) The assignee does not agree to be bound by the terms of the lease; 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 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 bonded its performance and provided supporting documents that demonstrate that the lease will be enforceable against the assignee, and that the assignee will be able to perform its obligations under the lease or assignment.

(c) We may not unreasonably withhold approval of an assignment.

Subleases

§ 162.451 May a lessee sublease a business lease?

(a) A lessee may sublease a business lease by meeting the consent requirements contained in § 162.452 and obtaining our approval of the sublease under § 162.453 and § 162.454, or by meeting the conditions in paragraph (b) of this section, unless the lease expressly prohibits subleases.

(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, as long as:

(1) The lease provides for subleasing without meeting consent requirements or obtaining BIA approval;

(2) We have approved a general plan and rent schedule for the development;

(3) We have approved a sublease form for use in the project; and

(4) The parties provide BIA with a copy of the executed sublease within 30 days.

§ 162.452 What are the consent requirements for a sublease of a business lease?

The Indian landowners must consent to a sublease of a business lease in the same percentages and manner as a new business lease under § 162.011, unless the requirements in paragraphs (a) or (b) of this section are met.

(a) The lease establishes that individual Indian landowners are deemed to have consented where they do not object in writing to the sublease after a specified period of time following landowners' receipt of the sublease. If the lease provides for deemed consent, it must require the parties to submit to us: A copy of the executed sublease or other documentation of the Indian landowners' consent; proof of mailing of the sublease to any Indian landowners who are deemed to have consented; and any other pertinent information for us to review.

(b) The lease authorizes one or more representatives to consent to a sublease on behalf of all Indian landowners. The lease may also designate us as the Indian landowners' representative for the purposes of consenting to a sublease.

§ 162.453 What is the approval process for a sublease of a business lease?

BIA has 30 days from receipt of the executed sublease, proof of required consents, and required documentation to make a determination whether to approve the sublease or notify the parties in writing that we need additional time to review the sublease.

(a) Our letter notifying the parties that we need additional time to review the sublease must identify our initial concerns and invite the parties to respond within 15 days. We have 30 days from sending the notification to make a determination whether to approve or disapprove the sublease.

(b) If we fail to send either a determination or a notification within 30 days from receipt of required documents or 30 days from sending the notification, the sublease is deemed approved to the extent consistent with Federal law. We will retain our full enforcement authority for subleases that are deemed approved.

§ 162.454 How will BIA decide whether to approve a sublease of a business lease?

(a) We may only disapprove a sublease of a business lease if:

(1) The required consents have not been obtained from the parties to the lease and any mortgagees or sureties;

(2) The lessee is in violation of the lease;

(3) The lessee will not remain liable under the lease;

(4) The sublessee does not agree to be bound by the terms of the lease; or

(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 requirement by paragraph (a)(5) of this section, we will consider whether:

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

(2) If a performance bond is required by the sublease, the sublessee has bonded its performance and provided supporting documents that demonstrate that the lease will be enforceable by the lessee against the sublessee, and that the sublessee will be able to perform its obligations under the lease.

(c) We may not unreasonably withhold approval of a sublease.

Leasehold Mortgages

§ 162.455 May a lessee mortgage a business lease?

(a) A lessee may mortgage a business lease by meeting the consent requirements contained in § 162.456 and obtaining our approval of the leasehold mortgage under § 162.457 and § 162.458, unless the lease expressly prohibits leasehold mortgages.

(b) Refer to § 162.447(c) for information on what happens if a sale or foreclosure under an approved mortgage of the leasehold interest occurs.

§ 162.456 What are the consent requirements for a leasehold mortgage under a business lease?

The Indian landowners, or their representatives under § 162.012, must consent to a leasehold mortgage under a business lease in the same percentages and manner as a new business lease under § 162.011, unless the requirements in paragraphs (a), (b), or (c) of this section are met.

(a) The lease contains a general authorization for a leasehold mortgage and states what law would apply in case of foreclosure.

(b) The lease establishes that individual Indian landowners are deemed to have consented where they do not object in writing to the leasehold mortgage after a specified period of time following landowners' receipt of the leasehold mortgage. If the lease provides for deemed consent, it must require the parties to submit to us: A copy of the executed leasehold mortgage or other documentation of the Indian landowners' consent; proof of mailing of the leasehold mortgage to any Indian landowners who are deemed to have consented; and any other pertinent information for us to review.

(c) The lease authorizes one or more representatives to consent to a leasehold mortgage on behalf of all Indian landowners. The lease may also designate us as the Indian landowners' representative for the purposes of consenting to a leasehold mortgage.

§ 162.457 What is the approval process for a leasehold mortgage under a business lease?

(a) We have 30 days from receipt of the executed leasehold mortgage, proof of required consents, and required documentation to make a determination whether to approve the leasehold mortgage or notify the parties in writing that we need additional time to review 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 fail to meet the deadline in this section, the lessee may take appropriate action under part 2 of this chapter.

§ 162.458 How will BIA decide whether to approve a leasehold mortgage under a business lease?

(a) We may only disapprove a leasehold mortgage under a business lease if:

(1) The required consents have not been obtained from the parties to the lease and the lessee's sureties;

(2) The leasehold mortgage covers more than the lessee's interest in the leased premises or encumbers unrelated collateral; 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 will consider whether:

(1) The lessee'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 leasehold 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 lessee.

(c) We may not unreasonably withhold approval of a leasehold mortgage.

Effectiveness, Compliance, and Enforcement

§ 162.459 When will an amendment, assignment, sublease, or leasehold mortgage under a business lease be effective?

(a) An amendment, assignment, sublease, or leasehold mortgage under a business lease will be effective when approved, notwithstanding any appeal that may be filed under part 2 of this chapter, unless approval is not required under § 162.008(b), § 162.447(b), or § 162.451(b), or the conditions in paragraph (b) of this section apply. We will provide the approved documents to the party requesting approval and, upon request, to the other parties to the agreement.

(b) If the amendment or sublease was deemed approved pursuant to § 162.445(b) or § 162.453(b), the amendment or sublease becomes effective 45 days from the date the parties mailed or delivered the document to us for our review.

(c) An assignment or sublease that does not require landowner consent or BIA approval shall be effective upon execution by the parties.

§ 162.460 What happens if BIA disapproves an amendment, assignment, sublease, or leasehold mortgage under 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 them of their right to appeal the decision under part 2 of this chapter.

§ 162.461 May BIA investigate compliance with a business lease?

(a) We may enter the leased premises at any reasonable time, upon reasonable notice, 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 the Indian landowner notifies us that a specific lease violation has occurred, we will promptly initiate an appropriate investigation.

§ 162.462 May a business lease provide for negotiated remedies in the event of 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 the parties with the power to terminate the lease, BIA approval of the termination is not required and the termination is effective without BIA cancellation. The parties must notify us of the termination so that we may record it in the Land Titles and Records Office.

(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 applicable percentage of Indian landowners under § 162.011 of this part. If the lease provides the parties with the power to terminate the lease, BIA concurrence with the termination is required to ensure that the Indian landowners of the applicable percentage of interests have consented. BIA will record the termination in the Land Titles and Records Office.

(c) The parties must notify any surety or mortgagee of a 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.

(e) A business lease may provide for lease disputes to be resolved in tribal court or any other court of competent jurisdiction, 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 proceedings, as appropriate, in deciding whether to exercise any of the remedies available to us.

§ 162.463 What will BIA do about a violation of a business lease?

(a) 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 (b) of this section, we will promptly send the lessee and its sureties 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) Within 10 business days of the receipt of a notice of violation, the lessee must:

(i) Cure the violation and notify us 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) If a violation is determined to have occurred, we will make a reasonable attempt to notify the Indian landowners.

(4) We may order the lessee to stop work.

(b) A lessee's failure to pay compensation 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 lessees and its sureties a notice of violation by certified mail, return receipt requested:

(i) Promptly following the date on which the payment was due, if the lease requires that payments be made to us; or

(ii) Promptly following the date on which we receive actual notice of non-payment from the Indian landowners, if the lease provides for payment directly to the Indian landowners.

(2) We will send a copy of the notice of violation to the tribe for tribal land, or provide constructive notice to the Indian landowners for individually owned Indian land.

(3) The lessee must provide adequate proof of payment as required in the notice of violation.

(c) The lessee and its sureties will continue to be responsible for the obligations contained in the lease until the lease is terminated, cancelled, or expires.

§ 162.464 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 requisite 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, 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) 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 its sureties and any mortgagees 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 their 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) Require 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 landowner may pursue any available remedies under tribal law.

§ 162.465 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 such amounts will be treated as a lease violation.

(b) The following special fees may be assessed 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 . . .
(a) $50.00	Dishonored checks.
(b) $15.00	Processing of each notice or demand letter.
(c) 18 percent of balance due.	Treasury processing following referral for collection of delinquent debt.

§ 162.466 How will payment rights relating to a business lease be allocated between the Indian landowners and the lessee?

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 insurance policy, order, award, judgment, or other document including the lease, the Indian landowners or lessees will be entitled to receive such payments.

§ 162.467 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 be stayed if an appeal is filed unless the cancellation is made immediately effective under part 2 of this chapter. While a cancellation decision is stayed, the lessee must continue to pay compensation and comply with the other terms of the lease.

§ 162.468 What will BIA do if a lessee remains in possession after a business lease expires or is cancelled?

If a lessee remains in possession after the expiration or cancellation of a business lease, we may treat the unauthorized possession as a trespass under applicable law. Unless the applicable percentage of Indian landowners under § 162.011 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 forcible entry and detainer action.

§ 162.469 Will BIA regulations concerning appeal bonds 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.

§ 162.470 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.

§ 162.471 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.

14. Remove subpart F in its entirety (§ 162.600–§ 162.623) and redesignate § 162.500–§ 162.503 in subpart E as § 162.600–§ 162.603 in subpart F under the following heading:

Subpart F—Special Requirements for Certain Reservations

15. Add a new subpart E to read as follows:

Subpart E—Wind and Solar Resource Leases

General Provisions Applicable to Both WEELs and WSR Leases

Sec.

WEELs

Monetary Compensation Requirements

Bonding and Insurance

Approval

Administration

Compliance and Enforcement

WSR Leases

Monetary Compensation Requirements

Bonding and Insurance

Subpart E—Wind and Solar Resource Leases

General Provisions Applicable to WEELs and WSR Leases

§ 162.501 What types of leases does this subpart cover?

(a) This subpart covers:

(1) Wind energy evaluation leases (WEELs), which are short-term leases that authorize possession of Indian land for the purpose of installing, operating, and maintaining instrumentation, and associated infrastructure, such as meteorological towers, to evaluate wind resources for electricity generation; and

(2) Wind and solar resource (WSR) leases, which are leases that authorize possession of Indian land for the purpose of installing, operating, and maintaining instrumentation, facilities, and associated infrastructure, such as wind turbines and solar panels, to harness wind and/or solar energy to generate and supply electricity:

(i) For resale on a for-profit or non-profit basis;

(ii) To a utility grid serving the public generally; or

(iii) To users within the local community (*e.g.,* on and adjacent to a reservation).

(b) If the generation of electricity is solely to support a use approved under subpart B, Agricultural Leases; subpart C, Residential Leases; or subpart D Business Leases (including religious, educational, recreational, cultural, or other public purposes), for the same parcel of land, then the installation, operation, and maintenance of instrumentation, facilities, and associated infrastructure are governed by subpart B, C, or D, as appropriate.

§ 162.502 Who must obtain a WEEL or WSR lease?

(a) Except as provided in § 162.008(b) and 162.501, anyone seeking to possess Indian land to conduct activities associated with the evaluation of wind resources must obtain a WEEL.

(b) Except as provided in § 162.008(b) and 162.501, 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 provide other guidance, such as checklists and a sample lease to assist in the lease negotiation process. Additionally, we may 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 use 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; and

(2) Additional consideration, if any, that will be due upon the exercise of the option to renew or the commencement 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 owner being represented and the authority under which such action is being taken, where one executes the WEEL in a representative capacity;
(6) The citation of the statute that authorizes our approval;
(7) Who is responsible for constructing, owning, operating, maintaining, and managing improvements, pursuant to § 162.515;
(8) Payment requirements and late payment charges, including interest; and
(9) Due diligence requirements, pursuant to § 162.517;
(b) All WEELs must include the provisions:
(1) There must not be any unlawful conduct, creation of a nuisance, illegal activity, or negligent use or waste of leased premises;
(2) 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;
(3) Nothing in the lease would prevent or delay termination of Federal trust responsibilities for the land during the lease's term;
(4) The lessee must comply with all applicable laws, ordinances, rules, regulations, and other legal requirements under § 162.013;
(5) The lessee indemnifies and holds the United States and the Indian landowners harmless from any loss, liability, or damages resulting from the lessee's use of the leased premises, unless the lessee would be prohibited by law from making such an agreement;
(6) In the event that 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 that has jurisdiction to determine how to proceed and appropriate disposition; and
(7) BIA has the right, at any reasonable time during the term of the lease, and upon reasonable notice, to enter upon the leased premises for inspection.

§ 162.514 May 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 improvements. An equipment installation plan must be submitted with the lease pursuant to § 162.528(f).

(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 improvements;

(2) Type of improvements; or

(3) Delay of 90 days or more in any phase of development.

§ 162.515 How must a WEEL address ownership of improvements?

(a) A WEEL must specify who will own any improvements the lessee installs during the lease term. In addition, the WEEL must indicate whether any improvements the lessee installs:

(1) Will remain on the premises upon expiration or termination of the lease whether or not there is conversion of the WEEL to a WSR lease, in a condition satisfactory to the Indian landowners;

(2) May be conveyed to the Indian landowners during the WEEL term;

(3) Will be removed within a time period specified in WEEL, at the lessee's expense, with the leased premises to be restored as close as possible to their condition before installation of such improvements; or

(4) Will be disposed of by other specified means.

(b) A WEEL that requires the lessee to remove the improvements must also provide the Indian landowners with an option to take possession and title to the improvements if the improvements are not removed within the specified time period.

(c) Any permanent improvements on the leased land shall be subject to 25 CFR 1.4 and, in addition, shall not be subject to any fee, tax, assessment, levy, or other such charge imposed by any State or political subdivision of a State, without regard to ownership of those improvements. Improvements may be subject to taxation by the Indian tribe with jurisdiction.

§ 162.516 How will BIA enforce removal requirements in a WEEL?

We may take appropriate enforcement action in consultation with the tribe for tribal land or, where feasible, Indian landowners for individually owned Indian land, to ensure removal of the improvements or restoration of the premises at the lessee's expense. We may take such enforcement action after termination or expiration of the WEEL.

§ 162.517 What requirements for due diligence must a WEEL include?

(a) A WEEL must require the lessee to undertake the following due diligence:
(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) Provide the Indian landowners and BIA with an explanation as to good cause for any delay, the anticipated date of installation of facilities, and evidence of progress toward installing or completing testing and monitoring facilities, if installation does not occur, or is not expected to be completed, within the time period specified in paragraph (a)(1) of this section.
(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 cancellation of the WEEL and the requirement that the lessee transfer of ownership of energy resource information collected under the WEEL to the Indian landowner under § 162.519.

§ 162.518 May a WEEL allow for compatible uses by the Indian landowner?

The WEEL may provide for the Indian landowner 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 landowner will not reduce or offset the monetary compensation for the WEEL.

§ 162.519 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 landowner at the termination or expiration 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.

§ 162.520 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 § 162.013 and any

other legal requirements may be incorporated by reference, as appropriate, into the analyses of a proposed WSR lease.

§ 162.521 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 time the lessee and the Indian landowner have the option to enter into a WSR lease if:

(1) The option period is no more than 3 years, except as provided in § 162.522;

(2) The intent to install energy resource development facilities is stated at the time of the initial WEEL application;

(3) The WSR lease will be limited to the land covered by the WEEL, or a portion thereof;

(4) The WEEL imposes due diligence requirements on the lessee;

(5) The WEEL states the circumstances in which the option period may be terminated; and

(6) The WSR lease will be the direct result of energy resource information gathered from the WEEL activities and associated data.

(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.

§ 162.522 How may a lessee obtain an extension of an option period?

(a) A lessee may request extension of the option period for a term of no more than 3 years.

(b) We will approve the extension if:

(1) The parties agree in writing to the extension and have already submitted a proposed WSR lease to us for approval; and

(2) The extension is necessary for us to complete the lease approval process.

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 §§ 162.549 through 162.555, also apply to WEELs.

§ 162.524 Will BIA require a valuation for a WEEL?

BIA will not require a valuation for a WEEL.

Bonding and Insurance

§ 162.525 Must a lessee provide a performance bond for a WEEL?

The lessee is not required to provide a performance bond 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 improvements on the leased premises, unless otherwise provided in the WEEL.

(a) Such insurance may include property, crop, liability and/or 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. We may revoke the waiver and require insurance at any time if the waiver is no longer in the best interest of the Indian landowner.

Approval

§ 162.528 What documents must the parties submit to obtain BIA approval of a WEEL?

A lessee or the Indian landowner 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 complies with the requirements of this part;

(b) Organizational documents, certificates, filing records, and resolutions or other authorization documents, including evidence of the representative's authority to execute a lease, if the lessee is a corporation, limited liability company, partnership, joint venture, or other legal entity, to show that the WEEL will be enforceable and that the legal entity is in good standing and authorized to conduct business in the jurisdiction where the land is located;

(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;

(e) Environmental and archeological reports, surveys, and site assessments as needed to facilitate compliance with applicable Federal and tribal environmental and land use requirements;

(f) An equipment installation plan;

(g) A restoration and reclamation plan (and any subsequent modifications to the plan);

(h) An official or certified survey of the leased premises that includes the legal description of the land encumbered by the WEEL and a description of each tract of trust or restricted land in the WEEL and the acreage of each. We will review the survey under the DOI Standards for Indian Trust Land Boundary Evidence;

(i) Documents that demonstrate the technical capability of the lessee or lessee's agent to construct, operate, maintain, and terminate resource evaluation facilities and history in successfully designing, constructing, or obtaining the funding for a resource evaluation project (for example, documents evidencing lessee's actual ownership, development, or management of a successful similar size project within the last 5 years);

(j) Information to assist us in our evaluation of the factors in 25 U.S.C. 415(a); and

(k) Any additional documentation we determine to be reasonably necessary for approval.

§ 162.529 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) 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) When we receive a WEEL and all of the supporting documents that conform to this part, we will, within 20 days of the date of receipt of the documents at the appropriate BIA office, approve, disapprove, return the submission for revision, or notify the parties in writing that we need additional time to review the WEEL. Our letter notifying the parties that we need additional time to review the WEEL must identify our initial concerns

and invite the parties to respond within 15 days. We have 30 days from sending the notification to make a determination whether to approve or disapprove the sublease.

(c) If we fail to meet the deadline in this section, then the parties may take appropriate action under part 2 of this chapter.

(d) In reviewing a WEEL for approval, we will defer to the Indian landowners' determination that the WEEL is in their best interest, to the maximum extent possible.

(e) Any WEEL approval or disapproval determination and the basis for the determination, along with notification of rights to appeal the determination under part 2 of this chapter, will be made in writing and will be sent to the parties.

Administration

§ 162.530 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.

§ 162.531 [Reserved]

Compliance and Enforcement

§ 162.532 How does BIA ensure compliance with a WEEL?

(a) If we determine that a WEEL has been violated, we will promptly send the lessee and its sureties a notice of violation. We may also order the lessee to stop work. The notice of violation must be provided by certified mail, return receipt requested.

(b) Within 5 days of the receipt of the notice of violation, the lessee 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; or

(3) Request additional time to cure the violation.

(c) If we determine that a violation has occurred, we will make a reasonable attempt to notify the Indian landowners.

§ 162.533 What will BIA do if a lessee does not cure a violation of a WEEL on time?

(a) If the lessee does not cure a violation of a WEEL within the requisite time period, we will consult with the tribe for tribal land or, where feasible, Indian landowners for individually owned Indian land, and determine whether:

(1) We should cancel the WEEL, or

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

(3) We should invoke any other remedies available to us under the WEEL.

(b) If we decide to cancel the WEEL, we will send the lessee and its sureties and any mortgagees 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 WEEL;

(3) Notify the lessee of their 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 we deem necessary to protect the Indian landowners.

(c) The cancellation will not be effective until 31 days after the lessee receives a cancellation letter from us, or 41 days from the date the letter is mailed, whichever is earlier.

(d) The cancellation decision will be stayed if the lessee files an appeal unless the cancellation is made immediately effective under part 2 of this chapter. While a cancellation decision is stayed, the lessee must continue to pay compensation and comply with the other terms of the WEEL.

(e) Nothing in this part affects BIA's ability to take emergency action to protect the leased premises under § 162.021.

§ 162.534 Under what circumstances may a WEEL be terminated or cancelled?

(a) A WEEL must state whether, and under what conditions, an Indian landowner may terminate the WEEL.

(b) We may cancel the WEEL if we have determined cancellation is appropriate under § 162.523 (failure to make timely payments) or § 162.533 (failure to cure a violation within the requisite time).

WSR Leases

§ 162.535 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.

§ 162.536 Must I obtain a WEEL before obtaining a WSR lease?

You may enter into a WSR lease independent of 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.

§ 162.537 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. Unless authorized by paragraph (b), leases for WSR development purposes may have an initial term not to exceed 25 years and one renewal period not to exceed 25 years.

(b) If a 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), the lease may provide for a primary term, and one renewal not to exceed 25 years, so long as the maximum term, including the renewal, does not exceed the maximum term established by statute.

(c) The lease term, including any renewal, must be reasonable, given the

(1) Purpose of the lease;

(2) Type of financing; and

(3) Level of investment.

(d) 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.

(e) The lease may not be extended by holdover.

§ 162.538 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;

(3) Whether Indian landowner consent to the renewal is required;

(4) That the lessee must provide notice to the Indian landowner and any mortgagees of the renewal;

(5) The additional consideration, if any, that will be due upon the exercise of the option to renew or the commencement of the renewal term; and

(6) That any change in the terms of the lease will be considered an amendment subject to consent and BIA approval requirements pursuant to §§ 162.568 to 162.571; and

(7) Any other conditions for renewal (*e.g.,* the lessee may not be in violation of the lease at the time of renewal).

(b) We must record any renewal of a lease in the Land Titles and Records Office.

§ 162.539 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 owner being represented and the authority under which such action is being taken, where one executes a lease in a representative capacity;

(6) The citation of the statute that authorizes our approval;

(7) Who is responsible for constructing, owning, operating, maintaining, and managing, WSR equipment, roads, transmission lines and related facilities;

(8) Who is responsible for evaluating the leased premises for suitability; purchasing, installing, operating, and maintaining WSR equipment; negotiating power purchase agreements; and transmission;

(9) Payment requirements and late payment charges, including interest;

(10) Due diligence requirements, pursuant to § 162.543;

(11) Insurance requirements; and

(12) 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 or guarantor for any legal instrument that directly affects their obligations and liabilities.

(b) 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) Nothing in the lease would prevent or delay termination of Federal trust responsibilities for the land during the lease's term;

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

(4) The lessee must comply with all applicable laws, ordinances, rules, regulations, and other legal requirements under § 162.013;

(5) The lessee indemnifies and 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 (this provision is not mandatory if the lessee would be prohibited by law from making such an agreement);

(6) In the event that 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 that has jurisdiction to determine how to proceed and appropriate disposition;

(7) BIA has the right, at any reasonable time during the term of the lease and upon reasonable notice, to enter upon the leased premises for inspection; and

(8) Unless otherwise indicated, this is a lease of the trust and restricted interests in the property described and is not a lease of any undivided fee interests. All compensation payments by the lessee will be distributed to the trust and restricted landowners and life estate holders on trust and restricted land only. The lessee will be responsible for accounting to the owners of any fee interests that may exist in the property being leased.

(c) We may treat any provision of a lease, sublease, assignment, amendment or mortgage that is in violation of Federal law as a violation of the lease.

§ 162.540 May 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. These facilities and associated infrastructure are considered improvements. A resource development plan must be submitted for approval with the lease pursuant to § 162.563(g).

(b) If any of the following changes are made to the resource development plan, the Indian landowner and BIA must approve the revised plan:

(1) Location of improvements;

(2) Type of improvements; or

(3) Delay of 90 days or more in any phase of development.

§ 162.541 How must a WSR lease address ownership of improvements?

(a) A WSR lease must specify who will own any improvements the lessee installs during the lease term and may specify that any improvements the lessee installs may be conveyed to the Indian landowners during the lease term and under what conditions the improvements may be conveyed. In addition, the lease must indicate whether each specific improvement the lessee installs will, upon the expiration or termination of the lease:

(1) Remain on the leased premises, in a condition satisfactory to the Indian landowners and become the property of the Indian landowner;

(2) Be removed within a time period specified in the lease, at the lessee's expense, with the leased premises to be restored as close as possible to their condition before installation of such improvements; or

(3) Be disposed of by other specified means.

(b) A lease that requires the lessee to remove the improvements must also provide the Indian landowners with an option to take possession of and title to the improvements if the improvements are not removed within the specified time period.

§ 162.542 How will BIA enforce removal requirements in a WSR lease?

We may take appropriate enforcement action in consultation with the tribe, for tribal land or, where feasible, Indian landowners for individually owned Indian land, to ensure removal of the improvements or restoration of the premises at the lessee's expense. We may take such enforcement action after termination or expiration of the lease. We may collect and hold the performance bond until removal and restoration are completed.

§ 162.543 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 contained in the resource development plan;

(2) Provide the Indian landowners and BIA good cause as to the nature of any delay, the anticipated date of installation of facilities, and evidence of progress toward commencement of installation, if installation does not occur, or is not expected to be completed, within the time period specified in paragraph (a)(1) of this section;

(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 30 days any idle, improperly functioning, or abandoned equipment or facilities that have been inoperative for any continuous period of 3 months (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 § 162.589.

§ 162.544 May a WSR lease allow compatible uses?

The lease may provide for the Indian landowner 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 landowner will not reduce or offset the monetary compensation for the WSR lease.

§ 162.545 How must a WSR lease describe the land?

(a) A WSR lease must describe the leased premises by reference to an official or certified survey as required by § 162.563(i) of this part.

(b) If the tract is fractionated, we will describe the undivided trust interest in the leased premises.

Monetary Compensation Requirements

§ 162.546 How much monetary compensation must be paid under a WSR lease?

(a) A WSR lease of tribal land may allow for any payment negotiated by the tribe as long as the tribe provides the tribal authorization required by § 162.547(a). The tribe may request, in writing, that we require fair market rental, in which case we will determine fair market rental in accordance with § 162.548 and will approve the lease only if it requires payment of not less than fair market rental. Unless the tribe makes such a request, BIA will not require a valuation or appraisal or determine fair market rental, but instead will defer to the tribe's determination that the negotiated compensation is in its best interest.

(b) 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 (a)(1) or (a)(2) 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.

(1) 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:

(i) The Indian landowners execute a written waiver of the right to receive fair market rental; and

(ii) We determine it is in the Indian landowners' best interest, based on factors including, but not limited to:

(A) The lessee is a member of the Indian landowners' immediate family as defined in § 162.003;

(B) The lessee is a co-owner of the leased tract;

(C) A special relationship or circumstances exist that we believe warrant approval of the lease; or

(D) The lease is for public purposes.

(2) 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.

(3) Where 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.

§ 162.547 Will BIA require a valuation to determine fair market rental of a WSR lease?

(a) We will not require valuations or appraisals for negotiated WSR leases of tribal land, or of any undivided tribal interest in a fractionated tract, if the tribe submits a tribal authorization expressly stating that it:

(1) Has negotiated compensation satisfactory to the tribe;

(2) Waives valuation and appraisal; and

(3) Has determined that accepting such negotiated compensation and waiving valuation and appraisal is in its best interest.

(b) The tribe may request that BIA require a valuation or appraisal, in which case BIA must determine fair market rental in accordance with § 162.548.

(c) We will not waive the valuation requirement for WSR leases on individually owned Indian land, but we may accept an economic analysis in lieu of an appraisal if we determine it to be in the best interest of the Indian landowners and:

(1) The Indian landowners submit a written statement to us requesting an economic analysis in lieu of an appraisal and explaining the basis for the request and their willingness to accept nominal or less than fair market rental;

(2) After receiving an estimated timeframe for completion of the analysis from the Office of Indian Energy & Economic Development (IEED), the Indian landowner submits a written request for economic analysis to IEED; and

(3) IEED prepares an economic analysis of the project.

§ 162.548 What type of valuation may be used to determine fair market rental for a WSR lease?

(a) We will use an appraisal 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, unless we approve another type of valuation under paragraph (d) of this section.

(b) We will either:

(1) Prepare an appraisal; or

(2) Use an approved appraisal from the Indian landowner or lessee.

(c) We will approve an appraisal for use only if it:

(1) Has been prepared in accordance with USPAP or a valuation method developed by the Secretary pursuant to 25 U.S.C. 2214; and

(2) Complies with Department policies regarding appraisals, including third-party appraisals.

(d) Upon receipt of a tribal authorization, we may use some other type of valuation for a WSR lease on tribal land, if it conforms to USPAP or a valuation method developed by the Secretary pursuant to 25 U.S.C. 2214.

§ 162.549 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 otherwise provided in the lease, 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.

§ 162.550 Must a WSR lease specify to whom monetary compensation payments may be made?

(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 whose trust accounts are unencumbered when there are 10 or fewer beneficial owners and 100 percent of the beneficial owners agree to receive payment directly from the lessee.

(1) If the lease provides that the lessee will directly pay the Indian landowners, the lease must also require that the lessee provide us with certification of payment.

(2) When we consent on behalf of an Indian landowner, the lessee must make payment to us.

(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 otherwise provided in the lease, 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 if:

(i) 100 percent of the Indian landowners agree to suspend direct pay and provide us with documentation of their agreement, then the lessee must make all Indian landowners' payments to us; or

(ii) If any individual Indian landowner dies, is declared non compos mentis, becomes whereabouts unknown, or owes a debt resulting in a trust account encumbrance, then the lessee must make that individual Indian landowner's payment to us.

§ 162.551 What form of monetary compensation payment may be accepted 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, we will accept:

(1) Money orders;

(2) Certified checks;

(3) Cashier's checks; or

(4) Electronic funds transfer payments.

(c) We will not accept cash, foreign currency, or third-party checks except for third-party checks from financial institutions.

(d) The preferred method of payment is electronic funds transfer payments.

§ 162.552 May the WSR lease provide for non-monetary or varying types of compensation?

(a) With our approval, the lease may provide for:

(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 individually owned land, we will approve alternative forms of compensation and varying types of consideration if we determine that it is in the best interest of the Indian landowners. For tribal land, we will defer to the tribe's determination that the alternative forms of rental and varying types of consideration are in its best interest, if the tribe submits a signed certification stating that it has determined the alternative forms of rental and varying types of consideration to be in its best interest.

§ 162.553 Will BIA notify a lessee when a payment is due under a WSR lease?

Upon request of the Indian landowner, we may issue invoices to a lessee in advance of the dates on which payments are due under a WSR lease, but the lessee's obligation to make such payments in a timely manner will not be excused if such invoices are not delivered or received.

§ 162.554 Must a WSR lease provide for compensation reviews or adjustments?

(a) A review of the adequacy of compensation must occur at least every fifth year, in the manner specified in the lease, unless the conditions in paragraph (b) of this section are met. The lease must specify:

(1) When adjustments take effect;

(2) Who is authorized to make adjustments;

(3) What the adjustments are based on; and

(4) How to resolve disputes arising from the adjustments.

(b) A review of the adequacy of compensation is not required if:

(1) The lease provides for automatic adjustments; or

(2) 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; or

(iii) The lease provides for most or all of the compensation to be paid during the first five years of the lease term or prior to the date the review would be conducted.

(c) When a review results in the need for adjustment of compensation, we must approve the adjustment and Indian landowners must consent to the adjustment in accordance with § 162.011, unless otherwise provided in the lease.

§ 162.555 What other types of payments are required under a WSR lease?

(a) The lessee may be required to pay additional fees, taxes, and/or assessments associated with the use of the land, as determined by entities having jurisdiction, except as provided in § 162.515(c). 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. Failure to make such payments will be treated 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 as to how to allocate payment of the operation and maintenance charges.

Bonding and Insurance

§ 162.559 Must a lessee provide a performance bond for a WSR lease?

(a) Except as provided in paragraph (f) of this section, the lessee must provide a performance bond in an amount sufficient to secure the contractual obligations including:

(1) No less than the highest annual rental specified in the lease, if the compensation is paid annually, or other amount established by BIA in consultation with the tribe, for tribal land or, where feasible, with Indian landowners for individually owned Indian land, if the compensation is to be paid on a non-annual schedule;

(2) The performance and payment for the installation of any required 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 commencement of the lease term or some other specified condition.

(b) The performance bond must be deposited with us and made payable only to us, and may not be modified without our approval.

(c) The lease must provide that we may adjust security or performance bond requirements at any time to reflect changing conditions.

(d) We may require that the surety provide any supporting documents needed to show that the performance bond will be enforceable, and that the surety will be able to perform the guaranteed obligations.

(e) The surety must provide notice to us at least 60 days before canceling a performance bond so that we may notify the lessee of its obligation to provide a substitute performance bond and require collection of the bond prior to the cancellation date. Failure to provide a substitute performance bond will be a violation of the lease.

(f) We may waive the requirement for a performance bond 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. We may revoke the waiver and require a performance bond at any time if the waiver is no longer in the best interest of the Indian landowner.

§ 162.560 What forms of performance bond may be accepted under a WSR lease?

(a) We will only accept a performance bond 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 bond issued by a company approved by the U.S. Department of the Treasury.

(b) All forms of performance bonds must:

(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; and

(4) Be automatically renewable during the term of the lease.

§ 162.561 What is the bond release process under a WSR lease?

(a) Upon expiration, termination, or cancellation of the lease, the lessee must submit a written request for a performance bond release to BIA.

(b) Upon receipt of the request under paragraph (a) of this section, BIA will 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, then release the performance bond to the lessee unless we determine that the performance bond 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 improvements on the leased premises.

(a) Such insurance may include property, liability and/or 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. We may revoke the waiver and require insurance at any time if the waiver is no longer in the best interest of the Indian landowner.

Approval

§ 162.563 What documents must the parties submit to obtain BIA approval of a WSR lease?

A lessee or the Indian landowner must submit the following documents to us to obtain BIA approval of a WSR lease:

(a) A lease executed by the Indian landowner and the lessee that complies with the requirements of this part;

(b) An appraisal or other valuation under § 162.547, if appropriate;

(c) Organizational documents, certificates, filing records, and resolutions or other authorization documents, including evidence of the representative's authority to execute a lease, if the lessee is a corporation, limited liability company, partnership, joint venture, or other legal entity, to show that the lease will be enforceable and that the legal entity is in good standing and authorized to conduct business in the jurisdiction where the land is located;

(d) A performance bond, where required;

(e) Statement from the appropriate tribal authority that the proposed use is in conformance with applicable tribal law;

(f) Environmental and archeological reports, surveys, and site assessments as needed to facilitate compliance applicable Federal and tribal environmental and land use requirements;

(g) A resource development plan that describes the type and location of any improvements the lessee plans to install and a schedule showing the tentative commencement and completion dates for those improvements;

(h) A restoration and reclamation plan (and any subsequent modifications to the plan);

(i) An official or a certified survey of the leased premises that includes the legal description of the land encumbered by the lease and a description of each tract of trust or restricted land in the lease and the acreage of each. We will review the survey under the DOI Standards for Indian Trust Land Boundary Evidence;

(j) Documents that demonstrate the technical capability of the lessee or lessee's agent to construct, operate, maintain, and terminate resource development facilities and the lessee's history in successfully designing, constructing, or obtaining the funding for a resource development project (for example, documents evidencing lessee's actual ownership, development, or management of a successful similarly-sized project within the last 5 years);

(k) Information to assist us in our evaluation of the factors in 25 U.S.C. 415(a); and

(l) Any additional documentation we determine to be reasonably necessary for approval.

§ 162.564 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) Assure ourselves that adequate consideration has been given to the factors in 25 U.S.C. 415(a);

(4) Require any lease modifications or mitigation measures necessary to satisfy any requirements including any other Federal or tribal land use requirements; and

(5) If the lease is a negotiated lease, defer to the Indian landowners' determination that the lease is in their

best interest, to the maximum extent possible.

(b) When we receive a WSR lease proposal and all of the supporting documents that conform to this part, we will, within 60 days of the date of receipt of the documents at the appropriate BIA office, approve, disapprove, return the submission for revision, or notify the parties in writing that we need additional time to review the lease. Our letter notifying the parties that we need additional time to review the lease must identify our initial concerns and invite the parties to respond within 15 days. We have 30 days from sending the notification to make a determination whether to approve or disapprove the sublease.

(c) If we fail to meet the deadlines in this section, then the parties may take appropriate action under part 2 of this chapter.

(d) We will make any lease approval or disapproval determination and the basis for the determination, along with notification of appeal rights under part 2 of this chapter, in writing and will send the determination and notification 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.

§ 162.565 When will a WSR lease be effective?

(a) A WSR lease will be effective on the date on which we approve the lease, notwithstanding any appeal that may be filed under part 2 of this chapter.

(b) The lease may specify a date on which the obligations between the parties to a WSR lease are triggered. Such date may be before or after the approval date under paragraph (a).

§ 162.566 Must WEEL and WSR lease documents be recorded?

(a) A WEEL and WSR lease, amendment, assignment, leasehold mortgage, and sublease must be recorded in our Land Titles and Records Office with jurisdiction over the leased land.

(1) We will record the lease or other document immediately following our approval.

(2) If our approval is not required, the parties must record the assignment or sublease in the Land Title and Records Office with jurisdiction over the leased land.

(b) The tribe must record the following leases in the Land Titles and Records Office 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.

§ 162.567 What action may BIA take if a lease disapproval decision is appealed?

(a) If a party appeals our decision to disapprove a lease, assignment, amendment, sublease or leasehold mortgage, then the official to whom the appeal is made may require the lessee to post an appeal bond in an amount necessary to protect the Indian landowners against financial losses and damage to trust resources likely to result from the delay caused by an appeal. The requirement to post an appeal bond will apply in addition to all of the other requirements in part 2 of this chapter.

(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

§ 162.568 May the parties amend a WSR lease?

(a) The parties may amend a WSR lease by obtaining:

(1) The lessee's signature;

(2) The Indian landowners' consent pursuant to the requirements contained in § 162.569; and

(3) BIA approval of the amendment under § 162.570 and § 162.571.

(b) The parties may not amend a WSR lease if the lease expressly prohibits amendments.

§ 162.569 What are the consent requirements for an amendment to a WSR lease?

(a) The Indian landowners, or their representatives under § 162.012, must consent to an amendment of a WSR lease in the same percentages and manner as a new WSR lease pursuant to § 162.011, unless the requirements in paragraphs (a)(1) or (a)(2) are met.

(1) The approved WSR lease establishes that individual Indian landowners are deemed to have consented if they do not object in writing to the amendment after a specified period of time following landowners' receipt of the amendment. If the lease provides for deemed consent, it must require the parties to submit to us: A copy of the executed amendment or other documentation of the Indian landowners' consent; proof of mailing of the amendment to any Indian landowners who are deemed to have consented; and any other pertinent information to us for review.

(2) The approved WSR lease authorizes one or more representatives to consent to an amendment on behalf of all Indian landowners. The lease may also designate us as the Indian landowners' representative for the purposes of consenting to an amendment.

(b) Unless specifically authorized in the lease, the written power of attorney, or court document, Indian landowners may not be deemed to have consented, and an Indian landowner's designated representative may not negotiate or consent to an amendment that would:

(1) Reduce the payment obligations or terms to the Indian landowners;

(2) Increase or decrease the lease area; or

(3) Terminate or change the term of the lease.

§ 162.570 What is the approval process for an amendment to a WSR lease?

We have 30 days from receipt of the executed assignment, proof of required consents, and required documentation to make a determination whether to approve the amendment or notify the parties in writing that we need additional time to review the amendment.

(a) Our letter notifying the parties that we need additional time to review the amendment must identify our initial concerns and invite the parties to respond within 15 days. We have 30 days from sending the notification to make a determination whether to approve or disapprove the amendment.

(b) If we fail to send either a determination or a notification within 30 days from receipt of required documents and the completion of any environmental reviews or 30 days from sending the notification, the amendment is deemed approved to the extent consistent with Federal law. We will retain our full enforcement authority for amendments that are deemed approved.

(c) Our determination whether to approve the amendment will be in writing and will state the basis for our approval or disapproval.

§ 162.571 How will BIA decide whether to approve an amendment to a WSR lease?

(a) We may only disapprove a WSR lease amendment if:

(1) The required consents have not been obtained from the parties to the lease and any mortgagees or sureties;

(2) The lessee is in violation of the lease; or

(3) We find a compelling reason to withhold our approval in order to protect the best interests of the Indian landowners.

(b) We may not unreasonably withhold approval of an amendment.

Assignments

§ 162.572 May a lessee assign a WSR lease?

(a) A lessee may assign a WSR lease by meeting the consent requirements contained in § 162.573 and obtaining our approval of the assignment under § 162.574 and § 162.575 or by meeting the conditions in paragraphs (b) or (c) of this section, unless the lease expressly prohibits assignments.

(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:

(1) Not more than two distinct legal entities specified in the lease; or

(2) The lessee's wholly owned subsidiaries.

(c) If a sale or foreclosure under an approved mortgage of the leasehold interest occurs and the mortgagee is the purchaser, the mortgagee/purchaser may assign the leasehold interest without meeting the consent requirements or obtaining our approval, as long as the assignee accepts and agrees in writing to be bound by all the terms and conditions of the lease.

§ 162.573 What are the consent requirements for an assignment of a WSR lease?

The Indian landowners, or their representatives under § 162.012, must consent to an assignment in the same percentages and manner as a new WSR lease, unless the requirements in paragraphs (a) or (b) of this section are met.

(a) The lease establishes that individual Indian landowners are deemed to have consented where they do not object in writing to the assignment after a specified period of time following landowners' receipt of the assignment. If the lease provides for deemed consent, it must require the parties to submit to us: a copy of the executed assignment or other documentation of the Indian landowners' consent; proof of mailing of the assignment to any Indian landowners who are deemed to have consented; and any other pertinent information for us to review.

(b) The approved WSR lease authorizes one or more representatives to consent to an assignment on behalf of all Indian landowners. The lease may also designate us as the Indian landowners' representative for the purposes of consenting to an assignment.

§ 162.574 What is the approval process for an assignment of a WSR lease?

(a) We have 30 days from receipt of the executed assignment, proof of required consents, and required documentation to make a determination whether to approve the assignment or notify the parties that we need additional information. Our determination whether to approve the assignment will be in writing and will state the basis for our approval or disapproval.

(b) If we fail to meet any of the deadlines in this section, the lessee or Indian landowners may take appropriate action under part 2 of this chapter.

§ 162.575 How will BIA decide whether to approve an assignment of a WSR lease?

(a) We may only disapprove an assignment of a WSR lease if:

(1) The required consents have not been obtained from the parties to the lease or the lessee's mortgagees or sureties;

(2) The lessee is in violation of the lease;

(3) The assignee does not agree to be bound by the terms of the lease; 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 will 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 bonded its performance and provided supporting documents that demonstrate that the lease will be enforceable against the assignee, and that the assignee will be able to perform its obligations under the lease or assignment.

(c) We may not unreasonably withhold approval of an assignment.

Subleases

§ 162.576 May a lessee sublease a WSR lease?

A lessee may sublease a WSR lease by meeting the consent requirements contained in § 162.577 and obtaining our approval of the sublease under § 162.578 and § 162.579, unless the lease expressly prohibits subleases.

§ 162.577 What are the consent requirements for a sublease of a WSR lease?

The Indian landowners, or their representatives under § 162.012, must consent to a sublease in the same percentages and manner as a new WSR lease under § 162.011, unless the requirements in paragraphs (a) or (b) of this section are met.

(a) The lease establishes that individual Indian landowners are deemed to have consented where they do not object in writing to the sublease after a specified period of time following landowners' receipt of the sublease. If the lease provides for deemed consent, it must require the parties to submit to us: a copy of the executed sublease or other documentation of the Indian landowners' consent; proof of mailing of the sublease to any Indian landowners who are deemed to have consented; and any other pertinent information for us to review.

(b) The approved WSR lease authorizes one or more representatives to consent to a sublease on behalf of all Indian landowners. The lease may also designate us as the Indian landowners' representative for the purposes of consenting to a sublease.

§ 162.578 What is the approval process for a sublease of a WSR lease?

We have 30 days from receipt of the executed sublease, proof of required consents, and required documentation to make a determination whether to approve the sublease or notify the parties to the sublease and Indian landowners in writing that we need additional time to review the sublease. Our determination whether to approve the sublease will be in writing and will state the basis for our approval or disapproval.

(a) Our letter notifying parties that we need additional time to review the sublease must identify our initial concerns and invite the parties to respond within 15 days. We have 30 days from sending the notification to make a determination whether to approve or disapprove the sublease.

(b) If we fail to send either a determination or a notification within 30 days from receipt of required documents or 30 days from sending the notification, the sublease is deemed approved to the extent consistent with Federal law. We will retain our full enforcement authority for subleases that are deemed approved.

§ 162.579 How will BIA decide whether to approve a sublease of a WSR lease?

(a) We will only disapprove a sublease of a WSR lease if:

(1) The required consents have not been obtained from the parties to the lease and the lessee's mortgagees or sureties;

(2) The lessee is in violation of the lease;

(3) The lessee will not remain liable under the lease;

(4) The sublessee does not agree to be bound by the terms of 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 will consider whether:

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

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

(c) We may not unreasonably withhold approval of a sublease.

Leasehold Mortgages

§ 162.580 May a lessee mortgage a WSR lease?

A lessee may mortgage a WSR lease by meeting the consent requirements contained in § 162.581 and obtaining our approval of the leasehold mortgage under § 162.582 and § 162.583, unless the lease expressly prohibits leasehold mortgages.

§ 162.581 What are the consent requirements for a leasehold mortgage of a WSR lease?

The Indian landowners, or their representatives under § 162.012, must consent to a leasehold mortgage in the same percentages and manner as a new WSR lease under § 162.011, unless the requirements in paragraphs (a), (b), or (c) of this section are met.

(a) The lease contains a general authorization for a leasehold mortgage and states what law would apply in case of foreclosure.

(b) The lease establishes that individual Indian landowners are deemed to have consented where they do not object in writing to the leasehold mortgage after a specified period of time following landowners' receipt of the leasehold mortgage. If the lease provides for deemed consent, it must require the parties to submit to us: a copy of the executed leasehold mortgage or other documentation of the Indian landowners' consent; proof of mailing of the leasehold mortgage to any Indian landowners who are deemed to have consented; and any other pertinent information for us to review.

(c) The approved WSR lease authorizes one or more representatives to consent to a leasehold mortgage on behalf of all Indian landowners. The lease may also designate us as the Indian landowners' representative for the purposes of consenting to a leasehold mortgage.

§ 162.582 What is the approval process for a leasehold mortgage of a WSR lease?

(a) We have 30 days from receipt of the executed leasehold mortgage, proof of required consents, and required documentation to make a determination whether to approve the leasehold mortgage or notify the parties in writing that we need additional time to review 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 fail to meet the deadline in this section, the lessee may take appropriate action under part 2 of this chapter.

§ 162.583 How will BIA decide whether to approve a leasehold mortgage of a WSR lease?

(a) We may only disapprove a leasehold mortgage under a WSR lease if:

(1) The required consents have not been obtained from the parties to the lease under or the lessee's sureties;

(2) The leasehold mortgage covers more than the lessee's interest in the leased premises collateral or encumbers unrelated collateral; 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 will consider whether:

(1) The lessee'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 leasehold 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 lessee.

(c) We may not unreasonably withhold approval of a leasehold mortgage.

Effectiveness, Compliance, and Enforcement

§ 162.584 When will an amendment, assignment, sublease, or leasehold mortgage under a WSR lease be effective?

(a) An amendment, assignment, sublease, or leasehold mortgage under a WSR lease will be effective when approved, notwithstanding any appeal that may be filed under part 2 of this chapter, unless approval is not required under § 162.008(b) or the conditions in paragraph (b) apply. We will provide copies of approved documents to the party requesting approval and, upon request, to the other parties to the agreement.

(b) If the amendment or sublease was deemed approved pursuant to § 162.570(b) or § 162.578(b), the amendment or sublease becomes effective 45 days from the date the parties mailed or delivered the document to us for our review.

(c) An assignment that has does not require landowner consent or BIA approval shall be effective upon execution by the parties.

§ 162.585 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 them of their right to appeal the decision under part 2 of this chapter.

§ 162.586 May BIA investigate compliance with a WSR lease?

(a) We may enter the leased premises at any reasonable time, upon reasonable notice, 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 the Indian landowner notifies us that a specific lease violation has occurred, we will promptly initiate an appropriate investigation.

§ 162.587 May a WSR lease provide for negotiated remedies in the event of 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 the parties with the power to terminate the lease, BIA approval of the termination is not required and the termination is effective without BIA cancellation. The parties must notify us of the termination so that we may record it in the Land Titles and Records Office.

(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 applicable percentage of Indian landowners under § 162.011 of this part. If the lease provides the parties with the power to terminate the lease, BIA concurrence with the termination is required to ensure that the Indian landowners of the applicable percentage of interests have consented. BIA will record the termination in the Land Titles and Records Office.

(c) The parties must notify any surety or mortgagee of a 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.

(e) A WSR lease may provide for lease disputes to be resolved in tribal court or any other court of competent jurisdiction, 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 proceedings, as appropriate, in deciding whether to exercise any of the remedies available to us.

§ 162.588 What will BIA do about a violation of a WSR lease?

(a) 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 (b) of this section, we will promptly send the lessee and its sureties and any mortgagee a notice of violation. The notice of violation must be provided 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) Within 10 business days of the receipt of a notice of violation, the lessee must:

(i) Cure the violation and notify us 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) If a violation is determined to have occurred, we will make a reasonable attempt to notify the Indian landowners.

(4) We may order the lessee to stop work.

(b) A lessee's failure to pay compensation 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 lessees and its sureties a notice of violation by certified mail, return receipt requested:

(i) Promptly following the date on which payment was due, if the lease requires that payments be made to us; or

(ii) Promptly following the date on which we receive actual notice of non-payment from the Indian landowners, if the lease provides for payment directly to the Indian landowners.

(2) We will send a copy of the notice of violation to the tribe for tribal land, or provide constructive notice to the Indian landowners for individually owned Indian land.

(3) The lessee must provide adequate proof of payment as required in the notice of violation.

(c) The lessee and its sureties will continue to be responsible for the obligations contained in the lease until the lease is terminated, cancelled, or expires.

(d) Nothing in this part affects BIA's ability to take emergency action to protect the leased premises under § 162.021.

§ 162.589 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 requisite 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, 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) 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 its sureties and any mortgagees 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 their 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) Require 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 landowner may pursue any available remedies under tribal law.

§ 162.590 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 such amounts will be treated as a lease violation.

(b) The following special fees may be assessed 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 . . .
(a) $50.00	Dishonored checks.
(b) $15.00	Processing of each notice or demand letter.
(c) 18 percent of balance due.	Treasury processing following referral for collection of delinquent debt.

§ 162.591 How will payment rights relating to WSR leases be allocated between the Indian landowners and the lessee?

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 insurance policy, order, award, judgment, or other document including the lease, the Indian landowners will be entitled to receive such payments.

§ 162.592 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 be stayed if an appeal is filed unless the cancellation is made immediately effective under part 2 of this chapter. While a cancellation decision is stayed, the lessee must continue to pay compensation and comply with the other terms of the lease.

§ 162.593 What will BIA do if a lessee remains in possession after a WSR lease expires or is cancelled?

If a lessee remains in possession after the expiration or cancellation of a lease, we may treat the unauthorized possession as a trespass under applicable law. Unless the applicable percentage of Indian landowners under § 162.011 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 forcible entry and detainer action.

§ 162.594 Will BIA regulations concerning appeal bonds 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.

§ 162.595 When will BIA issue a decision on an appeal from a WSR leasing decision?

BIA will issue a decision on an appeal from a leasing decision within 60 days of receipt of all pleadings.

§ 162.596 What happens if the lessee abandons the leased premises?

If a lessee abandons the leased premises, we will treat the abandonment as a violation of the lease. The lease may specify a period of non-use after which the lease premises will be considered abandoned.

16. Add a new subpart G to read as follows:

Subpart G—Records

Sec.

Subpart G—Records

§ 162.701 Who owns the records associated with this part?

(a) Records are the property of the United States if they:

(1) Are made or received by a tribe or tribal organization in the conduct of a Federal trust function under 25 U.S.C. 450f *et. seq.,* including the operation of a trust program; and

(2) Evidence the organization, functions, policies, decisions, procedures, operations, or other activities undertaken in the performance of a Federal trust function under this part.

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

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

(a) Any organization, including tribes and tribal organizations, 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 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.

§ 162.703 How does the Paperwork Reduction Act affect this part?

The collections of information contained in this part, have been approved by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.* and assigned OMB Control Number 1076–0155. Response is required to obtain a benefit. A Federal agency may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a currently valid OMB Control Number.

Dated: September 22, 2011.

Larry Echo Hawk,

Assistant Secretary—Indian Affairs.

[FR Doc. 2011–29991 Filed 11–28–11; 8:45 am]

BILLING CODE 4310–6W–P

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2015 Legislative Session, approved October 9, 2015.

WATER--UNCODIFIED ACTS
ACT 240. Desert Water Agency Law (1961 ch 1069)

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Uncod Water Deer Act 240 Note (2015)

Act 240 Note

AN ACT creating the Desert Water Agency, and prescribing its boundaries, organization, operation, management, financing and other powers and duties.

HISTORY:

[Added Stats 1961 ch 1069 p 2754. Amended Stats 1963 ch 1683 p 3301, ch 1685 p 3308; Stats 1965 ch 1575 p 3660; Stats 1967 ch 152 p 1217; Stats 1968 ch 492 p 1130; Stats 1970 ch 104, operative January 1, 1971; Stats 1970 ch 447; Stats 1971 ch 304; Stats 1973 ch 240; Stats 1974 ch 228; Stats 1975 ch 130, ch 320, ch 586, operative July 1, 1976; Stats 1976 ch 1480; Stats 1977 ch 290; Stats 1979 ch 335; Stats 1981 ch 725; Stats 1982 ch 254; Stats 1984 ch 1128; Stats 1987 ch 388; Stats 1991 ch 198 § 2; Stats 2007 ch 29 § 1]

NOTES:

Hierarchy Notes:

Uncod Water Deer Note

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WATER--UNCODIFIED ACTS
ACT 240. Desert Water Agency Law (1961 ch 1069)

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Uncod Water Deer, Act 240 § 1 (2015)

§ 1. Citation of act

This act is designated, and may be cited and referred to as, the "Desert Water Agency Law."

HISTORY:

Added Stats 1961 ch 1069 p 2754.

NOTES:

Hierarchy Notes:

Uncod Water Deer Note

Act 240 Note

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WATER--UNCODIFIED ACTS
ACT 240. Desert Water Agency Law (1961 ch 1069)

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Uncod Water Deer, Act 240 § 2 (2015)

§ 2. Creation of Desert Water Agency; Territory

The Desert Water Agency is hereby created, organized and incorporated and shall be managed as herein expressly provided and may exercise the powers herein expressly granted or necessarily implied, and may include contiguous or noncontiguous parcels of both unincorporated and incorporated territory, other than territory included in any public district having identity of purpose or substantial identity of purpose, without the prior consent of such public district, evidenced by a resolution duly adopted by the governing board thereof, and shall include all territory lying within the following described boundaries:

All that real property situate in the County of Riverside, State of California, more particularly described as follows:

Beginning at the southwest corner of Section 29, Township 3 South, Range 4 East, San Bernardino Base & Meridian, said point being an angle point in the boundary line of that certain parcel of land excluded from the Coachella Valley County Water District under Ordinance No. 689, recorded as Instrument No. 1641, March 25, 1941, in Book 494 of Official Records of Riverside County, California, at Page 408 thereof;

(1) Thence easterly along the south line of said Section 29 to the north quarter section corner of Section 32, said last mentioned township and range;

(2) Thence southerly along the north-south quarter section line of said Section 32 to the center quarter section corner thereof;

(3) Thence easterly along the east-west quarter section line of said Section 32 to the east quarter section corner thereof;

(4) Thence southerly along the east line of said Section 32 to the southeast corner thereof;

(5) Thence easterly along the township line between Township 3 South and Township 4 South in Range 4 East, San Bernardino Base & Meridian, to the northwest corner of Section 2, Township 4 South, Range 4 East;

(6) Thence southerly along the west line of said Section 2 to the southwest corner thereof;

(7) Thence easterly along the south line of said Section 2 to the northwest corner of Section 12, said last mentioned township and range;

(8) Thence southerly along the west line of said Section 12 to the southwest corner thereof;

(9) Thence easterly along the south line of said Section 12 to the southeast corner thereof;

(10) Thence along the range line between Range 4 East and Range 5 East, in Township 4 South, San Bernardino Base & Meridian, to the southwest corner of Section 7, Township 4 South, Range 5 East, San Bernardino Base & Meridian;

(11) Thence easterly along the south line of said Section 7 to the northwest corner of Section 17, said last mentioned township and range;

(12) Thence southerly along the west line of said Section 17 and the west line of Sections 20 and 29, said last mentioned township and range, to the southwest corner of said Section 29;

(13) Thence easterly along the south line of said Section 29 to the southeast corner thereof;

The last 13 courses and distances follow said boundary line of said excluded parcel as described hereinabove, said last mentioned point being the northwest corner of that certain parcel of land excluded from the Coachella Valley County Water District as Ordinance No. 765, recorded as Instrument No. 2473, January 19, 1946, in Book 723 of Official Records of Riverside County, California, at Page 416 thereof;

(14) Thence easterly along the north line of Section 33, said last mentioned township and range, to the northwest corner of the northeast quarter of the northeast quarter of said Section 33;

(15) Thence southerly along the west line of said northeast quarter of the northeast quarter to the southwest corner thereof;

(16) Thence easterly along the south line of said northeast quarter of the northeast quarter to the southeast corner thereof;

(17) Thence southerly along the east line of said Section 33 to the southeast corner thereof;

The last four courses and distances follow the boundary line of said last mentioned excluded parcel, said point being on the boundary line of said excluded parcel first mentioned hereinabove;

(18) Thence easterly along the south line of Section 34, said last mentioned township and range, to the north quarter section corner of Section 3, Township 5 South, Range 5 East, San Bernardino Base & Meridian;

(19) Thence southerly along the north-south quarter section line of said Section 3 to the south quarter section corner thereof;

The last two courses and distances follow the boundary line of said excluded parcel first mentioned hereinabove;

(20) Thence, leaving said boundary line, westerly along the south line of said Section 3 and the south line of Sections 4, 5 and 6 of said last mentioned township and range, to the south quarter section corner of said Section 6;

(21) Thence northerly along the north-south quarter section line of said Section 6 to the north quarter section corner thereof;

(22) Thence westerly along the north line of said Section 6 to the northwest corner thereof;

(23) Thence along the range line between Range 5 East and Range 4 East, San Bernardino Base & Meridian, to the northeast corner of Section 1, Township 5 South, Range 4 East, San Bernardino Base & Meridian;

(24) Thence westerly along the township line between Township 4 South, and Township 5 South, in Range 4 East, San Bernardino Base & 24 Meridian, to the southwest corner of Section 33, Township 4 South, Range 4 East, San Bernardino Base & Meridian;

(25) Thence northerly along the west line of said Section 33 and the west line of sections 28 and 21, said last mentioned township and range, to the northwest corner of said Section 21;

(26) Thence westerly along the south line of Sections 17 and 18, said last mentioned township and range to the southwest corner of said Section 18;

(27) Thence along the range line between Range 3 East and Range 4 East, in Township 4 South, San Bernardino Base & Meridian, to the southeast corner of Section 13, Township 4 South, Range 3 East, San Bernardino Base & Meridian;

(28) Thence westerly along the south line of said Section 13, to the southwest corner thereof;

(29) Thence northerly along the west line of said Section 13 and the west line of Sections 12 and 1, said last mentioned township and range, to the east quarter section corner of Section 2, said last mentioned township and range;

(30) Thence westerly along the east-west quarter section line of said Section 2 and the east-west quarter section line of Sections 3, 4 and 5, said last mentioned township and range, to the center quarter section corner of said Section 5;

(31) Thence northerly along the north-south quarter section line of said Section 5, to the north quarter section corner thereof;

(32) Thence along the township line between Township 3 South, and Township 4 South, in Range 3 East, San Bernardino Base & Meridian, to the south quarter section corner of Section 32, Township 3 South, Range 3 East, San Bernardino Base & Meridian;

(33) Thence northerly along the north-south quarter section line of said Section 32, to the north quarter section corner thereof;

(34) Thence westerly along the north line of said Section 32 and the north line of Section 31, said last mentioned township and range, to the northwest corner of said Section 31;

(35) Thence northerly along the range line between Range 2 East and Range 3 East in Township 3 South, San Bernardino Base & Meridian, to the northwest corner of Section 6, Township 3 South, Range 3 East, San Bernardino Base & Meridian;

(36) Thence easterly along the township line between Township 2 South and Township 3 South in Range 3 East, San Bernardino Base & Meridian, to the northeast corner of Section 2, Township 3 South, Range 3 East, San Bernardino Base & Merdian;

(37) Thence southerly along the east line of Sections 2, 11, 14, 23 and 26, said last mentioned township and range, to the southeast corner of Section 26;

(38) Thence easterly along the south line of Section 25, said last mentioned township and range, to the southeast corner of said Section 25;

(39) Thence along the range line between Range 3 East and Range 4 East, San Bernardino Base & Meridian to the southwest corner of Section 30, Township 3 South, Range 4 East;

(40) Thence easterly along the south line of said section to the point of beginning.

HISTORY:

Added Stats 1961 ch 1069 p 2754.

NOTES:

Hierarchy Notes:

Uncod Water Deer Note

Act 240 Note

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WATER--UNCODIFIED ACTS
ACT 240. Desert Water Agency Law (1961 ch 1069)

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Uncod Water Deer, Act 240 § 3 (2015)

§§ 3, 4. [Sections repealed 1965.]

HISTORY:

Added Stats 1961 ch 1069 p 2754. Repealed Stats 1965 ch 1575 §§ 1, 2 p 3660. The repealed sections related to dividing the agency into five districts and relocating division boundaries.

NOTES:

Hierarchy Notes:

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Act 240 Note

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WATER--UNCODIFIED ACTS
ACT 240. Desert Water Agency Law (1961 ch 1069)

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Uncod Water Deer, Act 240 § 5 (2015)

§ 5. Board of directors; Appointment of first board of directors; Election of successors

The Board of Directors of the Desert Water Agency organized under this act shall consist of five members. The Board of Supervisors of Riverside County shall appoint the first board of directors, each of whom shall be a resident of the agency, and shall hold office until his successor is elected. All successors of the first board shall be elected or chosen at the time and in the manner provided in the Uniform District Election Law.

HISTORY:

Added Stats 1961 ch 1069 p 2754. Amended Stats 1965 ch 1575 § 3 p 3660; Stats 1967 ch 152 § 1 p 1217.

NOTES:

Editor's Notes

The Uniform District Election Law is now found at *Elec C §§ 10500* et seq.

Hierarchy Notes:

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WATER--UNCODIFIED ACTS
ACT 240. Desert Water Agency Law (1961 ch 1069)

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Uncod Water Deer, Act 240 § 6 (2015)

§ 6. [Section repealed 1967.]

HISTORY:

Added Stats 1961 ch 1069 p 2754. Repealed Stats 1967 ch 152 § 2 p 1218. The repealed section related to appointment of officers and directors.

NOTES:

Hierarchy Notes:

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WATER--UNCODIFIED ACTS
ACT 240. Desert Water Agency Law (1961 ch 1069)

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Uncod Water Deer, Act 240 § 7 (2015)

§ 7. Voters of Desert Water Agency; Indication upon affidavits of registration; Power of county clerk or registrar of voters to provide two sets of ballots

No person shall vote at any Desert Water Agency election held under the provisions of this act who is not a voter within the meaning of the Elections Code. For the purpose of registering voters who shall be entitled to vote at Desert Water Agency elections, the county clerk or registrar of voters is authorized, in any county in which there is the Desert Water Agency to indicate upon the affidavit of registration whether the voter is a voter of the Desert Water Agency.

In case the boundary line of the Desert Water Agency crosses the boundary line of a county election precinct only those voters within such Desert Water Agency and within such precinct who are registered as being voters within the Desert Water Agency shall be permitted to vote, and for that purpose the county clerk or registrar of voters is hereby empowered to provide two sets of ballots within such precincts, one containing the names of candidates for office in said Desert Water Agency, and the other not containing such names, and it shall be the duty of the election officers in such precincts to furnish only those persons registered as voters within such Desert Water Agency with the ballots upon which are printed the names of the candidates for office in the Desert Water Agency.

HISTORY:

Added Stats 1961 ch 1069 p 2754. Amended Stats 1965 ch 1575 § 4 p 3661.

NOTES:

Hierarchy Notes:

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Act 240 Note

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WATER--UNCODIFIED ACTS
ACT 240. Desert Water Agency Law (1961 ch 1069)

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Uncod Water Deer, Act 240 § 8 (2015)

§ 8. Application of provisions of Elections Code to Desert Water Agency elections; Exceptions

The provisions of the Elections Code so far as they may be applicable shall govern all general Desert Water Agency elections and all special Desert Water Agency elections, except as in this act or otherwise provided.

HISTORY:

Added Stats 1961 ch 1069 p 2754. Amended Stats 1965 ch 1575 § 5 p 3661; Stats 1967 ch 152 § 3 p 1218.

NOTES:

Hierarchy Notes:

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Act 240 Note

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WATER--UNCODIFIED ACTS
ACT 240. Desert Water Agency Law (1961 ch 1069)

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Uncod Water Deer, Act 240 § 9 (2015)

§ 9. Calling and conducting elections; Duty of board of directors

The board of directors of Desert Water Agency shall call and canvass all elections involving matters of initiative, recall and referendum and shall call all other elections which it is authorized to canvass.

HISTORY:

Added Stats 1961 ch 1069 p 2754. Amended Stats 1967 ch 152 § 4 p 1218.

NOTES:

Hierarchy Notes:

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WATER--UNCODIFIED ACTS
ACT 240. Desert Water Agency Law (1961 ch 1069)

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Uncod Water Deer, Act 240 § 10 (2015)

§ 10. Incumbent of elective office as subject to recall

Every incumbent of an elective office, whether elected by popular vote for a full term, or chosen by the board of directors to fill a vacancy, is subject to recall by the voters of the Desert Water Agency organized under the provisions of this act in accordance with the recall provisions of the Elections Code of the State with reference to cities.

HISTORY:

Added Stats 1961 ch 1069 p 2754.

NOTES:

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WATER--UNCODIFIED ACTS
ACT 240. Desert Water Agency Law (1961 ch 1069)

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Uncod Water Deer, Act 240 § 11 (2015)

§ 11. Board of directors as governing body; Meeting; Quorum; Officers

The board of directors shall be the governing body of the Desert Water Agency. It shall hold its first meeting as soon as possible after the appointment and certification of the first board of directors; it shall choose one of its members president, and shall thereupon provide for the time and place of holding its meetings and the manner in which its special meetings may be called. All legislative sessions of the board of directors whether regular or special shall be open to the public. A majority of the board of directors shall constitute a quorum for the transaction of business. At its first meeting in the month of January of each even-numbered year, the board of directors shall choose one of its members president.

HISTORY:

Added Stats 1961 ch 1069 p 2754. Amended Stats 1967 ch 152 § 5 p 1218.

NOTES:

Hierarchy Notes:

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WATER--UNCODIFIED ACTS
ACT 240. Desert Water Agency Law (1961 ch 1069)

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Uncod Water Deer, Act 240 § 12 (2015)

§ 12. Acting by and adopting ordinances, resolutions or motions; Compensation; Vacancies

The board of directors shall act only by ordinance, resolution, or motion. On all ordinances, the roll shall be called and the ayes and noes recorded in the journal of the proceedings of the board of directors. Resolutions and orders may be adopted by voice vote, but on demand of any member the roll shall be called. No ordinance, motion, or resolution shall be passed or become effective without the affirmative vote of a majority of the members of the board. The enacting clause of all ordinances passed by the board shall be: "Be it ordained by the Board of Directors of the Desert Water Agency as follows:". The board of directors may enact any ordinance which adopts any code by reference following the procedures, definitions, and provisions of Article 2 (commencing with *Section 50020) of Chapter 1, Part 1, Division 1, Title 5 of the Government Code* so far as they may be applicable. Each director shall receive compensation in an amount not to exceed one hundred dollars ($100) per day for each day's attendance at meetings of the board or for each day's service rendered as a director by request of the board, not exceeding a total of six days in any calendar month, together with any expenses incurred in the performance of his duties required or authorized by the board. Any vacancy in the board of directors shall be filled by a majority of the remaining directors, the person so chosen shall be a resident of and otherwise qualified to be a director of the agency and shall hold office for the remainder of the unexpired term.

HISTORY:

Added Stats 1961 ch 1069 p 2754. Amended Stats 1965 ch 1575 § 6 p 3662; Stats 1967 ch 152 § 6 p 1218; Stats 1971 ch 304 § 1; Stats 1973 ch 240 § 1; Stats 1974 ch 228 § 3; Stats 1975 ch 320 § 12; Stats 1981 ch 725 § 12.

NOTES:

Hierarchy Notes:

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WATER--UNCODIFIED ACTS
ACT 240. Desert Water Agency Law (1961 ch 1069)

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Uncod Water Deer, Act 240 § 13 (2015)

§ 13. Validity of proceedings notwithstanding informality

No informality in any proceeding not substantially affecting adversely the legal rights of any citizen, shall be held to invalidate the legal existence of said Desert Water Agency and all proceedings in respect thereto shall be held to be valid and in every respect legal and incontestable.

HISTORY:

Added Stats 1961 ch 1069 p 2754.

NOTES:

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WATER--UNCODIFIED ACTS
ACT 240. Desert Water Agency Law (1961 ch 1069)

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Uncod Water Deer, Act 240 § 14 (2015)

§ 14. Assistants and employees of board

The board of directors shall at its first meeting, or as soon thereafter as practicable, appoint by a majority vote a vice president, secretary, treasurer, attorney, chief engineer, general manager and auditor, define their duties and fix their compensation, and each shall serve at the pleasure of the board, and may employ such additional assistants and employees as they may deem necessary to efficiently maintain and operate said agency. Said board may consolidate the office of secretary and treasurer, and the offices of chief engineer and general manager.

HISTORY:

Added Stats 1961 ch 1069 p 2754. Amended Stats 1967 ch 152 § 7 p 1219.

NOTES:

Hierarchy Notes:

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WATER--UNCODIFIED ACTS
ACT 240. Desert Water Agency Law (1961 ch 1069)

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Uncod Water Deer, Act 240 § 15 (2015)

§ 15. Powers of agency

The Desert Water Agency incorporated as herein provided, shall have the power:

1. To have perpetual succession.

2. To sue and be sued, except as otherwise provided herein or by law, in all actions and proceedings in all courts and tribunals of competent jurisdiction.

3. To adopt a seal and alter it at pleasure.

4. To take by grant, purchase, gift, devise, or lease, hold, use, enjoy, and to lease or dispose of real and personal property of every kind, within or without the Desert Water Agency.

5. To acquire, or contract to acquire, waterworks or a waterworks system, waters, water rights, lands, rights, and privileges, and construct, maintain, and operate conduits, pipelines, reservoirs, works, machinery, and other property useful or necessary to store, convey, supply, or otherwise make use of water for a waterworks plant or system for the benefit of the agency, and to complete, extend, add to, repair, or otherwise improve any waterworks or waterworks system acquired by it as herein authorized.

6. To construct, maintain, improve, and operate public recreational facilities appurtenant to any water reservoir operated or contracted to be operated by the Desert Water Agency, and to provide by ordinance regulations binding upon all persons to govern the use of such facilities including regulations imposing reasonable charges for the use thereof. Violation of any such regulation shall be a misdemeanor.

7. To lease of and from any person, firm or public or private corporation, or public agency, with the privilege of purchasing or otherwise, all or any part of water storage, transportation or distribution facilities, existing waterworks or a waterworks system, and to carry on and conduct waterworks or a waterworks system; also to sell water under the control of the agency to cities, and to other public corporations and public agencies within the agency, and to the inhabitants of such cities and of other territory within the agency, and to persons, corporations, and other private agencies within the agency for use within the agency without any preference; also to sell water outside the boundaries of the agency to the extent that the lands and inhabitants so served are southerly and westerly of the White Water River and northerly of the township line between Township 4 South and Township 5 South, S.B.B. & M., and exclusive of that certain subdivision known as Palm Springs Outposts Estates situated in Section 21, Township 4 South, Range 5 East, S.B.B. & M. and it may, whenever the board shall find that there is a surplus of water above that which may be required

by such consumers within the agency, sell or otherwise dispose of such surplus water to any persons, firms, public or private corporations, or public agencies or other consumers.

8. The agency may supply and deliver water to property not subject to agency taxes at special rates, terms, and conditions as are determined by the board for such service.

9. To have and exercise the power of eminent domain, and in the manner provided by law for the condemnation of private property for public use, to take any property necessary to the exercise of the powers granted in this act. The agency in exercising such power, shall in addition to the damage for the taking, injury, or destruction of property, also pay the cost of removal, reconstruction, or relocation of any structure, railways, mains, pipes, conduits, wires, cables, or poles of any public utility which is required to be removed to a new location. The agency shall not exercise the power of eminent domain with respect to property situated outside the boundaries of the agency unless it first obtains the consent of the board of supervisors of the county in which such property is located; provided, however, that the agency may exercise the right of eminent domain for the condemnation of property outside the boundaries of the agency for the acquisition of rights-of-way in any county in which territory of the agency is located or in any county adjacent to such county without obtaining the consent thereto of the board of supervisors thereof. When the agency proposes to exercise the power of eminent domain, under this section, for the condemnation of property outside the boundaries of the agency for the acquisition of rights-of-way in any county in which territory of the agency is located or in any county adjacent to such county, it shall give written notice, at least two weeks prior to condemning the property, to the board of supervisors of the county in which the property is located. Such written notice shall contain a description of the property to be condemned. The agency shall not have or exercise power of eminent domain as to any property belonging to a county water district which has more than 50,000 acres of land within its boundaries.

10. To issue bonds, borrow money, and incur indebtedness as authorized by law or in this act provided; also to refund (by the issuance of the same obligations following the same procedure) or retire any indebtedness or lien that may exist against the agency or property thereof; also to issue warrants to pay the formation expenses of the agency, which warrants may bear interest at a rate not exceeding 6 percent per annum from the date of issue until funds are available to pay the warrants, and which formation expenses may include fees of attorneys and others employed to conduct the formation proceedings.

11. To issue negotiable promissory notes bearing interest at a rate not exceeding 7 percent per annum; provided, however, that the notes shall be payable from revenues and taxes legally derived pursuant to any maximum property tax rate procedure; and provided further that the maturity shall not be later than five years from the date thereof and that the total aggregate amount of such notes outstanding at any one time may be at least equal to seventy-five thousand dollars ($75,000) in the Desert Water Agency but shall not otherwise exceed the lesser of either one million five hundred thousand dollars ($1,500,000) or 3 percent of the assessed valuation of the taxable property in the Desert Water Agency, or, if the assessed valuation is not obtainable, 3 percent of the county auditor's estimate of the assessed valuation of the taxable property in the agency evidenced by his certificate. Promissory notes issued pursuant to Section 51 may be disregarded in computing the aggregate amount of notes that may be issued pursuant to this subdivision.

12. To cause taxes to be levied, in the manner hereinafter provided, for the purpose of paying any obligation of the agency, including its formation expenses and any warrants issued therefor.

13. To restrict the use of agency water during any emergency caused by drought, or other threatened or existing water shortage, and to prohibit the wastage of agency water or the use of agency water during such periods, for any purpose other than household uses or such other restricted uses as may be determined to be necessary by the agency; to prohibit the use of such water during such periods for specific uses which the agency may from time to time find to be nonessential.

14. To prescribe and define by ordinance, the restrictions, prohibitions, and exclusions referred to in subdivision 13 hereof. Every ordinance relating to the matters referred to in this subdivision shall be in full force and effect forthwith upon adoption, but shall be published pursuant to *Section 6061 of the Government Code* in full in a newspaper of general circulation, printed, published and circulated in the agency within 10 days after adoption, or if there be no such newspaper it shall be posted within that time in three public places within the agency.

15. To make contracts, to employ labor, and do all acts necessary for the full exercise of the foregoing powers.

16. To provide by ordinance of its board of directors for the pensioning of officers or employees and the creation of a special fund for the purpose of paying such pensions, and the accumulation of contributions to that fund from the revenues of the agency, the wages of officers or employees, voluntary contributions, gifts, donations, or any source of

revenue not inconsistent with the general powers of the board, and to contract with any insurance corporation or any other insurance carrier for the maintenance of a service covering the pension of such officers or employees, and to provide in such ordinance for the terms and conditions under which such pensions shall be awarded, and for the time and extent of service of officers or employees before such pensions shall be available to them.

17. To acquire, control, distribute, store, spread, sink, treat, purify, reclaim, recapture, and salvage any water, including sewage and storm waters, and to acquire, construct, maintain, and operate sanitary sewers and sewerage systems, for the beneficial use or uses and protection of the agency or its inhabitants or the owners of rights to water therein; provided, however, that all waters of the Whitewater River system are excluded from the provisions hereof, except such waters of that system as may be lawfully acquired by the Desert Water Agency; provided further that rights to any water made available by the Desert Water Agency are owned and controlled exclusively by the agency, and no person within or outside of the boundaries of the Desert Water Agency shall acquire any property or other right in such water, except as provided by contract with the agency, or pursuant to such rules and regulations as the agency may from time to time establish and enforce.

18. Subject to the limitations in subdivision 9 of this section, to join with one or more public agencies, private corporations or other persons for the purpose of carrying out any of the powers of the agency, and for that purpose to contract with such other public agencies or private corporations or persons for the purpose of financing such acquisitions, constructions, and operations. Such contracts may provide for contributions to be made by each party thereto and for the division and apportionment of the expenses of such acquisitions and operations, and the division and apportionment of the benefits, the services and products therefrom, and may provide for any agency to effect such acquisitions and to carry on such operations, and shall provide in the powers and methods of procedure for such agency the method by which such agency may contract. Such contracts with other public agencies or private corporations or persons may contain such other and further covenants and agreements as may be necessary or convenient to accomplish the purposes thereof. The term "public agency," as used in this subdivision, shall be deemed to mean and include the United States of America or any department or agency thereof, the State of California or any department or agency thereof, a county, city, public corporation, the Metropolitan Water District of Southern California, or other public district of this state. The term "private corporation," as used in this subdivision, shall be deemed to m ean and include any private corporation organized under the laws of the United States of America or of this or any other state thereof. Contracts mentioned herein include those made with the United States under the Federal Reclamation Act of June 17, 1902, and all acts amendatory thereof or supplementary thereto or any other Act of Congress heretofore or hereafter enacted permitting cooperation. Any such contract with the United States of America or any department or agency thereof, or with any private corporation organized under the laws of the United States of America, by which the Desert Water Agency, or an improvement district thereof, incurs an indebtedness or liability exceeding in any year the income and revenue for such year shall not be executed without the assent of two-thirds of the qualified electors of the agency, or an improvement district thereof, voting at a special election to be held for that purpose, such election to be called and held, so far as practicable, in the same manner as bond elections for the agency. The exact form of such contract need not be available at the time of the special election, but the (1) purpose of the contract; (2) maximum amount of the indebtedness created thereby; (3) maximum term of repayment, and (4) maximum interest rate on such indebtedness shall be known and included in the proposition or measure submitted to the qualified electors of the agency, or an improvement district thereof, at such special election.

19. To commence, maintain, intervene in, defend, and compromise, in the name of the agency, or as a class representative of the inhabitants, property owners, taxpayers, or water producers or water users within the agency, or otherwise, and to assume the costs and expenses of any and all actions and proceedings, now or hereafter begun, involving or affecting the ownership or use of water or water rights, used or useful for any purpose of the agency, or a common benefit to the lands within the agency or its inhabitants.

20. To commence, maintain, intervene in, defend, and compromise, in the name of the agency, or as a class representative of the inhabitants, property owners, taxpayers, water producers or water users within the agency or otherwise, and to assume the costs and expenses of any and all actions or proceedings, now or hereafter begun, to prevent, control, or abate the pollution of water used or useful for any purpose of the agency, or a common benefit to lands within the agency, or to the inhabitants of the agency, or any watershed or basin overlain in whole or in part by the agency or which contributes to the water supply of the agency.

21. Distribute water to persons in exchange for ceasing or reducing groundwater extractions and to fix the terms and conditions of any contract under which producers may agree voluntarily to use replenishment water from a nontributary source in lieu of groundwater, and to such end an agency may become a party to such contract and pay from the

agency funds such portion of the cost of such replenishment waters as will encourage the purchase and use of such water in lieu of pumping so long as the persons or property within the agency are directly or indirectly benefited by the resulting replenishment.

22. To issue bonds under Section 28 of this act for the purpose of providing money required to be paid by this agency as all or part of the terms and conditions under which the corporate area of the Desert Water Agency may be annexed to and become a part of any metropolitan water district organized under the Metropolitan Water District Act. The amount of the bonds may include expenses of all proceedings for the authorization, issuance and sale of the bonds.

23. To issue revenue bonds for any purpose for which general obligation bonds may be issued, and for any purpose for which the bonds could be issued under the provisions of the Revenue Bond Law of 1941 or any other law which by its terms is applicable to this agency.

24. To use the Improvement Act of 1911, the Municipal Improvement Act of 1913, and the Improvement Bond Act of 1915 for the construction of any facilities authorized to be constructed under the provisions of this act. The powers and duties conferred by such improvement acts on the various boards, officers, and agents of cities shall be exercised by the respective boards, officers, and agents of the Desert Water Agency. In the application of such improvement acts to proceedings instituted by the Desert Water Agency, the terms used in such improvement acts shall have the following meanings:

(**a**) "City council," "council," or legislative body shall mean the Board of Directors of the Desert Water Agency.

(**b**) "Municipality" and "city" shall mean the Desert Water Agency.

(**c**) "Clerk" and "city clerk" shall mean the secretary of the agency.

(**d**) "Superintendent of streets," "street superintendent" and "city engineer" shall mean the chief engineer of the agency.

(**e**) "Tax collector" shall mean the county tax collector.

(**f**) "Treasurer" and "city treasurer" shall mean the Treasurer of the Desert Water Agency.

(**g**) "Mayor" shall mean the President of the Board or Directors of the Desert Water Agency.

(**h**) "Right-of-way" shall mean any parcel of land in, on, under or through which a right-of-way or easement has been granted to the agency for the purpose of constructing and maintaining any works or improvements of the Desert Water Agency.

(**i**) "Auditor" means the county auditor.

Any certificates or documents required by such improvement acts to be filed or recorded in the office of the superintendent of streets or street superintendent shall be filed and recorded in the office of the Secretary of the Desert Water Agency.

25. To disseminate information concerning the rights, properties, and activities of the agency.

HISTORY:

Added Stats 1961 ch 1069 p 2754. Amended Stats 1965 ch 1575 § 7 p 3662; Stats 1967 ch 152 § 8 p 1219; Stats 1968 ch 492 § 1 p 1130; Stats 1971 ch 304 § 2; Stats 1973 ch 240 § 2; Stats 1974 ch 228 § 4; Stats 1975 ch 586 § 6, operative July 1, 1976; Stats 1982 ch 254 § 2; Stats 1987 ch 388 § 1.

NOTES:

Editor's Notes

The Federal Reclamation Act of June 17, 1902: *43 USCS §§ 372* et seq.

Cross References:

Metropolitan Water District Act of 1969: Wat Uncod Act 550.

Revenue Bond Law of 1941: *Gov C §§ 54300-54700.*

Improvement Act of 1911: *Sts & H C §§ 5000-6794.*

Improvement Bond Act of 1915: *Sts & H C §§ 8500-8851.*

Municipal Improvement Act of 1913: *Sts & H C §§ 10000-10609.*

Hierarchy Notes:

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WATER--UNCODIFIED ACTS
ACT 240. Desert Water Agency Law (1961 ch 1069)

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Uncod Water Deer, Act 240 § 15.1 (2015)

§ 15.1. Development of hydroelectric energy

The agency shall have the power to construct, operate and maintain works to develop hydroelectric energy, for use by the agency in the operation of its works or as a means of assisting in financing the construction, operation, and maintenance of its projects for the control, conservation, diversion and transmission of water and to enter into contracts for the sale of such energy for a term not to exceed 50 years. Such energy may be marketed only at wholesale to any public agency or private entity, or both, or the federal or state government.

HISTORY:

Added Stats 1961 ch 1069 p 2754. Amended Stats 2007 ch 29 § 1 (AB 140), effective January 1, 2008.

NOTES:

Amendments:

2007 Amendment:

(1) Amended the first sentence by (a) deleting the comma after "operate"; (b) substituting "works to develop" for "facilities for the generation of electricity that are"; (c) substituting "energy" for "or eligible renewable energy resources as defined in *Section 399.12 of the Public Utilities Code*"; (d) deleting the comma after "operation"; (e) deleting the comma after "diversion"; (f) deleting ", or for the construction, treatment," after "of water"; (g) deleting "disposal of sewage, and" before "to enter into"; (h) substituting "such energy" for "electricity generated by the agency"; (2) amended the second sentence by substituting "Such energy" for "The electricity"; and (3) deleted the last sentence which read: "For the purposes of this section, "disposal of sewage" includes the sale or resale of treated effluent for any purposes."

Hierarchy Notes:

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ACT 240. Desert Water Agency Law (1961 ch 1069)

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Uncod Water Deer, Act 240 § 15.2 (2015)

§ 15.2. Power to contract for sale of right to use falling water for electric energy purposes

In connection with the construction and operation of the works of the agency, the agency shall have the power to contract for the sale of the right to use falling water for electric energy purposes with any public agency or private entity engaged in the retail distribution of electric energy, for a term not to exceed 50 years.

HISTORY:

Added Stats 1961 ch 1069 p 2754.

NOTES:

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ACT 240. Desert Water Agency Law (1961 ch 1069)

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Uncod Water Deer, Act 240 § 15.3 (2015)

§ 15.3. Required notice of intent to extract groundwater

(**a**) Any person who intends to dig, bore or drill a water well as defined in *Section 13710 of the Water Code*, and any person who intends to cause to have such a well dug, bored or drilled within the territory of the agency, shall file with the agency at least 15 days before the commencement of such construction a "Notice of Intent to Extract Groundwater," hereinafter called "notice."

(**b**) The notice shall contain such information as the agency may require, including, but not limited to (1) the location of the well site; (2) a description of the type of construction to be used; (3) the proposed uses of the extracted water, including the lands to be served thereby; and (4) the proposed date of construction. Both the owner of the land on which the construction is proposed and the person who will construct the well must sign and verify the notice. The agency may prepare and make available to interested persons a form setting forth such information and such other information as it may require under the provisions of this section, in which case all persons required to report under this section may satisfy the requirements of this section by filing such notice on such form.

(**c**) Failure to file a notice required by this section shall be punishable by a civil penalty of not exceeding five hundred dollars ($500). Both the owner of the land and the constructor of the well shall be assessed under this subdivision.

(**d**) "Person," as used in this section, includes any local governmental agency, except that any such agency shall not be subject to any civil penalty under subdivision (c) for failure to file a notice required by this section.

HISTORY:

Added Stats 1971 ch 304 § 3.

NOTES:

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ACT 240. Desert Water Agency Law (1961 ch 1069)

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Uncod Water Deer, Act 240 § 15.4 (2015)

§ 15.4. Levy and collection of water-replenishment assessments

The agency shall have the power to levy and collect water-replenishment assessments, as provided in this section, for the purpose of replenishing groundwater supplies within the agency.

(a) As used in this section:

(1) "Annual" or "year" means a calendar year unless the context indicates a contrary meaning.

(2) "Fiscal year" means the period of July 1 to June 30, inclusive.

(3) "Production" or "produce" means the extraction of groundwater by pumping or any other method within the boundaries of the agency, or the diversion within the agency of surface supplies which naturally replenish the groundwater supplies within the agency and are used therein.

(4) "Producer" means any individual, partnership, association or group of individuals, lessee, firm, private corporation, or any public agency or public corporation, including, but not limited to, the Desert Water Agency.

(5) "Minimal pumper" means any producer who produces 10 or fewer acre-feet in any year.

(6) "Supplemental water" means water from the State Water Resources Development System, or from the Colorado River Aqueduct of the Metropolitan Water District of Southern California, or from any other source which is not part of the natural replenishment of the groundwater supplies within the agency, including reclaimed water.

(b) By May 1 of each year, the board shall cause to be prepared and presented to it an engineering survey and report concerning the groundwater supplies within the agency. The report shall include the condition of those groundwater supplies, the need for replenishment, and recommendations for any replenishment program, including the source and amount of replenishment water and the cost of purchasing, transporting and spreading the water. In connection with any proposed replenishment program, the report shall also describe the area or areas benefited, either directly or indirectly, the amount of water production in each area during the prior year, and shall recommend the amount of assessment to be levied upon all production within each area or areas of benefit.

(c) If the board determines that funds should be raised by a replenishment assessment, it shall call a public hearing and shall publish notice at least 10 days in advance thereof pursuant to *Section 6061 of the Government Code*. Notice shall also be mailed by the agency to all producers as disclosed by the records of the agency who may be affected by the recommended assessment. Failure of any affected producers to receive the notice shall not affect the validity of any

subsequent replenishment assessment. The notice shall contain the time and place of the hearing, a generalized or common description of each area of benefit, the amount of each recommended replenishment assessment, and an invitation to all interested parties to attend and be heard in support of or in opposition to the proposed assessment. The notice shall also state that a copy of the engineering report is available for inspection at the office of the agency.

(**d**) The hearing shall be held before the board, and a quorum shall be present. The hearing may be adjourned from time to time by the president. All evidence relevant to the engineering survey and report, the recommendation that a replenishment assessment pursuant to this section be levied, and the determination of the area benefited by such assessment and replenishment program, may be introduced. Upon completion of the hearing, the board shall, by resolution make specific findings on all facts relevant and material to the purposes for which a replenishment assessment, if any, may be levied under this section. If the agency establishes a replenishment program and levies assessments, and the program is continued in subsequent years without substantial change and at the same rate of assessment, the board may dispense with the notice, hearing, and findings required by subdivisions (c) and (d).

(**e**) Before July 1 of each year, the board may by resolution levy a replenishment assessment upon all water production during the following fiscal year within each area of benefit as determined by the board. The assessment within each area of benefit shall be at a uniform rate per acre-foot. The resolution shall also state the time or times at which such assessment shall be due and payable, which may be in convenient installments as determined by the board.

(**f**) The amount of any replenishment assessment levied within an area of benefit shall be established in the discretion of the board, except that no assessment shall exceed the sum of the following costs and charges:

(**1**) Those charges under the contract between the Desert Water Agency and the state for an imported water supply from the State Water Resources Development System consisting of the variable operation, maintenance, power, and replacement component of the transportation charge, the off-aqueduct power facilities component of the transportation charge, the delta water charge, and any surplus water or unscheduled water charge.

(**2**) The cost of importing and recharging water from sources other than the State Water Resources Development System.

(**3**) The cost of treatment and distribution of reclaimed water.

(**g**) Minimal pumpers may be excluded from the engineering survey and report on water production, and they shall be exempt from any replenishment assessments and reporting provisions under this section.

(**h**) The agency, after the levying of any replenishment assessment, shall give notice thereof to all affected producers as disclosed by the records of the agency. The notice shall state the rate of assessment for each acre-foot of production during the fiscal year for which the assessment has been levied, and the dates when the assessment or installments thereof are due and payable. The notice shall be sent by first-class mail with the postage prepaid by the district.

(**i**) Except as provided in subdivision (k), each producer, on or before the dates when the assessment or installments thereof are due and payable, shall file with the agency a sworn statement setting forth the total quantity of water production in acre-feet which are subject to the replenishment assessment. The production shall be reported as of the end of the month immediately preceding the payment date. The statement shall be on a form prepared by the agency and, to the extent practicable, shall identify separately the production from each well or other water-producing facility. The statement shall also include a general description or number locating the well or water-producing facility, the method or basis of the measurement or computation of production, and any other information the agency may require.

(**j**) Any replenishment assessment levied pursuant to this section shall be due and payable to the agency at the time or times determined by the agency and stated in the notice of levy, and shall accompany the statement required from each producer.

(**k**) If the agency has an agreement with any producer whereby the agency regularly reads and maintains the water-measuring devices which record the production of the producer, the producer shall be exempt from the provisions of subdivision (i). In lieu thereof, the agency shall send the producer notice of its production and the amount of the replenishment assessment or installment due.

(**l**) If any producer subject to a replenishment assessment, after notice has been given pursuant to subdivision (h), fails to pay a replenishment assessment or installment thereof when due, the producer shall become liable to the agency for interest at the rate of 1 percent per month on the delinquent amount.

(**m**) If any producer, subject to a replenishment assessment, knowingly fails to file the water-production statement, the producer shall, in addition to interest as provided in subdivision (l), become liable to the agency for a penalty of one hundred fifty dollars ($150).

(**n**) If the agency has probable cause to believe that the production by any producer is unreported or, if reported, is substantially in excess of that disclosed by the statement filed by the producer, the agency shall cause an investigation and report to be made concerning that production. The board shall thereupon determine and fix the correct amount of production for the producer, and give written notice thereof. A determination made by the board shall be binding upon the producer, and the replenishment assessments based thereon together with interest and penalties shall be payable immediately, unless the producer files with the board, within 10 days after the mailing of notice, a written protest setting forth the grounds of protest. Upon the filing of a protest, the board shall hold a hearing at which time the total amount of production and the replenishment assessment shall be determined, and the interest and penalties fixed, which action shall be conclusive if based upon substantial evidence. A notice of the hearing shall be mailed to the protestant at least 10 days before the date fixed for the hearing. Notice of the determination by the board shall be mailed to the protestant. The producer shall have 20 days from the date of mailing of the notice to pay the replenishment assessment, interest, and penalties fixed by the board.

(**o**) The agency may, in any court having jurisdiction, bring suit against any producer to enjoin any water production in violation of any of the provisions of this section, and to collect any delinquent replenishment assessments, interest or penalties. The court may award interest, costs, and attorney's fees on any judgment.

(**p**) It is unlawful to produce water from within any area of benefit after one year following the levy of a replenishment assessment within the area, unless the well or other water-producing facility producing the water has a water-measuring device affixed thereto which is capable of measuring and registering the accumulated amount of water produced. The provisions of this subdivision shall not be applicable to minimal pumpers. Violation thereof shall be punishable by a fine not to exceed three hundred dollars ($300), or by imprisonment in the county jail for not to exceed 30 days, or by both fine and imprisonment.

HISTORY:

Added Stats 1977 ch 290 § 1. Amended Stats 1991 ch 198 § 2 (AB 1070).

NOTES:

Hierarchy Notes:

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WATER--UNCODIFIED ACTS
ACT 240. Desert Water Agency Law (1961 ch 1069)

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Uncod Water Deer, Act 240 § 16 (2015)

§ 16. Powers, privileges, and duties vested in or imposed on agency as exercisable and performable by and through board of directors; Powers of board

All powers, privileges and duties vested in or imposed upon the Desert Water Agency incorporated hereunder shall be exercised and performed by and through the board of directors; provided, however, that the exercise of any and all executive, administrative and ministerial powers may be by said board of directors delegated and redelegated to any of the officers created hereby and by the board of directors acting hereunder.

The board of directors shall have the power:

(1) To fix the time and place or places at which its regular meetings shall be held, and shall provide for the calling and holding of special meetings.

(2) To fix the location of the principal place of business of the agency and the location of all offices and departments maintained hereunder.

(3) To prescribe by ordinance a system of business administration and to create any and all necessary offices to establish and reestablish the powers and duties and compensation of all officers and employees and to require and fix the amount of all official bonds necessary for the protection of the funds and property of the agency.

(4) To prescribe by ordinance a system of civil service.

(5) To delegate and redelegate by ordinance to officers of the agency power to employ clerical, legal and engineering assistants and labor, and under such conditions and restrictions as shall be fixed by the directors, power to bind the agency by contract.

(6) To prescribe a method of auditing and allowing or rejecting claims and demands.

(7) To fix the rates at which water should be sold, and to establish different rates for different classes or conditions of service; provided, that rates shall be uniform for like classes or conditions of service throughout the agency, but any special water rate fixed in accordance with terms and conditions of annexation fixed by the board under the provisions of Section 36 or 37 hereof, shall be deemed to be a rate for a different class or condition of service.

HISTORY:

Added Stats 1961 ch 1069 p 2754. Amended Stats 1984 ch 1128 § 160.

NOTES:

Editor's Notes

Former subd (7) of this section, deleted by the 1984 amendment, was reenacted as *Pub Con C § 21501*.

Hierarchy Notes:

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WATER--UNCODIFIED ACTS
ACT 240. Desert Water Agency Law (1961 ch 1069)

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Uncod Water Deer, Act 240 § 17 (2015)

§ 17. Evidentiary effect of board's finding as to water emergency

A finding by the board of directors upon the existence, threat, or duration of an emergency or shortage of water or upon the matter of necessity or any other matter or condition referred to in subdivisions 13 and 14 of Section 15 of this act, shall be made by resolution or ordinance, and shall be prima facie evidence of the fact or matter so found, and such fact or matter shall be presumed to continue unchanged unless and until a contrary finding shall have been made by the board by resolution or ordinance. Such finding shall be received in evidence in any civil or criminal proceeding in which it may be offered, and shall be proof and evidence of the fact or matter found until rebutted or overcome by other sufficient evidence received in such proceeding. Copy of any resolution or ordinance setting forth such finding shall, when certified by the secretary of the agency, be evidence that the finding was made by the agency as shown by the resolution or ordinance and certification.

HISTORY:

Added Stats 1961 ch 1069 p 2754.

NOTES:

Editor's Notes

As enacted subdivisions 11 and 12 of section 15 pertained to agency powers to restrict the use of agency water during emergencies caused by drought or other water shortage and to prescribe ordinances relating to such restrictions, respectively. The section has since been amended.

Hierarchy Notes:

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WATER--UNCODIFIED ACTS
ACT 240. Desert Water Agency Law (1961 ch 1069)

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Uncod Water Deer, Act 240 § 18 (2015)

§ 18. Use or application of water in violation of agency's ordinance as misdemeanor; Punishment

From and after the publication or posting of any ordinance as provided in subdivision 14 of Section 15 of this act, it is hereby declared to be and it shall be a misdemeanor for any person, firm or corporation to use or apply 35 water received from the agency contrary to or in violation of such restriction or prohibition, until such ordinance shall have been repealed or such emergency or threatened emergency shall have ceased, and upon conviction thereof such person, firm or corporation shall be punished by being imprisoned in the county jail for not more than 30 days or by fine of not more than three hundred dollars ($300), or by both such fine and imprisonment.

HISTORY:

Added Stats 1961 ch 1069 p 2754.

NOTES:

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WATER--UNCODIFIED ACTS
ACT 240. Desert Water Agency Law (1961 ch 1069)

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Uncod Water Deer, Act 240 § 19 (2015)

§ 19. Superseded

HISTORY:

Added Stats 1961 ch 1069 p 2754.

NOTES:

Editor's Notes

See *Wat Uncod Act 240 § 19.5*. Stats 1961 AB 1412 was enacted as ch 1479 of that session and thus this section is superseded.

Hierarchy Notes:

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WATER--UNCODIFIED ACTS
ACT 240. Desert Water Agency Law (1961 ch 1069)

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Uncod Water Deer, Act 240 § 19.5 (2015)

§ 19.5. Procedural requirements

An action to determine the validity of any contract authorized by paragraph 19 of Section 15 may be brought pursuant to Chapter 9 (commencing with *Section 860) of Title 10 of Part 2 of the Code of Civil Procedure.* This section shall become operative only if Assembly Bill No. 1412 is enacted by the Legislature at its 1961 Regular Session, in which case it shall supersede Section 19 of this act.

HISTORY:

Added Stats 1961 ch 1069 p 2754.

NOTES:

Editor's Notes

Stats 1961 AB 1412 was enacted as ch 1479 of that session.

Hierarchy Notes:

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WATER--UNCODIFIED ACTS
ACT 240. Desert Water Agency Law (1961 ch 1069)

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Uncod Water Deer, Act 240 § 20 (2015)

§ 20. [Section repealed 1970.]

HISTORY:

Added Stats 1961 ch 1069 p 2754. Repealed Stats 1970 ch 447 § 25. The repealed section related to director's interest in contracts.

NOTES:

Hierarchy Notes:

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WATER--UNCODIFIED ACTS
ACT 240. Desert Water Agency Law (1961 ch 1069)

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Uncod Water Deer, Act 240 § 21 (2015)

§ 21. Duties of board's officers and assistants; Depository of funds; Bonds of employees or assistants

The president, vice president and secretary in addition to the respective duties imposed on them by law shall perform such duties as may be imposed on them by the board of directors. The treasurer, or such other person or persons as may be authorized by the board of directors, shall draw checks or warrants to pay demands when such demands shall have been audited and approved in the manner prescribed by the board of directors.

If the president is absent or unable to act, the vice president shall exercise the powers of the president granted by this act.

The general manager shall have full charge and control of the maintenance, operation and construction of the waterworks or waterworks system of the agency with full power and authority to employ and discharge all employees and assistants at pleasure, prescribe their duties, fix their compensation, subject to the approval of the board of directors.

The general manager shall perform such duties as may be imposed on him by the board of directors. The general manager shall report to the board of directors in accordance with such rules and regulations as they may direct.

The chief engineer shall be the engineering advisor of the agency and shall perform such other duties as may be prescribed by the board of directors.

The attorney shall be the legal adviser of the agency and shall perform such other duties as may be prescribed by the board of directors.

The board of directors shall designate a depository or depositories to have the custody of the funds of the agency, all of which depositories shall give security sufficient to secure the agency against possible loss, and who shall pay the warrants drawn by the treasurer for demands against the agency under such rules as the directors may prescribe.

The general manager, secretary and treasurer, and all other employees or assistants of said agency who may be required so to do by the board of directors, shall give such bonds to the agency conditioned for the faithful performance of their duties as the board of directors from time to time may provide. The premiums on such bonds shall be paid by the agency.

HISTORY:

Added Stats 1961 ch 1069 p 2754. Amended Stats 1967 ch 152 § 9 p 1224.

NOTES:

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WATER--UNCODIFIED ACTS
ACT 240. Desert Water Agency Law (1961 ch 1069)

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Uncod Water Deer, Act 240 § 22 (2015)

§ 22. Construction of works over stream, highway, railway, etc.

The board of directors shall have power to construct works along and across any stream of water, watercourse, street, avenue, highway, canal, ditch or flume, or across any railway which the route of said works may intersect or cross; provided, such works are constructed in such manner as to afford security for life and property, and said board of directors shall restore the crossings and intersections to their former state as near as may be, or in a manner not to have impaired unnecessarily their usefulness. Every company whose right-of-way shall be intersected or crossed by said works shall unite with said board of directors in forming said intersections and crossings and grant the rights therefor. The right-of-way is hereby given, dedicated and set apart to locate, construct and maintain such works along and cross any street or public highway and over and through any of the lands which are now or may be the property of this State, and to have the same rights and privileges appertaining thereto as have been or may be granted to cities within the State. Any use, under this section, of a public highway now or hereafter constituted a state highway shall be subject to the provisions of Chapter 3 of Division 1 of the Streets and Highway Code.

HISTORY:

Added Stats 1961 ch 1069 p 2754.

NOTES:

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WATER--UNCODIFIED ACTS
ACT 240. Desert Water Agency Law (1961 ch 1069)

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Uncod Water Deer, Act 240 § 23 (2015)

§ 23. Claims against agency

All claims for money or damages against this agency are governed by Part 3 (commencing with Section 900) and Part 4 (commencing with *Section 940) of Division 3.6 of Title 1 of the Government Code*, except as provided therein, by other statutes or regulations expressly applicable thereto.

HISTORY:

Added Stats 1961 ch 1069 p 2754. Amended Stats 1970 ch 104 § 10, operative January 1, 1971.

NOTES:

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WATER--UNCODIFIED ACTS
ACT 240. Desert Water Agency Law (1961 ch 1069)

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Uncod Water Deer, Act 240 § 24 (2015)

§ 24. [Section repealed 1963.]

HISTORY:

Added Stats 1961 ch 1069 p 2754. Amended Stats 1963 ch 1683 § 14 p 3301. Repealed Stats 1963 ch 1685 § 12 p 3308. The repealed section related to liability of officers and directors.

NOTES:

Note

Stats 1963 ch 1685 provides:

§ 44. This act shall become operative only if Senate Bill No. 42 of the 1963 Regular Session is enacted.

Senate Bill No. 42 was enacted as Stats 1963 ch 1681 p 3266.

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WATER--UNCODIFIED ACTS
ACT 240. Desert Water Agency Law (1961 ch 1069)

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Uncod Water Deer, Act 240 § 25 (2015)

§ 25. Rates for water

The board of directors, so far as practicable, shall fix such rate or rates for water in the agency and in each improvement district therein as will result in revenues which will pay the operating expenses of the agency, and the improvement district, provide for repairs and depreciation of works, provide a reasonable surplus for improvements, extensions and enlargements, pay the interest on any bonded debt, provide a sinking or other fund for the payment of the principal of such debt as it may become due, and repay advances, together with interest at a rate not to exceed the interest value of money to the agency, made from the agency to an improvement district. Said rates for water in each improvement district may vary from the rates of the agency and from other improvement districts therein.

HISTORY:

Added Stats 1961 ch 1069 p 2754. Amended Stats 1971 ch 304 § 4.

NOTES:

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WATER--UNCODIFIED ACTS
ACT 240. Desert Water Agency Law (1961 ch 1069)

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Uncod Water Deer, Act 240 § 26 (2015)

§ 26. Tax levy where revenues of agencies or district inadequate

If the revenues of the agency, or any improvement district therein, will be inadequate for any cause to pay the operating expenses of the agency, provide for repairs and depreciation of works owned or operated by it, and to meet all obligations of the agency, including principal of or interest on any bonded debt of the agency, or any improvement district thereof, as it becomes due, then the board of directors of this agency must provide for the levy and collection of a tax sufficient to raise the amount of money determined by such board of directors to be necessary for the purpose of paying such charges and expenses, as well as providing the funds required under Section 25 of this act.

HISTORY:

Added Stats 1961 ch 1069 p 2754.

NOTES:

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WATER--UNCODIFIED ACTS
ACT 240. Desert Water Agency Law (1961 ch 1069)

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Uncod Water Deer, Act 240 § 27 (2015)

§ 27. Estimate of amount of money required; Levy by board of supervisors; Collection

The board of directors shall determine the amounts necessary to be raised by taxation during the fiscal year and shall fix the rate or rates of tax to be levied which will raise the amounts of money required by the agency, and within a reasonable time previous to the time when the board of supervisors is required by law to fix its tax rate, the board of directors shall certify to the board of supervisors the rate or rates so fixed and shall furnish to the board of supervisors a statement in writing containing the following: (a) an estimate of the minimum amount of money required to be raised by taxation during the fiscal year for the payment of the principal of an interest on any bonded debt of the agency or of an improvement district thereof as will become due before the proceeds of a tax levied at the next general tax levy will be available; (b) an estimate of the minimum amount of money required to be raised by taxation during the fiscal year for all other purposes of the agency; (c) a statement of any delinquent and unpaid charges for water and other services, or either, requested in writing by the owner of the property that remain delinquent and unpaid for 60 days or more on July 1st. The board of directors shall direct that at the time and in the manner required by law for the levying of taxes for county purposes, such board of supervisors shall levy, in addition to such other tax as may be levied by such board of supervisors, at the rate or rates so fixed and determi ned by the board of directors, a tax upon the property within the agency, or improvement district thereof benefited by the bonded debt, as the case may be, and it is made the duty of the officer or body having authority to levy taxes within each county to levy the tax so required. Taxes for the payment of the interest on or principal of any bonded debts shall be levied on the property within the agency, or improvement district thereof, benefited by the bonded debt, as determined by the board of directors in the resolution declaring the necessity to incur the debt.

Taxes for other purposes of the agency shall be levied on all property in the district or portion thereof subject to the particular tax. And it shall be the duty of all county officers charged with the duty of collecting taxes to collect such tax in time, form, and manner as county taxes are collected, and when collected to pay the same to the agency. Taxes for the payment of a bonded debt and the interest thereon shall be a lien on all the property benefited thereby as stated in the resolution of the board of directors declaring the necessity to incur the debt. All taxes for other purposes of the agency shall be a lien on all the property in the agency subject to the respective tax. Agency taxes, whether for payment of a bonded indebtedness and the interest thereon or for other purposes, shall be of the same force and effect as other liens for taxes, and their collection may be enforced by the same means as provided for the enforcement of liens for state and county taxes.

HISTORY:

Added Stats 1961 ch 1069 p 2754. Amended Stats 1973 ch 240 § 3.

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WATER--UNCODIFIED ACTS
ACT 240. Desert Water Agency Law (1961 ch 1069)

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Uncod Water Deer, Act 240 § 27.1 (2015)

§ 27.1. Charges for water and other services as constituting a special assessment; Conditions under which assessment may become a lien upon property

(1) The amount of any charges for water and other services or either included in the statement of delinquent and unpaid charges pursuant to subdivision (c) of Section 27 shall constitute a special assessment against the property upon which the water for which the charges are unpaid was used and upon the property subject to the charges for any other agency services and shall constitute a lien on that property as of the same time and in the same manner as does the tax lien securing such annual taxes. The assessment may be collected at the same time and in the same manner as ordinary county ad valorem property taxes are collected and shall be subject to the same penalties and the same procedure and sale in case of delinquency as provided for such taxes. All laws applicable to the levy, collection, and enforcement of county ad valorem property taxes shall be applicable to such assessment, except that if any real property to which such lien would attach has been transferred or conveyed to a bona fide purchaser for value, or if a lien of a bona fide encumbrancer for value has been created and attaches thereon, prior to the date on which the first installment of such taxes would become delinquent, then the lien which would otherwise be imposed by this section shall not attach to such real property and the delinquent and unpaid charges relating to such property shall be placed on the unsecured roll for collection. The county shall deduct from the charges collected an amount suffic ient to compensate the county for costs incurred in collecting such delinquent and unpaid charges. The amount of such compensation shall be fixed by agreement between the board of supervisors and the agency's board of directors. The agency shall notify the holder of title to land whenever delinquent and unpaid charges for water and other services or either which could become a lien on such property remain delinquent and unpaid for 60 days.

(2) In case any charges for water or other services, or either, remain unpaid the amount of the unpaid charges may in the discretion of the agency be secured at any time by filing for record in the office of the county recorder of any county, a certificate specifying the amount of such charges and the name and address of the person liable therefor.

From the time of recordation of the certificate, the amount required to be paid together with interest and penalty constitutes a lien upon all real property in the county owned by the person or afterwards, and before the lien expires, acquired by him. The lien has the force, priority, and effect of a judgment lien and shall continue for 10 years from the date of the filing of the certificate unless sooner released or otherwise discharged. The lien may, within 10 years from the filing of the certificate or within 10 years from the date of the last extension of the lien in the manner herein provided, be extended by filing for record a new certificate in the office of the county recorder of any county and from the time of such filing the lien shall be extended to the real property in such county for 10 years unless sooner released or otherwise discharged.

HISTORY:

Added Stats 1973 ch 240 § 4. Amended Stats 1979 ch 335 § 6.

NOTES:

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WATER--UNCODIFIED ACTS
ACT 240. Desert Water Agency Law (1961 ch 1069)

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Uncod Water Deer, Act 240 § 28 (2015)

§ 28. Incurring bonded indebtedness; Resolution; Election; Period of limitation for contesting validity of bonds, etc.

Whenever the board of directors deems it necessary for the agency to incur a bonded indebtedness for the acquisition, construction, completion, or repair of any or all improvements, works or property mentioned in this act, the board shall, by resolution, so declare and call an election to be held in said agency for the purpose of submitting to the qualified voters thereof the proposition of incurring indebtedness by the issuance of bonds of said agency. Said resolution shall state: (a) the purpose for which the proposed debt is to be incurred, which may include expenses of all proceedings for the authorization, issuance and sale of the bonds; (b) the amount of debt to be incurred; (c) the maximum term the bonds proposed to be issued shall run before maturity, which shall not exceed 40 years; (d) the maximum rate of interest to be paid, which shall not exceed 8 percent per annum, payable semiannually, except that interest for the first year may be payable at the end of said year; (e) the measure to be submitted to the voters; (f) the date upon which an election shall be held for the purpose of authorizing said bonded indebtedness to be incurred; and (g) the designation of precincts, the location of polling places, and the names of the officers selected to conduct the election, who shall consist of one judge, one inspector and two clerks in each precinct. The board of directors shall provide for holding such special election on the day so fixed and in accordance with the prov isions of the Elections Code so far as the same shall be applicable, except as herein otherwise provided. Notice of the holding of such election shall be given by publishing pursuant to *Section 6066 of the Government Code* the resolution calling the election, the last publication to be made not less than two weeks prior to the date of the proposed election, in at least one newspaper published in such agency, then such resolution shall be posted in three public places in such agency not less than two weeks prior to the date of the proposed election. No other notice of such election need be given. The returns of such election shall be made, the votes canvassed by said board of directors within seven days following said election, and the results thereof ascertained and declared in accordance with the provisions of the Elections Code, so far as they may be applicable, except as in this act otherwise provided. The secretary of the board of directors, as soon as the result is declared, shall enter in the records of such board a statement of such results. No irregularities or informalties in conducting such election shall invalidate the same, if the election shall have otherwise been fairly conducted.

Any action or proceeding, wherein the validity of any such bonds or of the proceedings in relation thereto is contested, questioned or denied, shall be commenced within three months from the date of such election; otherwise, said bonds and all proceedings in relation thereto shall be held to be valid and in every respect legal and incontestable.

HISTORY:

Added Stats 1961 ch 1069 p 2754. Amended Stats 1967 ch 152 § 9.1 p 1225; Stats 1975 ch 130 § 93.

NOTES:

Hierarchy Notes:

Uncod Water Deer Note

Act 240 Note

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WATER--UNCODIFIED ACTS
ACT 240. Desert Water Agency Law (1961 ch 1069)

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Uncod Water Deer, Act 240 § 29 (2015)

§ 29. When bonded indebtedness payable from taxes levied on less than all of agency; Resolution; Notice and hearing; Election; Period of limitation for contesting validity

Whenever the board of directors deems it necessary to incur a bonded indebtedness for the acquisition, construction, completion, or repair of any or all improvements, works or property mentioned in this act and to provide for such bonded indebtedness to be payable from taxes levied upon less than all of the agency, the board shall, by resolution, so declare and state: (a) the purpose for which the proposed debt is to be incurred; (b) the amount of debt to be incurred, which may include expenses of all proceedings for the authorization, issuance and the sale of the bonds; (c) that the board intends to form an improvement district of a portion of the agency which in the opinion of the board will be benefited, the exterior boundaries of which portion are set forth on a map on file with the secretary of the agency, which map shall govern for all details as to the extent of the proposed improvement district, and to call an election in such proposed improvement district on a date to be fixed, for the purpose of submitting to the qualified voters thereof the proposition of incurring indebtedness by the issuance of bonds of the agency for said improvement district; (d) that taxes for the payment of said bonds and the interest thereon shall be levied exclusively upon the taxable property in the improvement district; (e) that a general description of the proposed improvement, together with a map showing the exterior boundaries of said proposed improvement district with relation to th e territory immediately contiguous thereto and to the proposed improvement is on file with the secretary of the agency and is available for inspection by any person or persons interested; (f) the time and place for a hearing by the board on the questions of the formation of said proposed improvement district, the extent thereof, the proposed improvement and the amount of debt to be incurred; and (g) that at the time and place specified in the resolution any person interested, including all persons owning property in the agency or in the proposed improvement district, will be heard. Notice of said hearing shall be given by publishing a copy of the resolution pursuant to *Section 6066 of the Government Code* prior to the time fized for the hearing in a newspaper printed and published in the Desert Water Agency, if there is a newspaper printed and published in such agency. Such notice shall also be given by posting a copy of said resolution in six public places within the proposed improvement district at least two weeks before the time fixed for said hearing.

At the time and place so fixed, or at any time and place to which the hearing is adjourned, the board shall proceed with the hearing. At the hearing any person interested, including any person owning property within the agency or within the proposed improvement district, may appear and present any matters material to the questions set forth in the resolution declaring the necessity for incurring the bonded indebtedness. The board shall have the power to change the purpose for which the proposed debt is to be incurred, or the amount of bonded debt to be incurred, or the boundaries of

said proposed improvement district, or one or all of said matters; provided, however, that said board shall not change such boundaries so as to include any territory which will not, in its judgment, be benefited by said improvement.

The purpose, amount of bonded debt or boundaries shall not be changed by said board except after notices of its intention to do so, given by publication pursuant to *Section 6061 of the Government Code* in a newspaper printed and published in said Desert Water Agency, if there is a newspaper printed and published in such agency, and by posting in six public places within said proposed improvement district. Said notice shall state the changed purpose and debt proposed and that the exterior boundaries as proposed to be changed are set forth on a map on file with the secretary of the agency, which map shall govern for all details as to the extent of the proposed improvement district, and specify the time and place for hearing on such change, which time shall be at least 10 days after publication or posting of said notice. At the time and place so fixed, or at any time and place to which the hearing is adjourned, the board shall proceed with the hearing. At the hearing any person interested, including any person owning property within the agency or the proposed improvement district, may appear and present any matters material to the changes stated in the notice. At the conclusion of the hearing the board shall by resolution determine whether it is deemed necessary to incur the bonded indebtedness, and, if so, the resolution shall also state the purpose for which said proposed debt is to be incurred, the amount of the proposed debt, that the exterior boundaries of the portion of t he agency which will be benefited are set forth on a map on file with the secretary of the agency which map shall govern for all details as to the extent of the improvement district, and that said portion of the agency set forth on said map shall thereupon constitute and be known as "Improvement District No. _____ of Desert Water Agency," and the determinations made in said resolution shall be final and conclusive. After the formation of such improvement district within the Desert Water Agency pursuant to this section all proceedings for the purpose of a bond election shall be limited, and shall apply only to the improvement district, and taxes for the payment of said bonds and the interest thereon shall be levied exclusively upon the taxable property in the improvement district.

After the board has made its determination of the matters required to be determined by said last mentioned resolution, and if the board deems it necessary to incur the bonded indebtedness, the board shall by a further resolution call a special election in said improvement district for the purpose of submitting to the qualified voters thereof the proposition of incurring indebtedness by the issuance of bonds of the agency for said improvement district. Said resolution shall state: (a) that the board deems it necessary to incur the bonded indebtedness; (b) the purpose for which the bonded indebtedness will be incurred; (c) the amount of debt to be incurred; (d) the improvement district to be benefited by said indebtedness, as set forth in the resolution making determinations, and that a map showing the exterior boundaries of said improvement district is on file with the secretary of the agency, which map shall govern for all details as to the extent of the improvement district; (e) that taxes for the payment of such bonds and the interest thereon shall be levied exclusively upon the taxable property in said improvement district; (f) the maximum term the bonds proposed to be issued shall run before maturity, which shall not exceed 40 years; (g) the maximum rate of interest to be paid, which shall not exceed 8 percent per annum, payable semiannually, except that interest for the first year may be payable at the end of the said year; (h) the measure to be submitted to the voters; (i) the date upon which an election shall be held for the purpose of authorizing said bonded indebtedness to be incurred; and (j) the designation of precincts, the location of polling places, and the names of the officers selected to conduct the election, who shall consist of one judge, one inspector and two clerks in each precinct.

The board of directors shall provide for holding such special election on the day so fixed and in accordance with the provisions of the Elections Code so far as the same shall be applicable, except as herein otherwise provided. Notice of the holding of such election shall be given by publishing pursuant to *Section 6066 of the Government Code* the resolution calling the election prior to the date of the proposed election in at least one newspaper printed and published in the Desert Water Agency, if there is a newspaper printed and published in such agency. Such resolution shall also be posted in three public places in such improvement district not less than two weeks prior to the date of the proposed election. No other notice of such election need be given.

The returns of such election shall be made, the votes canvassed by said board of directors within seven days following said election, and the results thereof ascertained and declared in accordance with the provisions of the Elections Code so far as they may be applicable, except as in this act otherwise provided. The secretary of the board of directors, as soon as the result is declared, shall enter in the records of such board a statement of such results. No irregularities or informalities in conducting such election shall invalidate the same, if the election shall have otherwise been fairly conducted.

Any action or proceeding, wherein the validity of the formation of the improvement district or of any such bonds or of the proceedings in relation thereto is contested, questioned or denied, shall be commenced within three months from

the date of such election; otherwise, said bonds and all proceedings in relation thereto, including the formation of the improvement district, shall be held to be valid and in every respect legal and incontestable.

HISTORY:

Added Stats 1961 ch 1069. Amended Stats 1975 ch 130 § 94.

NOTES:

Hierarchy Notes:

Uncod Water Deer Note

Act 240 Note

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WATER--UNCODIFIED ACTS
ACT 240. Desert Water Agency Law (1961 ch 1069)

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Uncod Water Deer, Act 240 § 30 (2015)

§ 30. Annexation of agency to improvement district; Petition; Notice and hearing; Resolution for annexation; Period of limitation for contesting validity of annexation

Any portion of the Desert Water Agency whether contiguous or not to an improvement district thereof may be annexed to said improvement district in the following manner. A petition, which may consist of any number of separate instruments, shall be filed with the secretary of the agency, signed by holders of title to sixty percent (60%) or more of the land in the portion proposed to be annexed, which land as so represented in said petition shall have an assessed valuation of not less than fifty percent (50%) of the land so proposed to be annexed. The petition shall contain the following: (a) a description of the area proposed to be annexed, which may be made by reference to a map on file with the secretary of the agency, which map shall govern for all details as to the extent of the area proposed to be annexed, or in any other definite manner; (b) the terms and conditions upon which said proposed area may be annexed as theretofore determined by resolution adopted by the board of directors of the agency; and (c) a prayer that the board of directors declare such area to be annexed to the improvement district. Said petition shall be accompanied by a certified check payable to the order of the agency in sufficient sum to reimburse said agency for expenses of processing and publishing the petition and preparing and making the filings required by law.

Within 10 days of the date of the filing of such petition the secretary of the agency shall examine the same and ascertain whether or not such petition is signed by the required number of property owners; and, if requested by the secretary of the agency, the board of directors shall authorize him to employ persons especially for that purpose, in addition to the persons regularly employed in his office, and shall provide for their compensation. When the secretary of the agency has completed his examination of the petition, he shall attach to the same his certificate, properly dated, showing the result of such examination; and if from such examination he shall find that said petition is signed by the requisite number of property owners, or is not so signed, he shall certify that the same is sufficient, or insufficient, as the case may be.

If by the certificate of the secretary of the agency the petition is found to be insufficient, said petition may be amended by filing a supplemental petition or petitions within 10 days of the date of such certificate. The secretary of the agency shall within 10 days after the filing of such supplemental petition or petitions, make like examination of the same and certify to the result of such examination as hereinbefore provided.

If by the certificate of the secretary such petition or petition as amended, is shown to be sufficient the secretary shall cause notice of hearing on the petition to be published and posted without delay.

The text of said petition shall be published pursuant to *Section 6066 of the Government Code* prior to the time at which the same is to be presented to the board of directors of the agency in at least one newspaper printed and published in the Desert Water Agency, if there is a newspaper printed and published in such agency; together with a notice stating the time and place of the meeting at which the same will be presented. When contained upon one or more instruments one copy only of such petition need be published. No more than five of the names attached to said petition need appear in said publication of said petition and notice, but the number of signers shall be stated. Said notice and petition shall also be posted in three public places in the improvement district and three public places in the area proposed to be annexed, at least two weeks prior to the hearing.

The board of directors of the agency shall proceed to hear the petition at the time and place fixed therefor and any person residing within the agency or improvement district or owning taxable property in said agency or improvement district shall be entitled to appear and be heard at such hearing. Such hearing may be continued from time to time by the board of directors of the agency. At the conclusion of the hearing, and if the board of directors finds and determines from the evidence presented at said hearing that the area proposed to be annexed to an improvement district will be benefited thereby, and that the improvement district to which said area proposed to be annexed will also be benefited thereby and will not be injured thereby, then and in such case the board of directors of the agency may, by resolution, approve such annexation, describing the territory so annexed, which may be by reference to a map on file with the secretary of the agency shall govern for all details as to the extent of the annexed area, or in any other definite manner, and the terms and conditions of annexation as theretofore determined by resolution of the board of directors.

From and after the date of the adoption of such resolution the area named therein shall be deemed added to and shall form a part of said improvement district and the taxable property therein shall be subject to taxation thereafter for the purposes of said improvement district, including the payment of the principal of and interest on bonds and other obligations of such improvement district at the time authorized and outstanding at the time of said annexation. If the terms and conditions established by the board of directors specifically so provides, the taxable property in the annexed area shall be subject to taxation as if the annexed property had always been a part of the improvement district, and the board of directors of the agency shall be empowered to do all things necessary to enforce and make effective the terms and conditions of annexation fixed as authorized pursuant to this section.

Any action or proceeding wherein the validity of any such annexation is contested, questioned or denied must be commenced within three months after the date of issuance by the Secretary of State of his certificate; otherwise said annexation shall be held to be valid and in every respect legal and incontestable.

HISTORY:

Added Stats 1961 ch 1069 p 2754. Amended Stats 1971 ch 304 § 5.

NOTES:

Hierarchy Notes:

Uncod Water Deer Note

Act 240 Note

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WATER--UNCODIFIED ACTS
ACT 240. Desert Water Agency Law (1961 ch 1069)

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Uncod Water Deer, Act 240 § 31 (2015)

§ 31. Issuance of bonds; Sale; Terms; Use of proceeds

If from such returns it appears that more than two-thirds of the votes cast in such election held pursuant to the provisions of Section 28 or of Section 29 of this act, were in favor of and assented to the incurring of such indebtedness, then the board of directors may, by resolution, at such time or times as it deems proper, issue bonds of the agency for the whole or any part of the amount of the indebtedness so authorized, and may from time to time provide for the issuance of such amounts as the necessity thereof may appear, until the full amount of such bonds authorized shall have been issued. Said full amount of bonds may be divided into two or more series and different dates fixed for each of the series. The maximum term which the bonds of any series shall run before maturity shall not exceed 40 years from the date of each series respectively.

The board of directors shall, by resolution, prescribe the form of the bonds and the form of the coupons attached thereto and fix the time when the whole or any part of the principal shall become due and payable. The payment of the first installment of principal may be deferred for a period of not more than five years from the date of the bonds or the date of the bonds of each series respectively. The bonds shall bear interest at a rate or rates not to exceed 8 percent per annum, payable semiannually, except that interest for the first year may be payable at the end of said year. The board of directors may also provide for call and redemption of bonds prior to maturity at such times and prices and upon such other terms as it may specify. A bond shall not be subject to call or redemption prior to maturity unless it contains a recital to that effect or unless a statement to that effect is printed thereon.

The denomination of the bonds shall be stated in the resolution providing for their issuance, but shall not be less than one hundred dollars ($100). The principal and interest shall be payable in lawful money of the United States at the office of the treasurer of the district or such other place or places as may be designated, or at either place or places at the option of the holder of the bond.

The bonds shall be dated, numbered consecutively, and be signed by the president and treasurer of the agency, countersigned by the secretary of the agency, and the official seal of the agency attached. The interest coupons of such bonds shall be signed by the treasurer of said agency. All such signatures and countersignatures may be printed, lithographed, or mechanically reproduced, except that one of said signatures or countersignatures to said bonds shall be manually affixed.

If the bond election proceedings have been limited to and have applied only to an improvement district within said agency, said bonds are bonds of the agency and shall be issued in the name of the agency and shall be designated "Bonds of the Desert Water Agency for Improvement District No. _____" and each bond and all interest coupons there-

of shall state that taxes levied for the payment thereof shall be levied exclusively upon the taxable property in said improvement district.

Before selling the bonds, or any part thereof, the board of directors shall give notice inviting sealed bids in such manner as it may prescribe. If satisfactory bids are received, the bonds offered for sale shall be awarded to the highest responsible bidder. If no bids are received, or if said board determines that the bids received are not satisfactory as to price or responsibility of the bidders, it may reject all bids received, if any, and either readvertise or sell the bonds at private sale.

The proceeds arising from the sale of bonds shall be paid into the treasury of the agency and placed to the credit of a special improvement fund and expended only for the purpose for which the indebtedness was created; provided, however, that when said purpose has been accomplished any moneys remaining in said special improvement fund may be transferred to the fund to be used for the payment of principal of and interest on the bonds. Said remaining moneys remaining from the sale of bonds of the agency may also be used for some other agency purpose. Such moneys remaining from the sale of bonds of the agency for an improvement district therein may also be used for any purpose which will benefit the property in the improvement district. Said moneys may not be used for said other agency purpose or improvement district purpose until two-thirds of the qualified voters of said agency or improvement district have consented thereto at a special election called in said agency or improvement district by the board of directors. Notice of said election shall be given in the manner provided for bond elections in said agency or improvement district, as the case may be, and in other respects the election shall be conducted as are other agency elections.

HISTORY:

Added Stats 1961 ch 1069 p 2754. Amended Stats 1967 ch 152 § 9.3; Stats 1975 ch 130 § 95.

NOTES:

Hierarchy Notes:

Uncod Water Deer Note

Act 240 Note

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WATER--UNCODIFIED ACTS
ACT 240. Desert Water Agency Law (1961 ch 1069)

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Uncod Water Deer, Act 240 § 32 (2015)

§ 32. Exemption of bonds from taxation

Any bonds issued by the Desert Water Agency are hereby given the same force, value and use as bonds issued by any city and shall be exempt from all taxation within the State of California.

HISTORY:

Added Stats 1961 ch 1069 p 2754.

NOTES:

Hierarchy Notes:

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WATER--UNCODIFIED ACTS
ACT 240. Desert Water Agency Law (1961 ch 1069)

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Uncod Water Deer, Act 240 § 33 (2015)

§ 33. Formation of improvement district for purpose other than incurring bonded indebtedness; Resolution; Notice and hearing; Election; Period of limitations for contesting validity

Whenever the board of directors deems it necessary to form an improvement district of a portion of the agency for a purpose other than the incurring of bonded indebtedness under Section 29 of this act it shall by resolution so declare and state: (a) the purpose for which the proposed improvement district is to be formed, (b) the estimated expense of carrying out said purpose, (c) that the board intends to form an improvement district of a portion of the agency which in the opinion of the board will be benefited, the exterior boundaries of which portion are set forth on a map on file with the secretary of the agency, which map shall govern for all details as to the extent of the proposed improvement district, (d) that taxes for carrying out said purpose shall be levied exclusively upon the taxable property in said proposed improvement district, (e) that a map showing the exterior boundaries of said proposed improvement district, with relation to the territory immediately contiguous thereto, is on file with the secretary of the agency and is available for inspection by any person or persons interested, (f) the time and place for a hearing by the board on the questions of the formation of said proposed improvement district, the extent thereof, the purpose for which it is to be formed, and the estimated expense of carrying out said purpose and (g) that at said time and place any person interested, including all persons owning property in the agency or in the proposed improvement district will be heard. Notice of said hearing shall be given by publishing a copy of the resolution pursuant to *Section 6066 of the Government Code* prior to the time fixed for the hearing in a newspaper circulated in the Desert Water Agency, if there is a newspaper circulated therein. Said notice shall also be given by posting a copy of said resolution in three public places within the proposed improvement district for at least two weeks before the time fixed for said hearing.

At the time and place so fixed, or at any time or place to which the hearing is adjourned, the board shall proceed with the hearing at which hearing any person interested, including all persons owning property in the agency, or in the proposed improvement district, may appear and present any matters material to the questions set forth in the resolution. At the conclusion of the hearing the board shall by resolution determine whether it is necessary to form said improvement district, and, if so, the resolution shall also state the purpose for which the proposed improvement district is to be formed, estimated expense of carrying out said purpose, that the exterior boundaries of the portion of the agency which will be benefited are set forth on a map on file with the secretary of the agency, which map shall govern for all details a to the extent of the improvement district, and that said portion of the agency set forth on said map, shall thereupon constitute and be known as "Improvement District (A, B, C, or other letter designation) of the Desert Water Agency," and the determinations made in said resolution shall be final and conclusive. After the formation of such improvement dis-

trict within the Desert Water Agency pursuant to this section all taxes levied for the carrying out of said purpose shall be levied exclusively upon the taxable property in the improvement district.

A copy of the resolution forming the improvement district shall be published pursuant to *Section 6066 of the Government Code* in a newspaper printed and published in the agency, if there is a newspaper printed and published in the agency, and a copy of said resolution shall also be posted in three public places within the proposed improvement district for at least two weeks. Said resolution shall not be effective until the 31st day after completion of said publication and/or posting. If before said effective date a petition signed by not less than 10 percent of the voters of the improvement district requesting that an election be held on the formation thereof is presented to the board of directors, said board shall call a special election in the improvement district for the purpose of submitting the question of the formation of the improvement district to the voters of said improvement district.

The board of directors shall provide for holding such special election on the day so fixed and in accordance with the provisions of the Elections Code so far as the same shall be applicable, except as herein otherwise provided. Notice of the holding of such election shall be given by publishing the resolution calling the election pursuant to *Section 6066 of the Government Code* prior to the date of the proposed election, in at least one newspaper printed and published in the Desert Water Agency, if there is a newspaper printed and published in such agency. Such resolution shall also be posted in three public places in such improvement district not less than two weeks prior to the date of the proposed election. No other notice of such election need be given.

The returns of such election shall be made, the votes canvassed by said board of directors within seven days following said election, and the results thereof ascertained and declared in accordance with the provisions of the Elections Code so far as they may be applicable, except as in this act otherwise provided. The secretary of the board of directors, as soon as the result is declared, shall enter in the records of such board a statement of such results. No irregularities or informalities in conducting such election shall invalidate the same, if the election shall have otherwise been fairly conducted.

If from such returns it appears that a majority of the votes cast at such election were in favor of the formation of such improvement district, the formation of such improvement district shall be complete.

Any action or proceeding wherein the validity of the formation of the improvement district or of any of the proceedings in relation thereto is contested, questioned or denied, shall be commenced within three months from the effective date of the resolution forming such district, or if an election is held, within three months from the date of such election, otherwise the formation of the improvement district and all proceedings in relation thereto, shall be held to be vali and in every respect legal and incontestable.

HISTORY:

Added Stats 1961 ch 1069 p 2754.

NOTES:

Hierarchy Notes:

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WATER--UNCODIFIED ACTS
ACT 240. Desert Water Agency Law (1961 ch 1069)

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Uncod Water Deer, Act 240 § 34 (2015)

§ 34. Advancement of general funds to accomplish purposes of improvement district; Manner of repayment

The board of directors may advance general funds of the agency to accomplish the purposes of an improvement district formed in accordance with Sections 29 or 33. If the improvement district is formed under Section 33, the board may provide that the district shall be repaid for any advance of funds, with interest at a rate not to exceed 8 percent per annum from the taxes levied exclusively upon the taxable property in the improvement district. If the improvement district is formed under Section 29 the board may repay the agency for any advance of funds from the proceeds of the sale of bonds authorized for the purposes of such improvement district or as provided in Section 25. To the extent that advances made for improvements for which such bonds were authorized are repaid from funds other than the proceeds of the sale of bonds of the improvement district, the authority of the board to issue bonds of the improvement district in a like amount or amounts shall terminate. The treasurer shall maintain proper records and accounts in which there shall be set forth all repayments of advances to the extent that such advances are made for the improvements for which such bonds were authorized and, to the extent that such repayments reduce the amount of bonds which may be issued on behalf of any improvement district, the net principal amount of authorized but unissued bonds of such improvement district.

HISTORY:

Added Stats 1961 ch 1069 p 2754. Amended Stats 1967 ch 152 § 9.6 p 1231; Stats 1971 ch 304 § 6; Stats 1975 ch 130 § 96.

NOTES:

Hierarchy Notes:

Uncod Water Deer Note

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WATER--UNCODIFIED ACTS
ACT 240. Desert Water Agency Law (1961 ch 1069)

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Uncod Water Deer, Act 240 § 35 (2015)

§ 35. Interest on bonds issued by agency

Interest on any bonds issued by the agency coming due before the proceeds of a tax levied at the next general tax levy after the sale of said bonds are available, and interest on any bonds issued by the agency coming due before the expiration of one year following completion of the acquisition and construction of the works and improvements for which the bonds were issued may be paid from the proceeds of the sale of such bonds.

HISTORY:

Added Stats 1961 ch 1069 p 2754. Amended Stats 1967 ch 152 § 9.7 p 1231.

NOTES:

Hierarchy Notes:

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WATER--UNCODIFIED ACTS
ACT 240. Desert Water Agency Law (1961 ch 1069)

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Uncod Water Deer, Act 240 § 36 (2015)

§ 36. Annexation; Petition; Certificate; Grant of petition by ordinance; Election

Land not a part of the agency whether or not contiguous to it or to other portions added to the agency, and consisting of any portion of the county wherein the agency was formed or of any municipality therein, or of land in any county contiguous to the county wherein the agency was formed or of any municipality therein, may be included within the agency, other than land included in any public district having identity of purpose or substantial identity of purpose, without the prior written consent of such public district, evidenced by a resolution duly adopted by the governing board thereof. Such annexation shall occur in the following manner. A petition, which may consist of any number of separate instruments, shall be filed with the secretary of the agency, signed by voters residing within the boundaries of the area proposed to be annexed equal in number to at least 10 per centum of the number of such voters voting for all candidates for the office of Governor of this State at the last general election prior to the filing of such petition. Such petition shall set forth and describe the boundaries of the area proposed to be annexed and shall contain a prayer that such area be annexed to such Desert Water Agency.

The text of such petition shall be published once a week for at least two weeks, the last publication to be made not less than one week nor more than four weeks before the time at which the same is to be presented to the board of directors of the agency in at least one, but not to exceed three, newspapers printed and published in such county, together with a notice stating the time of the meeting at which the same will be presented. When contained upon one or more instruments, one copy only of such petition need be published. No more than five of the names attached to said petition need appear in said publication of said petition and notice, but the number of signers shall be stated.

Within 10 days of the date of the filing of such petition the secretary of the agency shall examine the same and ascertain whether or not such petition is signed by the requisite number of voters; and if requested by the secretary of the agency, the board of directors shall authorize him to employ persons especially for that purpose, in addition to the persons regularly employed in his office, and shall provide for their compensation. When the secretary of the agency has completed his examination of the petition, he shall attach to the same his certificate, properly dated, showing the result of such examination; and if from such examination he shall find that said petition is signed by the requisite number of voters or is not so signed, he shall certify that the same is sufficient or insufficient, as the case may be.

If, by the certificate of the secretary of the agency, the petition is found to be insufficient, he shall also certify to the number of voters required to make such petition sufficient, and it may be amended by filing a supplemental petition or petitions within 10 days of the date of such certificate. The secretary of the agency shall, within 10 days after the filing

of such supplemental petition or petitions, make like examination of the same and certify to the result of such examination as hereinbefore provided.

If his certificate shall show any such petition, or such petition as amended, to be insufficient, it shall be filed by hi with the board of directors of the agency and kept as a public record without prejudice, however, to the filing of a new petition to the same effect. But if, by the certificate of the secretary, such petition, or petition as amended, is shown to be sufficient, the secretary shall present the same to the board of directors, without delay.

If any supplemental petition be filed, all the signatures appended to the petition or to the supplemental petition or petitions shall be considered in determining the number of voters signing the petition.

After an election for the annexation of such area to the agency the sufficiency of such petition in any respect shall not be subject to judicial review or be otherwise questioned.

Such petition may be granted by ordinance of the board of directors of such agency. In granting such petition, such board of directors may fix in said ordinance the terms and conditions upon which such annexation may occur, and such terms and conditions may provide, among other things, for the levy by such Desert Water Agency of special taxes upon taxable property which such annexed area or areas in addition to the taxes elsewhere in this act authorized to be levied by such Desert Water Agency, and in case such terms and conditions shall provide for the levy of such special taxes, the board of directors, in fixing such terms and conditions, shall specify the aggregate amount to be so raised and the number of years prescribed for raising such aggregate sum and that substantially equal annual levies will be made for the purpose of raising such sum over the period so prescribed. Such terms and conditions also may provide, among other things, that a special water rate may be fixed from time to time by the board of directors for the area or areas proposed to be annexed. Such terms and conditions also may further provide that the taxable property in the annexed area be subject to taxation to the extent set forth in such terms and conditions for the purpose of the payment of bonds and other obligations of such agency at the time authorized or outstanding. If such petition is granted, the proposition of such annexation subject to the terms and conditions so fixed, shall be submitted to the vote of the voters in the proposed addition, at an election called by the board of directors and held, as herein provided, within 70 days after the effective date of such ordinance. Notice of such election shall be given by publication in a newspaper of general circulation published in the county once a week for three successive weeks, the last publication to be not more than four weeks nor less than one week prior to the date fixed for such election. Such notice shall describe the boundaries of the area or areas so proposed to be annexed and shall designate such territory by some appropriate name, or other words of identification, by which such territory may be referred to and indicated upon the ballot to be used at any election at which the question of such annexation is submitted, as in this act provided. Such notice also shall contain the substance of the terms and conditions fixed by the board of directors, as herein provided. The measure so submitted at such election shall be stated on the ballot substantially as follows: "Shall ..... (giving the name or other designation of the territory proposed to be annexed, as stated in the notice of election) be annexed to the Desert Water Agency, subject to the terms and conditions fixed by the board of directors of said agency?" At the right of such proposition there shall be printed the words "Yes" and "No" with voting squares. The board of directors shall canvass the votes cast at such election and if such proposition is approved by a majority of the voters voting thereon at such election, the president and secretary of the board of directors shall certify that fact to the Secretary of State and to the county recorder of the county in which such agency is located. Upon receipt of such last-mentioned certificate, the Secretary of State shall within 10 days, issue his certificate, reciting the passage of said ordinance and the addition of said area or areas to said agency. A copy of said certificate shall be transmitted to, and filed with the county clerk of the county in which such Desert Water Agency is situated. From and after the date of such certificate, the area or areas named therein shall be deemed added to, and shall form a part of, said Desert Water Agency, and the taxable property therein shall be subject to taxation thereafter for the purposes of said Desert Water Agency, and the board of directors of such Desert Water Agency shall be empowered to do all things necessary to enforce and make effective the terms and conditions of annexation fixed as hereinabove authorized.

HISTORY:

Added Stats 1961 ch 1069 p 2754.

NOTES:

Hierarchy Notes:

Uncod Water Deer Note

Act 240 Note

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WATER--UNCODIFIED ACTS
ACT 240. Desert Water Agency Law (1961 ch 1069)

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Uncod Water Deer, Act 240 § 37 (2015)

§ 37. Uninhabited territory; When annexation permitted; Petition; Resolution; Notice; Certificate; Protest; Ordinance approving annexation

Uninhabited territory within a county in which the Desert Water Agency is situated, other than territory included in any public district having identity of purpose or substantial identity of purpose, without the prior written consent of such public district, evidenced by a resolution duly adopted by the governing board thereof, may be added to such agency pursuant to the provisions of this section. For the purposes hereof, territory shall be deemed uninhabited if less than 12 voters reside therein at the time of the filing of the petition for annexation or the initiation of proceedings by resolution of the board. Such uninhabited territory, whether consisting of unincorporated territory or of incorporated territory or of both such unincorporated and incorporated territory, may consist of one or more parcels, which need not be contiguous one with the other or with the agency.

Proceedings for the annexation of uninhabited territory to the agency may be initiated by petition. Such petition, which may consist of any number of separate instruments, shall be filed with the secretary of the agency, signed by the owners of not less than one-fourth of the land in such territory by area and by assessed value as shown on the last equalized assessment roll of the county in which such territory is situated. A guardian, executor, administrator, or other person holding property in a trust capacity under appointment of court, may sign any petition or protest provided for in this section, when authorized by the proper court, which authorization may be made without notice. The last equalized assessment roll of said county is prima facie evidence of the ownership of the land or lands lying within such territory proposed to be annexed. Such petition shall set forth and describe the boundaries of the area proposed to be annexed an shall contain a prayer that such area be annexed to such Desert Water Agency pursuant to the provisions of this section.

The secretary shall present such petition to the board of directors of the agency at its next meeting, and said board, without delay, shall pass a resolution giving notice of the proposed annexation. Said resolution shall state that such petition has been filed, shall set forth and describe the boundaries of the territory proposed to be annexed, shall contain the terms and conditions of annexation, if any, prescribed by the board as hereinafter authorized, shall state that any owner of property within such territory may file with the secretary of the agency, at any time prior to the hour set for the hearing thereof, written protest to the annexation of such territory, or to the annexation of such territory upon such terms and conditions, as the case may be, and shall fix the time and place of the meeting of the board at which the board will hear such protests.

The board of directors of the agency by resolution may initiate proceedings for the annexation of uninhabited territory to such agency. Such resolution shall declare that proceedings have been initiated by the board of directors under

the provisions of this section, shall state the reason for proposing such annexation, shall set forth and describe the boundaries of the territory proposed to be annexed, shall contain the terms and conditions of annexation, if any, prescribed by the board as hereinafter authorized, shall state that any owner of property within such territory may file with the secretary of the agency, at any time prior to the hour set for the hearing thereof, written protest to the annexation of such territory, or the annexation of such territory upon such terms and conditions, as the case may be, and shall fix the time and place of the meeting of the board at which the board will hear such protests.

Said hearing shall be commenced not less than 20 nor more than 40 days after the passage of the resolution of the board of directors. The secretary of the agency shall cause the text of the resolution to be published once each week for at least two weeks, the last publication to be made not less than one week nor more than four weeks before the time so fixed for the hearing, in at least one, but not to exceed three, newspapers printed and published in the agency.

After the date of issuance by the Secretary of State of his certificate reciting the passage of the ordinance approving the annexation and the addition of the uninhabited territory to the agency, the sufficiency of the petition or resolution shall not be subject to judicial review or be otherwise questioned.

At any time prior to the hour set for the hearing of protests, any owner of property within the territory proposed to be annexed may file with the secretary of the agency written protest against the annexation, or against the annexation upon the terms and conditions specified in the resolution, as the case may be. The protest shall state the name of the owner of the property affected, and the description and area of such property in general terms. At the hearing, which may be adjourned from time to time, the board of directors shall hear and pass upon all protests so filed. If such protests are so filed by the owners of one-half of the value of the territory proposed to be annexed as shown by the last equalized assessment roll of the county, further proceedings shall not be taken. If such protest is not made, the ordinance approving such annexation shall set forth and describe the boundaries, of the territory so annexed and the terms and conditions of annexation, if any, prescribed by the board as hereinafter authorized. If the board of directors disapproves the annexation, or the annexation subject to such terms and conditions, as the case may be, a new proceeding to annex any of the same territory shall not be initiated under this section for a period of 12 months from the effective date of the ordinance.

The board of directors may approve the annexation of such territory upon terms and conditions fixed by the board in the manner hereinafter provided. Such terms and conditions may provide, among other things, for the levy by such Desert Water Agency of special taxes upon taxable property within such annexed area or areas in addition to the taxes elsewhere in this act authorized to be levied by such Desert Water Agency, and in case such terms and conditions shall provide for the levy of such special taxes, the board of directors, in fixing such terms and conditions, shall specify the aggregate amount to be so raised and the number of years prescribed for raising such aggregate sum and that substantially equal annual levies will be made for the purpose of raising such sum over the period so prescribed. Such terms and conditions also may provide, among other things, that a special water rate may be fixed from time to time by the board of directors for the area or areas proposed to be annexed. Such terms and conditions also may further provide that the taxable property in the annexed area be subject to taxation to the extent set forth in such terms and conditions for the purpose of the payment of bonds and other obligations of such agency at the time authorized or outstanding. The board shall propose such terms and conditions either in the resolution adopted subsequent to the filing of a petition for annexation or in the resolution initiating the proceedings, as the case may be, or in a resolution adopted by the board at the hearing. Terms and conditions proposed in a prior resolution may be amended and the amended terms and conditions proposed in a resolution adopted by the board at the hearing. If such terms and conditions or amended terms and conditions, are proposed by the board in a resolution adopted at the hearing, the board shall adjourn the hearing for not less than 20 nor more than 40 days, to a time and place to be fixed in such resolution, and said resolution shall state that any owner of property within such territory may file with the secretary of the agency, at any time prior to the hour set for the adjourned hearing, written protests to the annexation of such territory upon such terms and conditions. The secretary of the agency shall cause the text of the resolution to be published for the time and in the manner required for publication of the resolution giving notice of the original hearing. If prior to the hour set for the adjourned hearing, written protests, in the form hereinabove prescribed, to the annexation of such territory subject to such terms and conditions, are filed with the secretary of the agency by the owners of one-half of the value of said territory as shown by the last equalized assessment roll of the county, further proceedings shall not be taken. If such protest is not made the board of directors shall by ordinance approve or disapprove the annexation. If approved, such annexation shall be subject to the terms and conditions, or amended terms and conditions, so proposed by resolution of the board, which terms and conditions shall be set forth in the ordinance.

When an ordinance approving annexation of uninhabited territory becomes effective, the president and secretary of the board of directors shall file with the Secretary of State a certified copy of the ordinance. Upon receipt of the certified

copy of the ordinance, the Secretary of State shall, within 10 days issue his certificate reciting the passage of said ordinance and the addition of said area or areas to said agency. A copy of said certificate shall be transmitted to, and filed with, the county clerk of the county in which such Desert Water Agency is situated. From and after the date of such certificate, the area or areas named therein shall be deemed added to, and shall form a part of said Desert Water Agency, and the taxable property therein shall be subject to taxation thereafter for the purposes of said Desert Water Agency, and the board of directors of such Desert Water Agency shall be empowered to do all things necessary to enforce and make effective the terms and conditions of annexation fixed as hereinabove authorized.

Notwithstanding the eligibility of any territory for annexation to the agency pursuant to the provisions of this section, the procedure herein prescribed shall not be deemed exclusive and such territory may be annexed to such agency as a separate parcel, or as part of a larger parcel, of territory annexed under the provisions of Section 36 of this act.

HISTORY:

Added Stats 1961 ch 1069 p 2754.

NOTES:

Hierarchy Notes:

Uncod Water Deer Note

Act 240 Note

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WATER--UNCODIFIED ACTS
ACT 240. Desert Water Agency Law (1961 ch 1069)

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Uncod Water Deer, Act 240 § 38 (2015)

§ 38. Exclusion of territory; Petition; Determination as to petition's sufficiency; Publication of petition in notice; Resolution; Election

Territory included within the Desert Water Agency may be excluded from such agency; provided, that where any part of the corporate area of any city is included in the territory proposed to be excluded from the agency, the whole of the corporate area of such city, or part thereof, then included within such agency shall be included in the territory so proposed to be excluded from such agency. Such territory may consist of one or more parcels, which need not be contiguous one with the other.

Proceedings for the exclusion of territory from the agency may be initiated by petition. Such petition, which may consist of any number of separate instruments, shall be filed with the secretary of the agency, signed by voters residing within the boundaries of the area proposed to be excluded equal in number to at least ten (10) per centum of the number of such voters voting for all candidates for the office of Governor of this State at the last general election prior to the filing of such petition; provided, that where one or more cities, or parts thereof, are included in the areas so proposed to be excluded, such petition must be signed by a least ten (10) per centum of the voters of each such city, or part thereof, so voting at such election. Such petition shall set forth and describe the boundaries of the area proposed to be excluded, shall state the reason for proposing such exclusion and shall contain a prayer that such area be excluded from the agency.

Within ten (10) days of the date of the filing of such petition the secretary of the agency shall examine the same and ascertain whether or not such petition is signed by the requisite number of voters; and if requested by the secretary of the agency, the board of directors shall authorize him to employ persons especially for that purpose, in addition to the persons regularly employed in his office, and shall provide for their compensation. When the secretary of the agency has completed his examination of the petition, he shall attach to the same his certificate, properly dated, showing the result of such examination; and if from such examination he shall find that said petition is signed by the requisite number of voters, or is not so signed, he shall certify that the same is sufficient or insufficient, as the case may be.

If, by the certificate of the secretary of the agency, the petition is found to be insufficient, he shall also certify to the number of voters required to make such petition sufficient, and it may be amended by filing a supplemental petition or petitions within ten (10) days of the date of such certificate. The secretary of the agency shall, within ten (10) days after the filing of such supplemental petition or petitions, make like examination of the same and certify to the result of such examination as hereinbefore provided.

If any supplemental petition be filed, all the signatures appended to the petition or to the supplemental petition or petitions shall be considered in determining the number of voters signing the petition.

If his certificate shall show any such petition, or such petition as amended, to be insufficient, it shall be filed by him with the board of directors of the agency and kept as a public record, without prejudice, however, to the filing of a new petition to the same effect. But if, by the certificate of the secretary, such petition, or petition as amended is shown to be sufficient, the secretary shall present the same to the board of directors without delay.

The text of such petition shall be published once each week for at least two weeks, the last publication to be made not less than one week nor more than four weeks, before the time at which the same is to be presented to the board of directors of the agency in at least one, but not to exceed three, newspapers printed and published in such agency, together with a notice stating the time of the meeting at which the same will be presented. When contained upon more than one instrument, one copy only of such petition need be published. No more than five of the names attached to said petition need appear in such publication of said petition and notice, but the number of signers shall be stated.

After an election for the exclusion of such area from the agency the sufficiency of such petition in any respect shall not be subject to judicial review or be otherwise questioned.

The board of directors of the agency, by resolution, may initiate proceedings for the exclusion of territory from such agency. Such resolution shall describe the boundaries of the area proposed to be excluded, shall state the reason for proposing such exclusion, shall require all persons interested in the proposed exclusion to appear before the board and be heard as to why said area should not be so excluded, shall fix the time of the meeting of the board at which persons so interested will be heard, and shall direct the secretary of the agency to give notice thereof. The secretary thereupon shall cause the text of said resolution and a notice of the time and place of said hearing to be published once each week for at least two weeks, the last publication to be made not less than one week nor more than four weeks, before the time so fixed for the hearing, in at least one, but not to exceed three, newspapers printed and published in the agency.

After an election for the exclusion of such area from the agency the sufficiency of such resolution shall not be subject to judicial review or be otherwise questioned.

If the proceedings for exclusion have been initiated by petition, such petition may be granted by ordinance of the board of directors of such agency. If such proceedings have been initiated by resolution, the board of directors shall hear all persons interested in the proposed exclusion who appear at the hearing, which may be adjourned from time to time, and after the conclusion of the hearing, the board may determine by ordinance that such area should be excluded from the agency. If such petition is granted or if such determination is made, the proposition of such exclusion shall be submitted to the vote of the voters within the area proposed to be excluded, at an election called by the board of directors and held, as herein provided, within 70 days after the effective date of such ordinance. Notice of such election shall be given by publication in a newspaper of general circulation published in the agency once a week for three successive weeks, the last publication to be not more than four weeks nor less than one week, prior to the date fixed for such election. Such notice shall describe the boundaries of the area so proposed to be excluded and shall designate such area by some appropriate name, or other words of identification, by which such area may be referred to and indicated upon the ballot to be used at any election at which the question of such exclusion is submitted, as in this act provided. The measure so submitted at such election shall be stated on the ballot substantially as follows:

"Shall ..... (giving the name or other designation of the area proposed to be excluded, as stated in the notice of the election) be excluded from the Desert Water Agency?"

At the right of such proposition there shall be printed the words "Yes" and "No" with voting squares. The board of directors shall canvass the votes cast at such election and if such proposition is approved by a majority of the voters voting thereon at such election, the president and secretary of the board of directors shall certify that fact to the Secretary of State. Upon receipt of such last-mentioned certificate, the Secretary of State shall, within 10 days, issue his certificate reciting the passage of said ordinance and the exclusion of said area from said agency. A copy of said certificate shall be transmitted to, and filed with, the county clerk of the county or counties in which the Desert Water Agency is situated. From and after the date of such certificate, the area named therein shall be deemed excluded from, and shall no longer form a part of, said Desert Water Agency, but the taxable property within such excluded area shall continue taxable by the Desert Water Agency for the purpose of paying the bonded or other indebtedness of the Desert Water Agency outstanding or contracted for at the time of such exclusion and until such bonded or other indebtedness shall have been satisfied, to the same extent that such property would be taxable for such purpose if such exclusion had not occurred.

HISTORY:

Added Stats 1961 ch 1069 p 2754.

NOTES:

Hierarchy Notes:

Uncod Water Deer Note

Act 240 Note

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WATER--UNCODIFIED ACTS
ACT 240. Desert Water Agency Law (1961 ch 1069)

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Uncod Water Deer, Act 240 § 39 (2015)

§ 39. Uninhabited territory; When exclusion authorized; Petition; Resolution; Notice and hearing; Protests; Ordinance

Uninhabited territory included within the Desert Water Agency may be excluded from such agency pursuant to the provisions of this section. For the purposes hereof, territory shall be deemed uninhabited if less than 12 voters reside therein at the time of the filing of the petition for exclusion or the initiation of proceedings by resolution of the board. Where any part of the corporate area of any city is included in the territory proposed to be excluded from the agency, the whole of the corporate area of such city, or a part thereof, then included within such agency shall be included in the territory so proposed to be excluded from such agency. Such uninhabited territory may consist of one or more parcels, which need not be contiguous one with the other.

Proceedings for the exclusion of uninhabited territory from the agency may be initiated by petition. Such petition, which may consist of any number of separate instruments, shall be filed with the secretary of the agency, signed by the owners of not less than one-fourth of the land in such territory by area and by assessed value as shown on the last equalized assessment roll of the county or counties in which such territory is situated. A guardian, executor, administrator, or any person holding property in a trust capacity under appointment of court, may sign any petition or protest provided for in this section, when authorized by the proper court, which authorization may be made without notice. The last equalized assessment roll of said county is prima facie evidence of the ownership of the land or lands lying within such territory proposed to be excluded. Such petition shall set forth and describe the boundaries of the area proposed to be excluded, shall state the reason for proposing such exclusion, and shall contain a prayer that such area be excluded from the Desert Water Agency pursuant to the provisions of this section.

The secretary shall present such petition to the board of directors of the agency at its next meeting, and said board, without delay, shall pass a resolution giving notice of the proposed exclusion. Said resolution shall state that said petition has been filed, shall set forth and describe the boundaries of the territory proposed to be excluded, shall state that any owner of property within such territory may file with the secretary of the agency, at any time prior to the hour set for the hearing thereof, written protest to the exclusion of such territory, and shall fix the time and place of the meeting of the board at which the board will hear such protests.

The board of directors of the agency by resolution may initiate proceedings for the exclusion of uninhabited territory from such agency. Such resolution shall declare that proceedings have been initiated by the board of directors under the provisions of this section, shall state the reason for proposing such exclusion, shall set forth and describe the boundaries of the territory proposed to be excluded, shall state that any owner of property within such territory may file with

the secretary of the agency, at any time prior to the hour set for the hearing thereof, written protest to the exclusion of such territory, and shall fix the time and place of the meeting of the board at which the board will hear such protests.

Said hearings shall be commenced not less than 20 nor more than 40 days after the passage of the resolution of the board of directors. The secretary of the agency shall cause the text of the resolution to be published once each week for at least two weeks, the last publication to be made not less than one week nor more than four weeks before the time so fixed for the hearing, in at least one, but not to exceed three, newspapers published in the agency.

After the date of issuance by the Secretary of State of his certificate reciting the passage of the ordinance approving the exclusion and the exclusion of the uninhabited territory from the agency, the sufficiency of the petition or resolution shall not be subject to judicial review or be otherwise questioned.

At any time prior to the hour set for the hearing of protests, any owner of property within the territory proposed to be excluded may file with the secretary of the agency written protest against the exclusion. The protest shall state the name of the owner of the property affected, and the description and area of such property in general terms. At the hearing, which may be adjourned from time to time, the board of directors shall hear and pass upon all protests so filed. If such protests are so filed by the owners of one-half of the value of the territory proposed to be excluded as shown by the last equalized assessment roll of the county or counties, further proceedings shall not be taken. If such protest is not made, the board of directors shall approve or disapprove the exclusion by ordinance. Any ordinance approving such exclusion shall set forth and describe the boundaries of the territory so excluded. If the board of directors disapproves the exclusion, a new proceeding to exclude any of the same territory shall not be initiated under this section for a period of 12 months from the effective date of the ordinance.

When an ordinance approving exclusion of uninhabited territory becomes effective, the president and secretary of the board of directors shall file with the Secretary of State a certified copy of the ordinance. Upon receipt of the certified copy of the ordinance, the Secretary of State shall, within 10 days, issue his certificate reciting the passage of said ordinance and the exclusion of said area or areas from said agency. A copy of said certificate shall be transmitted to, and filed with, the county clerks of the counties in which the Desert Water Agency is situated. From and after the date of such certificate, the area or areas named therein shall be deemed excluded from, and shall no longer form a part of, said Desert Water Agency, but the taxable property within such excluded area or areas shall continue taxable by such Desert Water Agency for the purpose of paying the bonded or other indebtedness of the Desert Water Agency outstanding or contracted for at the time of such exclusion and until such bonded or other indebtedness shall have been satisfied, to the same extent that such property would be taxable for such purpose if such exclusion had not occurred.

Notwithstanding the eligibility of any territory for exclusion from the Desert Water Agency pursuant to the provisions of this section, the procedure herein prescribed shall not be deemed exclusive and such territory may be excluded from such agency as a separate parcel, or as part of a larger parcel, of territory excluded under the provisions of Section 38 of this act.

HISTORY:

Added Stats 1961 ch 1069 p 2754.

NOTES:

Hierarchy Notes:

Uncod Water Deer Note

Act 240 Note

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WATER--UNCODIFIED ACTS
ACT 240. Desert Water Agency Law (1961 ch 1069)

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Uncod Water Deer, Act 240 § 40 (2015)

§ 40. Passage of ordinances by voters; Method

Ordinances may be passed by the voters of the Desert Water Agency organized under the provisions of this act in accordance with the methods provided by the Elections Code for direct legislation in cities.

HISTORY:

Added Stats 1961 ch 1069 p 2754.

NOTES:

Hierarchy Notes:

Uncod Water Deer Note

Act 240 Note

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WATER--UNCODIFIED ACTS
ACT 240. Desert Water Agency Law (1961 ch 1069)

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Uncod Water Deer, Act 240 § 41 (2015)

§ 41. Disapproval of ordinances by voters; Method

Ordinances may be disapproved and thereby vetoed by the voters of this agency by proceeding in accordance with the methods provided by the Elections Code for protesting against legislation in cities.

HISTORY:

Added Stats 1961 ch 1069 p 2754.

NOTES:

Hierarchy Notes:

Uncod Water Deer Note

Act 240 Note

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WATER--UNCODIFIED ACTS
ACT 240. Desert Water Agency Law (1961 ch 1069)

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Uncod Water Deer, Act 240 § 42 (2015)

§ 42. Disorganization or disincorporation of agency; Petition; Certificate as to petition; Sufficiency; Election

The Desert Water Agency organized under the terms of this act may be disorganized or disincorporated in the following manner:

A petition shall be filed with the county clerk of the principal county in which such agency is located, signed by at least 25 percent of the voters of the area included in the district who voted at the last gubernatorial election, praying for the disorganization and disincorporation of such agency and briefly stating the reasons therefor. Upon the filing of such petition the county clerk shall examine the same within 10 days and ascertain whether or not said petition is signed by the requisite number of voters. When the said county clerk has completed his examination of the petition he shall attach to the same his certificate properly dated, showing the result of such examination, and if from such examination he shall find that said petition is signed by the requisite number of voters residing within the boundaries of the Desert Water Agency, or is not so signed, he shall certify that the same is sufficient or insufficient, as the case may be. If the same is found to be insufficient by him, supplemental petitions may be filed at the time and in the manner and for the same purpose as supplemental petitions to the original petition for the incorporation of the agency. After an election for the disincorporation of the agency hereunder the sufficiency of such petition in any respect shall not be subject to judicial review or be otherwise questioned.

If by the certificate of the county clerk such petition, or such petition as amended or supplemented, is shown to be sufficient, the county clerk shall present the same to the board of supervisors without delay. When such petition is presented by the county clerk as aforesaid, the board of supervisors shall give notice of an election to be held in said agency for the purpose of determining whether or not the same shall be disincorporated and dissolved; provided, however, that in the event the said agency shall have issued bonds, the board of supervisors shall not consider said petition or take any action hereunder until evidence shall be furnished showing said bonds to have been fully satisfied. Said notice of election shall be published in a newspaper published in said agency and determined by said board most likely to give notice to those interested in said hearing, at least once a week for three successive weeks, the last publication to be not more than four weeks nor less than one week prior to the date fixed for the election; said notice shall state that the question of disincorporating said corporation shall be submitted to the voters of said agency at the time appointed for such election, and voters shall be invited thereby to vote upon such proposition by placing upon their ballots the cross as provided by law after the words "For Disincorporation" or "Against Disincorporation." The board of supervisors shall cause a copy of said notice to be mailed by the clerk of said board to each of the directors of said Desert Water Agency, within five days after the date of the first publication thereof, and no election shall be had until proof of such mailing is furnished by affidavit of the clerk of said board. Such election shall be held and conducted in the same manner as the

election on the organization of said agency, as nearly as practicable. Within seven days after the date of said election, the board of supervisors shall proceed to canvass the vote cast thereat; if it be found by the canvass of said votes that less than a majority of the votes cast were in favor of disincorporation, said board of supervisors shall declare the petition for disincorporation is denied. In case it shall appear from said canvass that a majority of all the votes cast were in favor of disincorporation, said board of supervisors shall make and cause to be entered upon the records of their proceedings an order that the petition for such disincorporation be granted, and declaring that the Desert Water Agency be disincorporated; said order to take effect at the time hereinafter provided. Said board of supervisors shall in case said Desert Water Agency is so disincorporated, forthwith cause its clerk, or other officer performing the duties of clerk, to make and transmit to the Secretary of State a certified copy of the notice of election hereinbefore provided for, and a statement of the number of voters voting for said disincorporation and the number of voters voting against said disincorporation. Twenty days from and after the holding of the election, in case a majority of said votes were cast in favor of said disincorporation, said Desert Water Agency shall be forever disincorporated.

HISTORY:

Added Stats 1961 ch 1069 p 2754.

NOTES:

Hierarchy Notes:

Uncod Water Deer Note

Act 240 Note

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WATER--UNCODIFIED ACTS
ACT 240. Desert Water Agency Law (1961 ch 1069)

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Uncod Water Deer, Act 240 § 43 (2015)

§ 43. Procedure on disincorporation; Determination of amount of agency's indebtedness, etc.; Disposition of agency's moneys and property; Warrants for indebtedness; Payment of indebtedness

Upon disincorporation of the agency in the manner hereinbefore provided for, the board of supervisors of the principal county shall forthwith, after ascertaining by said canvass that the disincorporation has been carried, determine the amount of the indebtedness of said agency, the amount of money in the treasury thereof and all indebtedness due or coming due the said agency, and the directors of said agency shall furnish the said board of supervisors with a statement showing said amount of indebtedness, the same amount of money in the treasury and all indebtedness due or coming due said agency, and said Desert Water Agency shall before the expiration of 30 days turn over to the treasury of said county all moneys of said agency in his possession, and said county treasurer shall place said money in a special fund to be drawn upon as hereinafter provided for. Upon the disincorporation of said agency every public officer of said agency shall immediately turn over to the board of supervisors of the principal county in which said agency is situated, all public property of every nature and description in their possession, and including all public records and data of every nature and description. Nothing contained in this act shall be held to relieve said Desert Water Agency, or the territory included within it, from any liability or any debt contracted by said agency prior to its disincorporation. All warrants for said indebtedness shall be drawn on order of said board of supervisors of the county, on the fund hereinabove provided for in the county treasury of the principal county. All moneys paid into the county treasury under the provisions of this act shall be placed in the special fund hereinbefore provided for. If at any time after the disincorporation of said agency it shall be found that there is not sufficient money in the treasury to the credit of the fund hereinbefore provided, with which to pay any indebtedness of said agency, said board of supervisors shall have the power, and it shall be their duty, to levy upon, and there shall be collected from, the property within the territory formerly included within said agency subject to taxation for the indebtedness, a tax or taxes sufficient in amount to pay the said indebtedness as the same shall become due; such tax or taxes, assessments and collections shall be made in the same manner and at the same time that other taxes of the county are levied and collected, and there shall be an additional tax within said territory for the payment of said debts. If after payment of all debts of said agency there shall remain any surplus in the hands of said county treasurer to the credit of the fund hereinbefore mentioned, the board of supervisors shall appropriate said surplus and declare a dividend pro rata to the taxpayers of said agency duly paid, and said taxpayers shall have the right to have the amount of such pro rata dividends refunded to them on demand, and the said board of supervisors shall refund such pro rata to said taxpayers and each thereof. The board of supervisors of the principal county in which said agency has been disincorporated, shall have the power and it shall be the duty of said board, if the board of directors of such agency shall fail or refuse to return to said board the statement of said amounts as hereinbefore in this act provided, to ascertain the indebtedness, other than the bonded indebtedness, of said agency at the time of its disincorporation, the amount of

money in its treasury and the amount due it at the said time; said board of supervisors shall make provision for the collection of the amounts due to said agency for the closing up of its affairs, and any act or acts necessary for said purposes not otherwise herein provided for, shall upon the order of said board of supervisors directing the same, be as fully done and performed and with as full effect as if the same had been performed by the proper officers of said agency before disincorporation, and said county shall succeed to and possess all the right of said agency in and to said indebtedness, and shall have the power to sue for or otherwise collect any such debts in the name of said county, and all costs and expenses of ascertaining the facts hereinbefore mentioned, and all other costs and expenses incurred by the board of supervisors in the execution of the orders and duties of said board of supervisors provided for in this act, shall be paid out of the special fund in this act provided for.

It is the intention that the Desert Water Agency shall not be disincorporated until all bonded indebtedness shall have been fully paid, and by the word "indebtedness" as used herein is meant all indebtedness other than said bonded indebtedness unless the latter is expressly used.

HISTORY:

Added Stats 1961 ch 1069 p 2754.

NOTES:

Hierarchy Notes:

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WATER--UNCODIFIED ACTS
ACT 240. Desert Water Agency Law (1961 ch 1069)

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Uncod Water Deer, Act 240 § 44 (2015)

§ 44. Validity of proceedings, etc., notwithstanding informality; Period of limitation for attacking validity

No informality in any proceeding or informality in the conduct of any election, not substantially affecting adversely the legal rights of any citizen, shall be held to invalidate the annexation of territory to, or exclusion of territory from, or the disincorporation of, the Desert Water Agency. Any action or proceeding, wherein the validity of such annexation or exclusion or disincorporation is denied or questioned, shall be commenced within three months from the date of the certificate of annexation or of exclusion issued by the Secretary of State, or from the date of the order of the board of supervisors declaring the disincorporation, as the case may be; otherwise, said annexation or exclusion or disincorporation, and all proceedings in respect thereto, shall be held to be valid and in every respect legal and incontestable.

HISTORY:

Added Stats 1961 ch 1069 p 2754.

NOTES:

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WATER--UNCODIFIED ACTS
ACT 240. Desert Water Agency Law (1961 ch 1069)

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Uncod Water Deer, Act 240 § 45 (2015)

§ 45. Continuance of other statutory provisions relating to water, etc., to cities; Definitions

Nothing in this act shall be so construed as repealing or in any wise modifying the provisions of any other act relating to water or the supply of water to, or the acquisition thereof, by cities within this State. The term "city," as used in this act, shall mean and include any city or incorporated town, whether organized or functioning under a freeholders' charter or under the provisions of general laws. The word "agency" shall apply, unless otherwise expressed or used, to the Desert Water Agency formed under the provisions of this act, and the word "board" and the words "board of directors" shall apply to the board of directors of such agency. The meaning of the term "voter," as used in this act, shall be ascertained by reference to *Section 21 of the Elections Code*.

HISTORY:

Added Stats 1961 ch 1069 p 2754.

NOTES:

Editor's Notes

Elec C § 21 defining "voter" has been repealed. See now *Elec C § 359*.

Hierarchy Notes:

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WATER--UNCODIFIED ACTS
ACT 240. Desert Water Agency Law (1961 ch 1069)

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Uncod Water Deer, Act 240 § 46 (2015)

§ 46. Registrar of voters; Performance of duties assigned to county clerk

If there shall be a registrar of voters, other than the county clerk, in the principal county in which the Desert Water Agency is hereby incorporated, or incorporated, under the provisions of this act, is situated, the duties required by this act to be performed by the county clerk respecting the nomination of candidates for offices of such water agency and the holding of elections in such agency, shall be performed by such registrar of voters.

HISTORY:

Added Stats 1961 ch 1069 p 2754.

NOTES:

Hierarchy Notes:

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WATER--UNCODIFIED ACTS
ACT 240. Desert Water Agency Law (1961 ch 1069)

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Uncod Water Deer, Act 240 § 47 (2015)

§ 47. Lands situated in more than one county; Formation of or annexation of lands to agency; Procedure

The agency formed hereunder may contain lands situate in more than one county and this agency may annex lands situate in another county or counties. In either such case the lands need not be contiguous. The procedure relating to formation, annexation, disorganization, disincorporation, exclusion, fiscal matters and taxation shall conform as near as may be to such provisions with respect to agencies containing lands located in one county, subject to the following provisions:

(**a**) The secretary of the board of directors of the Desert Water Agency containing land in more than one county shall perform all duties prescribed by law to be performed by county clerks or registrars of voters, as the case may be, i connection with agency elections and such duties of county clerks as are required by this act which relate to annexation, disorganization, disincorporation and exclusion, and, where necessary such secretary is authorized to procure from the proper county officials all requisite registration books and copies of indexes thereof; all papers required by this act to be filed with a county clerk shall be filed with said secretary and the board of directors shall perform all duties prescribed by law to be performed by boards of supervisors in connection with agency elections and such duties as are required by this act which relate to annexation, disorganization, disincorporation and exclusion of territory.

(**b**) Immediately after equalization and not later than the 15th day of August of each year, it shall be the duty of the auditor of each county wherein such agency or any part thereof shall lie, to prepare and deliver to the secretary of the agency or such other officer thereof as may be designated by the board of directors therefor a certificate showing the assessed valuation of all property within the agency lying within the county. Thereafter, the board of directors shall make the certification and statement, and issue the directions, as required by Section 27 of this act. After collection of taxes by the proper county officers at the rate specified, such officers shall pay the moneys received therefrom to the agency.

Whenever an improvement district within the Desert Water Agency is itself located in two or more counties, the method and procedure for the apportionment of agency taxes between counties shall apply to such improvement district.

(**c**) Whenever provision is made in this act for notice within a county, it shall be construed to require notice within each county in which agency lands are located.

(**d**) "Principal county" as used in this section means the county in which the greater portion of land of the Desert Water Agency is located.

HISTORY:

Added Stats 1961 ch 1069 p 2754.

NOTES:

Hierarchy Notes:

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WATER--UNCODIFIED ACTS
ACT 240. Desert Water Agency Law (1961 ch 1069)

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Uncod Water Deer, Act 240 § 48 (2015)

§ 48. Repeal of conflicting statutes; Severability of provisions

All acts and parts of acts in conflict herewith are hereby repealed. If any section, subsection, sentence, clause or phrase of this act or the application thereof to any person or circumstance is for any reason held invalid the validity of the remainder of the act or the application of such provision to other persons or circumstances shall not be affected thereby. The Legislature hereby declares that it would have passed this act and each section, subsection, sentence, clause and phrase thereof irrespective of the fact that one or more sections, subsections, sentences, clauses or phrases or the application thereof to any person or circumstance be held invalid.

HISTORY:

Added Stats 1961 ch 1069 p 2754.

NOTES:

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WATER--UNCODIFIED ACTS
ACT 240. Desert Water Agency Law (1961 ch 1069)

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Uncod Water Deer, Act 240 § 49 (2015)

§ 49. Continuance of public corporation or agency and its powers though included in agency; Prohibition against formation of public corporation or agency in water agency's territory without its consent

The inclusion in, or annexation or addition to this agency, of the corporate area of any public corporation or public agency shall not destroy the identity or legal existence or impair the powers of any such public corporation or public agency, notwithstanding the identity of purpose, or substantial identity of purpose of this agency. No public corporation or public agency having identity of purpose or substantial identity of purpose shall be formed partly or entirely within this agency, whether by incorporation or annexation, without the consent of the board of directors of this agency.

HISTORY:

Added Stats 1961 ch 1069 p 2754.

NOTES:

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WATER--UNCODIFIED ACTS
ACT 240. Desert Water Agency Law (1961 ch 1069)

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Uncod Water Deer, Act 240 § 50 (2015)

§ 50. Standby charges; Amount; Ordinance adopting charge; Liens

The agency, by ordinance, may fix, on or before the first day of July in any calendar year, a water standby or availability charge within the agency or in any improvement district thereof to which water is made available by the agency through underground or by surface facilities, whether the water is actually used or not. The standby charge shall not exceed ten ($10) per acre per year for each acre of land within the agency or any improvement district thereof or ten dollars ($10) per year for any parcel of less than one acre. The ordinance fixing a standby charge shall be adopted by the board only after adoption of a resolution setting forth the particular schedule or schedules of charges proposed to be established by ordinance and after notice and hearing in the manner prescribed in the District Reorganization Act of 1965 (commencing with *Section 56000 of the Government Code*). The ordinance fixing a standby charge may establish schedules varying the charges according to land uses, water uses, and degree of water availability. On or before the third Monday in August, the board shall furnish in writing to the board of supervisors and the county auditor of each affected county a description of each parcel of land within the agency upon which a charge is to be levied and collected for the current fiscal year, together with the amount of standby charge fixed by the district on each parcel of land. The board shall direct that, at the time and in the manner required by law for the levying of taxes for county purposes, the board of supervisors shall levy, in addition to any other tax it levies, a standby charge in the amounts for the respective parcels fixed by the board. All county officers charged with the duty of collecting taxes shall collect agency standby charges with the regular tax payments to the county. Such charges shall be collected in the same form and manner as county taxes are collected and shall be paid to the agency. Charges fixed by the agency shall be a lien on all the property benefited thereby. Liens for such charges shall be of the same force and effect as other liens for taxes, and their collection may be enforced by the same means as provided for the enforcement of liens for state and county taxes.

HISTORY:

Added Stats 1967 ch 152 § 10 p 1231.

NOTES:

Editor's Notes

The District Reorganization Act of 1965 was repealed 1986. See now the Cortese-Knox-Hertzberg Local Government Reorganization Act of 2000, also commencing with *Gov C § 56000*.

Hierarchy Notes:

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WATER--UNCODIFIED ACTS
ACT 240. Desert Water Agency Law (1961 ch 1069)

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Uncod Water Deer, Act 240 § 51 (2015)

§ 51. Issuance of promissory notes; Interest; Maturity; Amount of indebtedness

The agency may issue negotiable promissory notes pursuant to this section, bearing interest at a rate not to exceed 8 percent per annum, for the purpose of acquiring funds to finance the construction or acquisition of administrative offices, construction headquarters, commercial offices, or facilities for similar agency purposes and for the acquisition of land for agency purposes. The maturity of such promissory notes shall not be later than 10 years from the date thereof. The total aggregate amount of such notes outstanding at any one time may be at least equal to fifty thousand dollars ($50,000), but shall not exceed the lesser of either five hundred thousand dollars ($500,000) or 1 percent of the assessed valuation of the taxable property in the agency or, if the assessed valuation is not obtainable, 1 percent of the county auditor's estimate of the assessed valuation of the taxable property in the agency evidenced by his certificate. Promissory notes issued pursuant to subdivision 11 of Section 15 may be disregarded in computing the aggregate amount of notes that may be issued pursuant to this section.

HISTORY:

Added Stats 1967 ch 152 § 11 p 1232. Amended Stats 1976 ch 1480 § 3.

NOTES:

Hierarchy Notes:

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WATER--UNCODIFIED ACTS
ACT 240. Desert Water Agency Law (1961 ch 1069)

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Uncod Water Deer, Act 240 § 51.1 (2015)

§ 51.1. Issuance, sale, and refund of bond anticipation notes

The agency may borrow money in anticipation of the sale of, but not in excess of the principal amount of, authorized bonds of any improvement district formed pursuant to Section 29 which have not yet been sold and delivered, and for that purpose may issue and sell negotiable bond anticipation notes, and may refund such notes from time to time, but the maximum maturity of any such notes, as originally issued or as refunded, shall not exceed five years from the date of the original notes. The notes shall be sold in such manner as the board may determine, and such notes and the resolution providing for the issuance of such notes may contain any provision, condition or limitation which a bond, or any resolution or ordinance providing for the issuance of bonds, may contain. The interest on bond anticipation notes shall be payable at the time or times provided in such notes and may be represented by interest coupons attached to the notes and shall be payable from the same funds from which the interest on bonds of the improvement district are payable. The principal of such notes may be paid from any moneys of the improvement district available for such purpose. If such notes, or any portion thereof, have not been previously paid, they shall be paid from the proceeds of the next sale of bonds in anticipation of which the notes were issued. The resolution providing for the issuance of bond anticipation notes may contain a provision that, if for any reason bonds of the improvement di strict are not sold in time to provide funds to pay any unpaid note, and, if other funds of the improvement district are not available for such payment, taxes shall be levied upon the taxable property in the improvement district for such payment in the same manner provided for the payment of bonds in such amount each year for such period of years as may be set forth in such resolution. To the extent bond anticipation notes are paid from a tax levy, authorized bonds in a corresponding amount shall be canceled and not issued thereafter. When bonds of the improvement district are issued and any portion of the proceeds of the sale are to be used to pay bond anticipation notes, such bonds shall mature not later than the maximum permissible years for such bonds from the date of such notes as originally issued.

HISTORY:

Added Stats 1971 ch 304 § 7.

NOTES:

Hierarchy Notes:

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WATER--UNCODIFIED ACTS
ACT 240. Desert Water Agency Law (1961 ch 1069)

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Uncod Water Deer, Act 240 § 51.2 (2015)

§ 51.2. Bond anticipation notes; Additional provisions

The agency may borrow money in anticipation of the sale of, but not in excess of the principal amount of, authorized bonds of the agency which have not yet been sold and delivered, and for that purpose may issue and sell negotiable bond anticipation notes, and may refund such notes from time to time, but the maximum maturity of any such notes, as originally issued or as refunded, shall not exceed five years from the date of the original notes. The notes shall be sold in such manner as the board may determine, and such notes and the resolution providing for the issuance of such notes may contain any provision, condition or limitation which a bond, or any resolution or ordinance providing for the issuance of bonds, may contain. The interest on bond anticipation notes shall be payable at the time or times provided in such notes and may be represented by interest coupons attached to the notes and shall be payable from the same funds from which the interest on bonds of the agency are payable. The principal of such notes may be paid from any moneys of the agency available for such purpose. If such notes, or any portion thereof, have not been previously paid, they shall be paid from the proceeds of the next sale of bonds in anticipation of which the notes were issued. The resolution providing for the issuance of bond anticipation notes may contain a provision that, if for any reason bonds of the agency are not sold in time to provide funds to pay any unpaid note, and, if other fun ds of the district are not available for such payment, taxes shall be levied upon the taxable property in the agency for such payment in the same manner provided for the payment of bonds in such amount each year for such period of years as may be set forth in such resolution. To the extent bond anticipation notes are paid from a tax levy, authorized bonds in a corresponding amount shall be canceled and not issued thereafter. When bonds of the agency are issued and any portion of the proceeds of the sale are to be used to pay bond anticipation notes, such bonds shall mature not later than the maximum permissible years for such bonds from the date of such notes as originally issued.

HISTORY:

Added Stats 1971 ch 304 § 8.

NOTES:

Hierarchy Notes:

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WATER--UNCODIFIED ACTS
ACT 240. Desert Water Agency Law (1961 ch 1069)

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Uncod Water Deer, Act 240 § 52 (2015)

§ 52. Issuance of bonds; Resolution; Notice, hearing, and protest limitation in contesting validity of proceedings; Advancement and repayment of funds

Whenever the board deems it necessary to incur a bonded indebtedness for the acquisition, construction, completion, or repair of any or all improvements, works, or property mentioned in this law and to provide for such bonded indebtedness to be payable from taxes levied upon an uninhabited portion of the agency, the board shall, by resolution, declare its intention to form an uninhabited improvement district in such portion of the agency and to incur such indebtedness.

For the purposes of this law the portion of the agency formed into an uninhabited improvement district shall be deemed uninhabited if less than 12 voters reside therein at the time of the formation thereof.

The resolution of intention shall state that the board intends to form an improvement district of an uninhabited portion of the agency which in the opinion of the board will be benefited, and to incur indebtedness by the issuance of bonds of the agency for such uninhabited improvement district.

The resolution of intention shall also state:

(a) The purpose for which the proposed debt is to be incurred.

(b) The amount of debt to be incurred, which may include expenses of all proceedings for the authorization, issuance, and sale of the bonds.

(c) That taxes for the payment of the bonds and the interest thereon will be levied exclusively upon the taxable property in the uninhabited improvement district.

The resolution of intention shall also state that a general description of the proposed improvement, together with a map showing the exterior boundaries of the proposed uninhabited improvement district with relation to the territory immediately contiguous thereto and to the proposed improvement is on file with the secretary and is available for inspection by any person or persons interested. This map shall govern for all details as to the extent of the proposed uninhabited improvement district.

The resolution of intention shall also state:

(a) The time and place for a hearing by the board on the questions of the formation and extent of the proposed uninhabited improvement district, the proposed improvement, and the amount of debt to be incurred.

(b) That at the time and place specified in the resolution any person interested will be heard, and that any owner of property within the proposed uninhabited improvement district may file with the secretary at any time prior to the time set for the hearing thereon written protest to the formation of the proposed uninhabited improvement district.

Notice of the hearing shall be given by publishing a copy of the resolution pursuant to *Section 6066 of the Government Code* prior to the time fixed for the hearing in a newspaper circulated in the agency, if there is a newspaper circulated in the agency. Such notice shall also be given by posting a copy of the resolution of intention in three public places within the proposed uninhabited improvement district for at least two weeks before the time fixed for the hearing.

A copy of the resolution of intention shall also be mailed, postage prepaid, to each person to whom land in the proposed uninhabited improvement district is assessed as shown on the last equalized county assessment roll, at his address as shown upon the roll, and to any person, whether owner in fee or having a lien upon, or legal or equitable interest in, any land within the proposed uninhabited improvement district, whose name and address and a designation of the land in which he is interested is on file with the secretary.

At the time and place fixed in the resolution of intention, or at any time or place to which the hearing is adjourned, the board shall proceed with the hearing. At the hearing any person interested may appear and present any matters material to the questions set forth in the resolution. Also at the hearing the board shall hear and pass upon all written protests filed by the owners of property within the proposed uninhabited improvement district.

If written protests are filed by the owners of one-half of the value of the property within the proposed uninhabited improvement district, as shown by the last equalized assessment roll of the county, further proceedings shall not be taken. If such protests are not made the board shall by resolution determine whether it is necessary to incur the bonded indebtedness and if so, the resolution shall also state:

(a) The purpose for which the proposed debt is to be incurred.

(b) The amount of the proposed debt.

(c) That the exterior boundaries of the portion of the agency which will be benefited are set forth on a map on file with the secretary, which map shall govern for all details as to the extent of the uninhabited improvement district.

(d) That such portion of the agency set forth on the map shall thereupon constitute and be known as "Improvement District No _____ of _____ Desert Water Agency".

The determinations made in the resolution of formation shall be final and conclusive.

After the formation of the uninhabited improvement district pursuant to this law the board may, by resolution, at such time or times as it deems proper, issue bonds of the agency, pursuant to Section 31 of this law, for the whole or any part of the amount of the indebtedness authorized by the resolution of formation. All taxes levied for the payment of the bonds and the interest thereon shall be levied exclusively upon the taxable property in the uninhabited improvement district.

Any action or proceedings in which the validity of the formation of an uninhabited improvement district or of any of the proceedings in relation thereto is contested, questioned, or denied shall be commenced within three months from the date of the resolution forming such district; otherwise the formation of the uninhabited improvement district and all proceedings in relation thereto shall be held to be valid and in every respect legal and incontestable.

The board may advance general funds of the agency to accomplish the purposes of an improvement district formed pursuant to this law.

The board may repay the agency for any advance of funds from the proceeds of the sale of bonds authorized for the purposes of such improvement district. To the extent that advances made for improvements for which such bonds were authorized are repaid from the funds other than the proceeds of the sale of bonds of the improvement district, the authority of the board to issue bonds of the improvement district in a like amount or amounts shall terminate. The treasurer shall maintain proper records and accounts in which there shall be set forth all repayment of advances to the extent that advances are made for the improvements for which such bonds were authorized and, to the extent that such repayments reduce the amount of bonds which may be issued on behalf of any improvement district, the net principal amount of authorized but unissued bonds of such improvement district.

HISTORY:

Added Stats 1967 ch 152 § 12. Amended Stats 1971 ch 304 § 9.

NOTES:

Hierarchy Notes:

Uncod Water Deer Note

Act 240 Note

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2015 Legislative Session, approved October 9, 2015.

WATER--UNCODIFIED ACTS
ACT 240. Desert Water Agency Law (1961 ch 1069)

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Uncod Water Deer, Act 240 § 53 (2015)

§ 53. Annexation of territory; Resolution; Notice, hearing, and protest; Taxation; Limitation on contest of validity of proceedings

The board, by resolution, may initiate proceedings for the annexation of territory within the agency whether contiguous or not to an improvement district to such improvement district.

The resolution proposing annexation shall:

(a) Declare that proceedings have been initiated by the board pursuant to this law.

(b) State the reason for proposing the annexation.

(c) Set forth a description of the area proposed to be annexed, which may be made by reference to a map on file with the secretary of the agency which map shall govern for all details as to the extent of the area proposed to be annexed.

(d) State the terms and conditions of the annexation.

(e) State that the holders of title to any of the land sought to be annexed may file written protests with the secretary to the annexation or the annexation upon such terms and conditions.

(f) Fix the time and place of a meeting at which the board will receive written protests theretofore filed with the secretary, receive additional written protests, and hear from any and all persons interested in the annexation.

The text of the resolution proposing annexation shall be published, pursuant to *Section 6066 of the Government Code*, prior to the time of hearing in at least one newspaper printed and published in the agency, if there is a newspaper published and printed in the agency.

A copy of the resolution proposing annexation shall also be posted in three public places within the improvement district and three public places in the area proposed to be annexed at least two weeks prior to the hearing.

The board shall proceed with the hearing at the time and place fixed therefor and may continue the hearing, if need be, from time to time. All interested persons will be heard at the hearing.

If written protests are filed by the holders of title of one-half of the value of the territory proposed to be annexed as shown by the last equalized assessment roll of each county in which the territory is situated, further proceedings shall not be taken, and the board shall refuse the annexation by a resolution so stating.

If written protest is not made by the owners of one-half of the value of the territory proposed to be annexed, and if, at the conclusion of the hearing, the board finds and determines from the evidence presented at the hearing that the area proposed to be annexed to an improvement district will be benefited thereby, and that the improvement district to which the area proposed to be annexed will also be benefited thereby and will not be injured thereby, the board may, by resolution, approve such annexation.

The resolution shall describe the territory annexed, which may be by reference to a map on file with the secretary, which map shall govern for all details as to the extent of the annexed area. The resolution shall also state the terms and conditions of annexation as theretofore determined by resolution of the board.

If the board finds and determines that either the area proposed to be annexed to the improvement district will not be benefited thereby or that the improvement district to which the area is proposed to be annexed will not be benefited thereby and will be injured thereby, the board shall by resolution disapprove such annexation.

From and after the date of the adoption of the resolution approving the annexation, the area described therein is added to and forms a part of the improvement district.

The taxable property in the annexed area shall be subject to taxation after the annexation thereof for the purposes of the improvement district, including the payment of the principal of and interest on bonds and other obligations of the improvement district authorized and outstanding at the time of the annexation. If the terms and conditions established by the board specifically so provide, the taxable property in the annexed area shall be subject to taxation as if the annexed property had always been a part of the improvement district.

The board may do all things necessary to enforce and make effective the terms and conditions of annexation fixed by it.

Any action or proceeding in which the validity of an annexation to an improvement district pursuant to this section is contested, questioned, or denied shall be commenced within three months after the date of the board approving the annexation of the territory to an improvement district; otherwise, the annexation shall be held valid and in every respect legal and incontestable.

HISTORY:

Added Stats 1967 ch 152 § 13 p 1235. Amended Stats 1971 ch 304 § 10.

NOTES:

Hierarchy Notes:

Uncod Water Deer Note

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WATER--UNCODIFIED ACTS
ACT 240. Desert Water Agency Law (1961 ch 1069)

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Uncod Water Deer, Act 240 § 53.1 (2015)

§ 53.1. Landowners' signatures on petition; Dispensing with requirements for notice and hearing

Notwithstanding the provisions of Section 53, if the petition for annexation of land to an improvement district formed under Section 33 is signed by all of the holders of title of land in the portion proposed to be annexed, the board may proceed and act thereon without notice and hearing, but shall otherwise comply with the applicable provisions of this law.

HISTORY:

Added Stats 1967 ch 152 § 13.5 p 1236.

NOTES:

Hierarchy Notes:

Uncod Water Deer Note

Act 240 Note

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WATER--UNCODIFIED ACTS
ACT 240. Desert Water Agency Law (1961 ch 1069)

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Uncod Water Deer, Act 240 § 53.2 (2015)

§ 53.2. Exclusion of territory; Motion; Petition; Resolution; Notice; Hearing; Determinations by board; Validation proceedings

Proceedings to exclude territory from an improvement district, formed pursuant to Section 33, may be initiated by the board upon its own motion, or shall be initiated by the board upon receipt of a petition for exclusion signed by not less than 10 percent of the voters of the area proposed to be excluded, which states reasons such exclusion will be beneficial to the agency or the improvement district or the territory to be excluded.

Upon adoption of said motion to initiate exclusion proceedings or upon receipt of said petition for exclusion, the board shall adopt a resolution of intention to exclude which shall state:

(a) The method by which said exclusion proceedings were initiated; by motion of the board or by petition of voters.

(b) That taxes for carrying out the purpose of the improvement district will not be levied upon taxable property in the excluded territory following such exclusion in the event such territory is excluded.

(c) That following such exclusion, the taxable property in the territory remaining in said improvement district shal continue to be levied upon and taxed to provide funds for the purposes of said improvement district.

The resolution of intention to exclude shall also state that a map showing the exterior boundaries of the proposed territory to be excluded, with relation to the territory remaining in said improvement district, is on file with the secretary and is available for inspection by any person or persons interested. This map shall govern for all details as to the extent of the proposed exclusion.

The resolution of intention shall also state:

(a) The time and place for a hearing by the board on the questions of the proposed exclusion and the effect of such exclusion upon the agency, the improvement district and the territory to be excluded.

(b) That at such time and place any person interested, including all persons owning property in the agency or in the improvement district, will be heard.

Notice of the hearing shall be given by publishing a copy of the resolution of intention to exclude, pursuant to *Section 6066 of the Government Code*, prior to the time fixed for the hearing in a newspaper circulated in the agency. Such

notice shall also be given by posting a copy of the resolution of intention to exclude in three public places within the affected improvement district for at least two weeks before the time fixed for the hearing.

At the time and place so fixed in the resolution of intention to exclude, or at any time or place to which the hearing is adjourned, the board shall proceed with the hearing. At the hearing any person interested, including any person owning property in the agency, or in the improvement district may appear and present any matters material to the questions set forth in the resolution of intention to exclude.

At the conclusion of the hearing, the board shall by resolution determine whether it is necessary or desirable to exclude said territory. If so, the resolution shall also state:

(a) The reasons why such exclusion is necessary or desirable.

(b) That the exterior boundaries of the improvement district following such exclusion are set forth on a map on file with the secretary, which map shall govern all details as to the extent of said, then existing, improvement district.

The determinations made in the resolution of exclusion shall be final and conclusive.

After the exclusion of territory from the improvement district pursuant to this section, all taxes levied for the carrying out of said improvement district's purpose shall be levied exclusively upon the taxable property in the improvement district as then constituted.

A copy of the resolution of exclusion shall be published pursuant to *Section 6066 of the Government Code* in a newspaper printed and published in the agency. A copy of the resolution shall also be posted in three public places within the improvement district for at least two weeks.

The resolution of exclusion shall not be effective until the 31st day after completion of the publication and posting.

Any action or proceeding in which the validity of the exclusion of territory from the improvement district or of any of the proceedings in relation thereto is contested, questioned, or denied shall be commenced within three months from the effective date of the resolution of exclusion; otherwise, the exclusion and all proceedings in relation thereto shall be held to be valid and in every respect legal and incontestable.

HISTORY:

Added Stats 1967 ch 152 § 13.6 p 1236.

NOTES:

Hierarchy Notes:

Uncod Water Deer Note

Act 240 Note

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WATER--UNCODIFIED ACTS
ACT 240. Desert Water Agency Law (1961 ch 1069)

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Uncod Water Deer, Act 240 § 53.3 (2015)

§ 53.3. Modification of improvement and issuance of bonds on exclusion of territory from district

If territory is excluded from an improvement district as a result of being detached from the agency after bonds have been authorized at an election held in such improvement district, but before any of such bonds have been issued and sold, the board of directors may modify the proposed improvement to take into consideration any change in circumstances resulting from such detachment, and may issue bonds in an amount not exceeding the amount authorized at such election for the purpose of paying the cost of the improvement as modified, without any further election, but only after notice and hearing in the same manner as provided in Section 53.2, and provided that at the conclusion of the hearing the board of directors shall by resolution determine that the remaining territory within the improvement district will be benefited by the improvement as modified.

HISTORY:

Added Stats 1971 ch 304 § 11.

NOTES:

Hierarchy Notes:

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Act 240 Note

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WATER--UNCODIFIED ACTS
ACT 240. Desert Water Agency Law (1961 ch 1069)

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Uncod Water Deer, Act 240 § 54 (2015)

§ 54. Dissolution of improvement district; Resolution; Notice; Hearing; Ordinance of dissolution; Continued taxation authorized; Validation proceedings

Notwithstanding any other provision herein, whenever the board deems it necessary for any improvement district formed pursuant to this act to be dissolved, it shall by resolution declare its intention to dissolve the improvement district.

As used in this act, "improvement district" includes an uninhabited improvement district formed pursuant to Section 52.

The resolution of intention shall state:

(a) The reason why the improvement district should be dissolved.

(b) If the improvement district was formed pursuant to Section 29 or Section 52 of this act, that no bonds have been issued for the improvement district or are outstanding.

(c) If the improvement district was formed pursuant to Section 33 of this act, that no indebtedness or liability was incurred for the improvement district or is outstanding.

(d) That a map showing the exterior boundaries of the improvement district, with relation to the territory immediately contiguous thereto, is on file with the secretary and is available for inspection by any person or persons interested.

(e) The time and place for a hearing by the board on the question of the dissolution of the improvement district.

(f) That at such time and place any person interested, including all persons owning property in the agency or in the improvement district will be heard.

Notice of the hearing shall be given by publishing a copy of the resolution, pursuant to *Section 6066 of the Government Code*, prior to the time fixed for the hearing in a newspaper circulated in the agency, if there is a newspaper circulated in the agency. Such notice shall also be given by posting a copy of the resolution in three public places within the improvement district for at least two weeks before the time fixed for the hearing.

At the time and place fixed in the resolution of intention, or at any time or place to which the hearing is adjourned, the board shall proceed with the hearing. At the hearing any person interested, including all persons owning property in the agency, or in the improvement district, may appear and present any matters material to the proposed dissolution.

At the conclusion of the hearing, the board shall by ordinance determine whether it is necessary to dissolve the improvement district. If so, the ordinance shall state that the exterior boundaries of the improvement district are set forth on a map on file with the secretary and shall declare the improvement district dissolved. The determinations made in the ordinance shall be final and conclusive.

When the ordinance declaring an improvement district dissolved becomes effective, the dissolution of such improvement district is complete.

The taxable property within the boundaries of the dissolved improvement district shall continue to be taxed for any indebtedness of the agency contracted for such dissolved improvement district until the indebtedness has been satisfied, to the same extent that such property would be taxable for such purpose if the dissolution had not occurred.

Any action or proceeding in which the validity of the dissolution of an improvement district, or of any of the proceedings in relation thereto, is contested, questioned, or denied shall be commenced within three months from the effective date of the ordinance dissolving the improvement district; otherwise, the dissolution of the improvement district and, all proceedings in relation thereto, shall be held to be valid and in every respect legal and incontestable.

After a bond election has been held in an improvement district formed pursuant to Section 29 of this law and less than two-thirds of the votes cast in such election were in favor of the measure the board may within one year of the date of such election call and hold another election as provided in Sections 28 and 29 of this law for the purpose of resubmitting said measure to the electors of said improvement district. If said measure is not so resubmitted said improvement district, on the anniversary date of the election, is dissolved without further action by the board. If said measure is resubmitted and fails to receive more than two-thirds of the votes cast in such election in favor of said measure said improvement district is dissolved following the canvass of the election returns.

HISTORY:

Added Stats 1967 ch 152 § 14 p 1238.

NOTES:

Hierarchy Notes:

Uncod Water Deer Note

Act 240 Note

PROOF OF SERVICE

I, Irene Islas, declare:

I am a citizen of the United States and employed in Contra Costa County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 2001 N. Main Street, Suite 390, Walnut Creek, California 94596. On November 16, 2015, I served a copy of the within document(s):

ADDENDUM OF CITED DOCUMENTS IN SUPPORT OF APPELLANT DESERT WATER AGENCY'S OPENING BRIEF

☒ by transmitting via electronic transmission the document(s) listed above to the person(s) at the e-mail address(es) set forth below by way of filing the document(s) with the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

☒ by placing the document(s) listed above in a sealed envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to by the method listed below.

UPS Overnight Delivery

Matthew Littleton
U.S. Dept. of Justice
Environment and Natural Resources
Division
P.O. Box 7415
Washington, DC 20009
Phone: (202) 514-4010

Attorneys for U.S. Dep't of the Interior; Sally Jewell, Sec'y of the U.S. Dep't of the Interior; U.S. Bureau of Indian Affairs; Kevin K. Washburn, Ass't Sec'y of Indian Affairs

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on November 16, 2015, at Walnut Creek, California.

/S/Irene Islas
Irene Islas